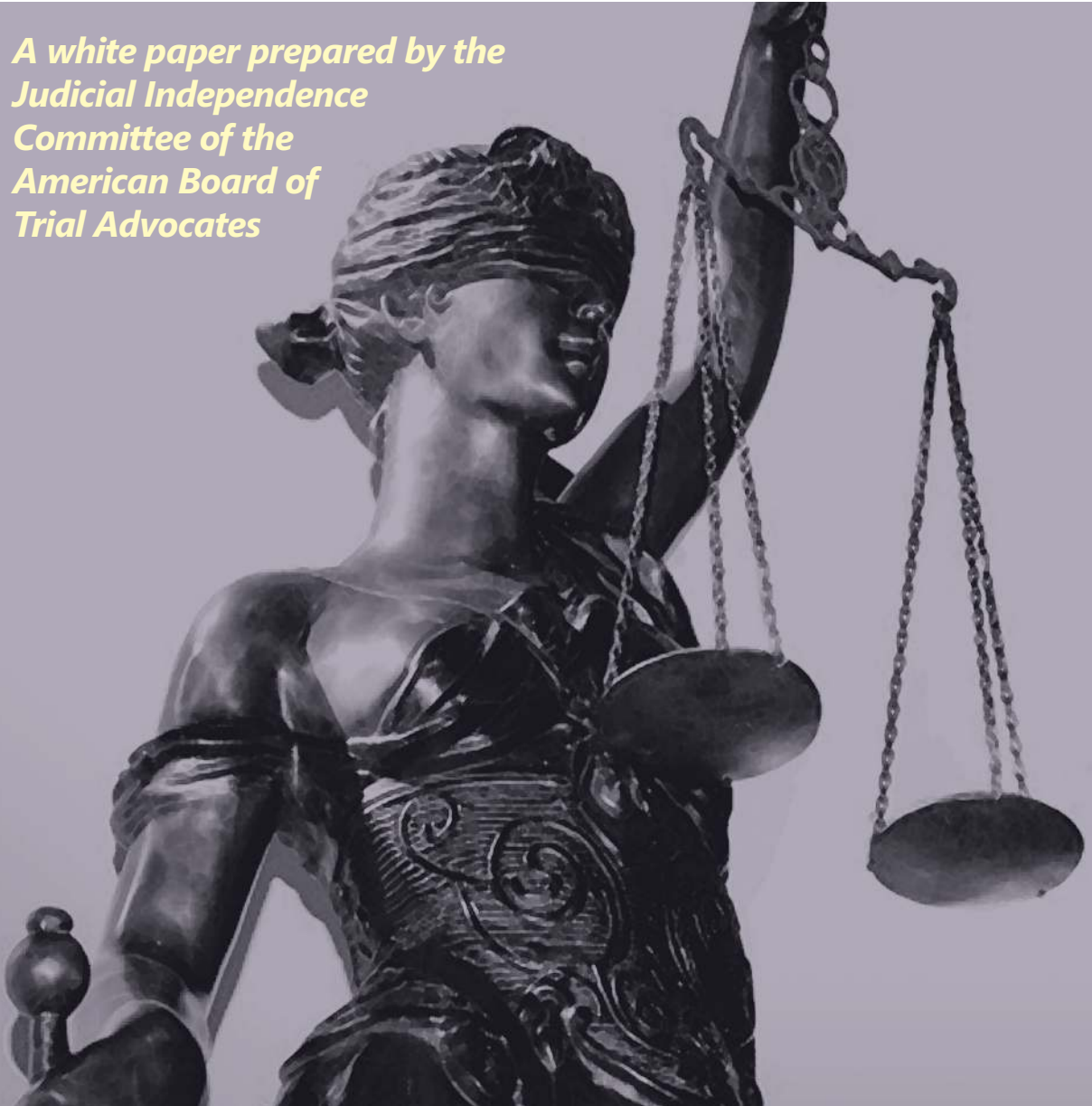


Preserving a Fair, Impartial and Independent Judiciary

*A white paper prepared by the
Judicial Independence
Committee of the
American Board of
Trial Advocates*



Inside:

- 3 Introduction
- 4 Historical Background
- 7 Jury Trials and Judicial Independence
- 8 Political Interference and Intimidation
- 10 The Skyrocketing Costs of Judicial Elections
- 14 Judicial Independence Maintained Through Adequate Funding
- 15 White Paper Conclusion

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Founded in 1958, ABOTA is a national association of experienced trial lawyers and judges. ABOTA and its members are dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment to the U.S. Constitution. The Foundation of ABOTA is an affiliated charitable entity, the mission of which is to support the purposes of ABOTA through education and research. ABOTA membership consists of more than 7,000 lawyers and judges spread among 97 Chapters in all 50 States and the District of Columbia. ABOTA publishes VOIR DIRE magazine, which features in-depth articles on current and historical issues related to constitutional rights, in particular the Seventh Amendment right to trial by jury.

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Introduction

Beginning with the Declaration of Independence and culminating in the Constitution and Bill of Rights, the Founders of our nation adhered to a steadfast dedication to the rule of law.

To achieve that critical goal, our forefathers established a separate judicial branch co-equal with the executive and legislative branches and created a constitutional right to trial by jury. Fair and impartial justice rendered by neutral judges and citizen juries is at the heart of America's fidelity to the rule of law. Throughout our history, the American justice system has proven to be a beacon to the world.

Of late, diverse challenges have threatened to impair Americans' access to evenhanded justice. This White Paper seeks to remind readers of the evolution and tradition of impartial courts free from political or other influence, identify current perils, and focus on innovative remedies. Principal among the threats confronting our courts are the infusion of vast sums of unregulated money in judicial elections, serious underfunding of the courts, political interference with — and intimidation of — the judiciary, and disinformation which compromises the impartiality of juries.

Preservation of a fair and impartial judiciary and the right to trial by jury are two of ABOTA's core missions. Allegiance to our calling requires enduring vigilance, unyielding resolve and voicing our principles in the public forum. ■

Historical Background — How We Got to Where We Are

I. From the Magna Charta to the American Revolution

Henry II chose five members of his personal household in 1178 “to hear all the complaints of the realm and to do right.” These formed the King’s court, later known as the Court of Common Pleas, with their activities supervised by the King. Then in 1215, the *Magna Carta* declared “We [will not] proceed against or prosecute [a free man], except by the lawful judgment of his peers and by the law of the land.” This early notion of a rule of law was the first step toward judicial independence.

The 1689 English Bill of Rights ended royal commissions for judges and was an opening to creation of an independent judiciary that would execute the laws as written, rather than imposing the will of the King. The Habeas Corpus Act of 1640 was another step in the direction of judicial independence. As *habeas corpus* evolved into a process to examine the basis of a person’s detention, the real target of the writ became the government officer called on to justify the basis of his authority to detain. The Act expressly allowed anyone imprisoned by the King or his agents to file a *habeas corpus* petition, sowing the seeds of judicial independence and the separation of powers.

American colonists also understood the need for an independent judiciary. The Declaration of Independence detailed several grievances, but none greater than the total dependence of Colonial judges upon King George: “He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.” In 1780, John Adams drafted the Declaration of Rights in the Massachusetts Constitution: “It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.”

Thus, the concept of judicial independence — that judges should decide cases faithful to the law and free from political or external pressures — was well-ingrained in American legal culture by the time of the Constitutional Convention.

II. The Constitution’s Plan for an Independent Judiciary

Early in the Convention, delegates agreed that there would be a single supreme court, but there were differing opinions on everything else. Only in the final two weeks of the Convention did the delegates agree that federal judges would be appointed by the President with the advice and consent of the Senate. The delegates generally agreed judges should have tenure

with good behavior, but disagreed on specifics. It was ultimately agreed that judges could be removed only through impeachment by the House of Representatives and conviction of “high crimes and misdemeanors” by the Senate. Salary provision for judges was also key to protecting judicial independence from political pressure.

The Convention’s longest debate involving the judiciary was about a proposed council of revision to be made up of the President and a group of judges who would review all legislation and have authority to suggest revisions or to veto an act. Many delegates thought it would violate the separation of powers to join the executive and the judiciary in this way. Others believed the council was unnecessary because they expected the federal judiciary to exercise the power of judicial review. As we know, the Convention rejected the notion of the council and left the President with veto power.

The ratification process produced heated debate between Federalists and Anti-Federalists over the degree of independence to be granted federal judges and the level of accountability imposed upon them. A significant concern was that judges would substitute their will for the text of the Constitution. Federalists made clear that no federal judge had the legal authority to impose his or her will on the people in defiance of the Constitution. Federalist No. 78 also described the process of judicial review, in which federal courts review statutes to determine whether they are consistent with the Constitution. This principle of judicial review was affirmed by the Supreme Court in *Marbury v. Madison* in 1803.

III. From *Marbury v. Madison* to *Cooper v. Aaron*

The framers’ hopes for judicial independence were challenged by the emergence of political parties in the 1790s. By the end of the decade, judicial nominations and legislation relating to courts became intertwined with the political struggle between Federalists and Republicans. Republicans argued that partisan actions of Federalist judges undermined all pretenses of impartiality and judicial independence. While Federalists decried what they saw as an assault on the constitutional guarantee of tenure during good behavior. The Constitution, they declared, made the judges independent. Chief Justice Marshall, in *Marbury v. Madison*, backed the notion of judicial independence, recognizing the judiciary’s right to declare an act of Congress unconstitutional and the Supreme Court’s authority to compel executive compliance with an act of Congress. After the Senate failed to convict Justice

Samuel Chase in his 1805 impeachment trial, a truce of sorts fell into place, as Republicans abandoned their impeachment plans and overtly partisan Federalist judges, like Chase, curtailed their political activity. Chase's acquittal established an important precedent—no judge should be removed simply because of his political beliefs

A. Non-Acquiescence – Presidential Disagreement with the Supreme Court

In the 1820s, the State of Georgia purported to assert authority over the Cherokee Indians, despite treaties proclaiming them to be a “nation.” The Supreme Court declared that effort unconstitutional in *Worcester v. Georgia* (1832). But Georgia refused to comply with the Court's decision, which President Andrew Jackson declined to enforce. Four months later, Jackson challenged the Court again, by vetoing the renewal charter for the Second Bank of the United States, whose constitutionality the Court had upheld in *McCulloch v. Maryland* (1819). Not only had Marshall used *McCulloch* to announce the rational basis test, declaring the Bank both “necessary and proper” to the implementation of Congress' “great powers,” he also used the occasion to explain the respective powers of the judicial and legislative branches:

“to undertake here to inquire into the degree of [the Bank's] necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.”

So, when Jackson vetoed the Bank's extension, he was merely expressing his political opinion — indeed, the one he ran on for President — not taking a legal stance in defiance of the Supreme Court.

Lincoln evaluated national policies in constitutional terms and demanded that the government justify its actions by citing the legal authority that supported them. Lincoln's formulation of *stare decisis* in his Springfield speech on the *Dred Scott* decision is best understood as stating a “safe harbor” in which disagreement with Supreme Court precedent is legitimate while defiance of is not.

In sum, Jackson and Lincoln understood the difference between political disagreement with the Supreme Court and defiance of judicial authority. Neither, no matter how strongly they disagreed, took steps to undermine judicial independence.

B. Civil War Challenges

The Civil War spawned new challenges to judicial independence. Supporters of the anti-slavery movement and Unionists were highly suspicious of the federal courts because of decisions in support of slavery, particularly the *Dred Scott* decision. Following the war, Republicans in Congress feared that federal courts would not uphold much of their ambitious legislation designed to ensure full citizenship for freed slaves. A power struggle ensued between Congress and the other Branches, culminating in *US v. Klein*, which, broadly speaking, stands for the proposition that the legislative branch cannot impair the exclusive powers of another branch. Congress may not direct a judicial outcome by prescribing the rule of decision, nor may it impair the effect of a Presidential pardon. Read broadly, *Klein* suggests that Congress may not impair the Court's role as final arbiter of what the Constitution means.

C. Roosevelt's Court-Packing Plan

President Franklin Roosevelt's battle with Congress over his 1937 proposal to reorganize the Supreme Court by increasing the number of justices, often referred to as the “court packing plan,” was of considerable significance both legally and politically. During the Depression, Roosevelt tried to instigate sweeping changes by passage of the New Deal. When the Supreme Court overturned New Deal laws, Roosevelt proposed the Judicial Branch Reorganization Act to “pack the courts” with younger, New Deal-friendly justices. Although Roosevelt's proposal failed, a judicial revolution of sorts ensued when the Supreme Court deferred to Congress on matters of socioeconomic reform and upheld the New Deal programs.

D. Eisenhower backs up the Supreme Court with federal troops

In *Brown v. Board of Education* (1954), the Supreme Court announced that segregation violated the Equal Protection Clause of the Constitution. Recognizing that implementing this decree would be difficult, the Court invited the southern states and the federal government to suggest what course should be followed. In *Brown II*, the Court called upon the southern States to desegregate their schools with “all deliberate speed.”

A constitutional crisis appeared to arise in 1957 when Arkansas Governor Orvil Faubus ordered the National Guard to block black pupils from entering

Little Rock Central High School. The Supreme Court has neither power of the sword nor the purse, so it relies upon its moral authority for adherence to its orders, or upon aid from the President or Congress. President Eisenhower resolved the Little Rock crisis by sending federal troops to enforce the *Brown* decision. Later, in *Cooper v. Aaron* (1958), the Supreme Court reaffirmed *Brown* and reiterated its role as ultimate interpreter of the Constitution. *Cooper* is the only opinion ever to have been signed by all nine justices.

IV. Recent Threats to Judicial Independence

The process for judicial impeachment is spelled out in the Constitution. A federal judge may only be impeached for certain specific and extraordinary acts: conviction of treason, bribery, or other high crimes and misdemeanors. Judicial independence is threatened when impeachment is suggested as a response to an unpopular decision. Even an “incorrect” decision is not grounds for impeachment. There have been recent efforts to use impeachment as a tool to control the federal judiciary. A notable example was the ill-named “Constitution Restoration Act of 2005,” a Bill “to limit the jurisdiction of federal courts,” which would have instructed judges how to interpret the constitution and threatened impeachment for failure to follow the Bill’s dictates.

“Court stripping” is another mechanism to limit the power of courts by attempting to deny jurisdiction over particular causes or types of claims (*e.g.*, school prayer). Politicians increasingly use court stripping to try to reverse decisions, punish judges or avoid future rulings they may not like. Sometimes legislation seeks to eliminate jurisdiction altogether. In other instances, politicians shuffle lawsuits between state and federal courts to achieve political ends.

V. The Right to Jury Trial

Jury trials became an explicit right afforded to English citizens through the Magna Carta in 1215. Later, juries in England became essential to counterbalance the tyranny of judges who were under the influence of the King. Jury trials are a critical means of ensuring judicial independence. The need for trial by jury was a main grievance addressed in the Declaration of Independence and ultimately as part of the Bill of Rights in the Sixth and Seventh Amendments.

The Seventh Amendment, which is ABOTA’s cornerstone, seems self-explanatory: “In suits at common law ... the right of trial by jury shall be

preserved.” While civil jury trials are a guaranteed fundamental right, they are available only for those matters tried by jury in England in 1791. When new rights of action are created, they must be analogized to a historical counterpart to determine if there is a right of jury trial. In 1876, in *Walker v. Sauvinet*, the Court held that the Seventh Amendment was not made applicable to the states through the 14th Amendment. Nevertheless, all States preserve the right to a jury trial in nearly all civil cases. The right to trial by jury is a vital aspect in any concept of judicial independence. ■

Jury Trials and Judicial Independence

Through the Seventh Amendment guarantee of trial by jury in civil cases, the Founding Fathers created an additional check and balance beyond those established in the Constitution. The jury trial creates a benign tension between bureaucratic justice, as represented by the jurist, and popular justice embodied by the citizen jurors. Substitution of a jury verdict for a judgment by the court implicitly curtails judicial independence in the particular case. But it also complements and reinforces judicial independence. Jury service allows for citizen participation in self-governance. The fresh eyes of a jury keep justice consistent with contemporary values and perspectives. As a consequence, trial by jury provides societal validation of the deliberations of the courts. With some issues decided by the court and others by the jury, the trial amounts to a collaborative exercise that enhances public confidence in the administration of justice. Arguments that judicial independence equates to judicial unaccountability, ring hollow with juries as a check on judicial discretion. At a minimum citizen participation in the justice system provides an element of transparency to court proceedings that dispels public suspicions and confusion concerning the judiciary.

Regrettably, in recent years special interests and their political allies have tried to poison the well of justice. In broad-brush strokes, the court systems of entire states have been characterized as unfair to business. Judicial districts have been labeled “judicial hell holes.” The terms “runaway jury” and “jackpot justice” have been reiterated ad nauseum so that they have evolved into urban legend. The facts in a case of a senior citizen scarred by scaldingly hot coffee have been horribly distorted to spawn ridicule of the civil justice system in general and juries in particular. Using the first name of the plaintiff in that case, “Stella Awards” were granted to bizarre cases portraying a judicial system run amok. An investigation revealed that all of the cases were fabrications.

Well-funded public relations campaigns have cynically endeavored to not only change tort law but also to condition, even program, potential jurors to be skeptical of, and unreceptive to, personal injury claims. These campaigns are mounted by shadow organizations with patriotic titles, but their special interest sponsors go unnamed.

The American Board of Trial Advocates founded, and has long sponsored, the American Civil Trial Bar

Roundtable. The Roundtable’s White Paper on the civil justice system states the following:

The jury trial is a potent symbol of the quality of justice rendered in America largely free from political influence or economic pressure. Unwarranted attacks on, and distortions concerning, the jury and civil justice system should not go unanswered by trial lawyers and their organizations. Education of the public regarding the history, role, value and benefits of the jury system, should be undertaken.

Concepts of judicial independence and right to trial by jury share a common trajectory in our Anglo-American legal tradition. They enjoy a symbiosis so ingrained in our legal culture that they deserve a vigorous common defense. Fair and impartial judges and juries provide the two sturdy legs that support American justice.

In 2007, ABOTA published the ABOTA Initiative, which provides tools and strategies for ABOTA members to educate the public on the virtues of trial by jury. This should be expanded to encompass similar measures to inform the public as to the vital importance of judicial independence. ■

Political Interference and Intimidation

At its core the principle of judicial independence stands for fair and impartial courts accountable to the Constitution and laws, not to politicians, ideologies or special interests. As Alexander Hamilton enunciated in Federalist No. 78, the Judiciary is responsible for upholding the Constitution and protecting the rights and liberties of individuals from encroachment by the other two branches. This, the weakest branch of government, cannot perform its vital task unless it enjoys complete independence. Politicians, political parties and special interests struggle mightily against the restraints of a truly independent judiciary. The people, on the other hand, overwhelmingly support strong courts that are free from political influence.

Recent years have witnessed a tremendous increase in attempts to assert political influence on the courts. These efforts came from politicians, political parties and special interests with a political agenda. Frequently they amount to efforts at intimidation and retaliation. When successful, they disrupt and interfere with the fair and impartial administration of justice.

In October 2011, Governor Chris Christie of New Jersey reacted to a trial judge's ruling declaring a bill to reform judicial pensions unconstitutional with a press conference where he condemned the entire judiciary of his state as self-serving elitists who ignored the plain language of laws in order to achieve their desired outcome. In New Jersey the governor has the power to appoint and reappoint judges, subject to the consent of the legislature. His malicious remarks sent a clear message that he had no tolerance of judicial independence and would not hesitate to impugn the integrity of the bench for political gain.

In 2011, Florida politicians attempted to stack their supreme court. The measure would have given the governor three new appointments and a majority on the court. Fortunately a bipartisan opposition defeated the measure. In both 2011 and 2012, legislators attempted to grant the governor sole authority for the composition of the Judicial Nominating Commission. Bipartisan opposition killed these measures. In 2012, the Republican Party in Florida announced its opposition to the retention of three supreme court justices in nominally nonpartisan elections. Governor Rick Scott launched a groundless criminal investigation of the three justices and a conservative special interest group sued to remove them from the ballot based upon supposed criminal violations. All of these efforts constitute a persistent drive to impose political control over the courts.

In 2005, through the initiative process, a group in South Dakota succeeded in placing Amendment E on the statewide ballot. The amendment, entitled "J.A.I.L. for Judges," was specifically intended to intimidate judges. If passed, the amendment would have eliminated judicial immunity and allowed special grand and petit juries to remove judges from the bench. These juries also would be empowered to indict, prosecute, convict and sentence judges for criminal offenses, render conclusive findings of fact and law and apply the amendment retroactively. Fortunately the State Bar of South Dakota marshaled civic, business, and professional organizations, as well as public bodies, to undertake a well-funded educational campaign resulting in 89% of voters rejecting the amendment. The J.A.I.L. Amendment had been drafted by a Californian who unsuccessfully attempted to place it on the ballot there. He and his supporters hoped to place it on ballots throughout the nation.

In Montana, a 2006 proposed ballot initiative failed to garner enough valid signatures. If passed it would have allowed Montanans to recall state judges at any time. The only requirement would have been a "justification statement" that set forth "any reason acknowledging electoral dissatisfaction with a justice or judge notwithstanding good faith attempts to perform the duties of the office".

Most alarmingly, in the 2012 presidential campaign six unsuccessful contenders for the Republican nomination asserted that as president they would encroach upon the independence and authority of the judiciary. Announced presidential candidate and former Speaker of the House, Newt Gingrich, went so far as to urge Congress to shut down the Ninth Circuit Court of Appeals, remove judges for unfavorable rulings and use U.S. Marshals to compel judges to appear before Congress to face questions about their rulings. He also stated that his administration would ignore recent court decisions concerning national security issues. To his credit, Mitt Romney repudiated the radical intentions of Gingrich and the other candidates to provoke a constitutional crisis.

In the much-publicized Schiavo case, elected officials at both the state and federal levels attempted to impose their will on the courts. This presented a flagrant and direct challenge to judicial independence and separation of powers.

Terri Schiavo suffered brain damage in 1990. Based upon extensive expert testimony, a circuit court declared her to be in a persistent vegetative state in 2000. At the request of her husband, the judge ordered her feeding tube to be removed. Her parents unsuccessfully appealed and by 2003 had exhausted their appeals.

In October 2003 the Florida legislature enacted “Terri’s Law” which authorized Governor Jeb Bush to intervene in the case. He promptly ordered the feeding tube reinserted. A circuit court overturned the law as a violation of the right to privacy. In September 2004 the Florida Supreme Court unanimously struck the law as an unconstitutional violation of separation of powers. The U.S. Supreme Court refused to grant writs. The Florida legislature debated, but did not pass, bills to circumvent the court rulings.

In March 2005 the U.S. Congress passed, and President George W. Bush signed, a bill transferring jurisdiction over the Schiavo case to the federal courts. A House Committee then issued a subpoena for Terri Schiavo, which purportedly placed her in the custody of the federal government. The Florida Circuit Judge, George Greer, declared the subpoena invalid, and the Florida Supreme Court affirmed. Congressmen threatened a citation for Contempt of Congress but never pursued it. Ms. Schiavo’s parents sought injunctive relief in the U.S. District Court. Their petition was denied, and the denial was affirmed by the 11th Circuit Court of Appeals. The 11th Circuit refused an en banc review and the U.S. Supreme Court denied writs.

Finally, Governor Bush contemplated having state agencies assume protective custody over Terri Schiavo. Judge Greer enjoined them from doing so. Governor Bush relented, putting an end to a constitutional crisis. Terri Schiavo died on March 31, 2005.

In recent years, politicians and special interests have repeatedly attempted to erode judicial independence, evidencing a lack of respect for the vital roles of separation of powers and checks and balances within American constitutional governance. These challenges demand a robust response.

ABOTA and its members cannot stand on the sidelines. Our message is straightforward: Fair and impartial courts accountable to the Constitution and the laws, not to politicians, ideologies or special interests, best safeguard our individual rights and liberties. Unfettered access to justice preserves the rule of law upon which our nation was founded and has flourished.

Improved civics education for our nation’s youth is essential in the long term. The genius of the Founding Fathers — in establishing a separate and independent judicial branch charged with holding elected officials to the commitments set forth in the Constitution and laws — must not only be conveyed but reinforced throughout the school years. To this end ABOTA must diligently develop and pursue educational programs coupled with greater coordination with like-minded

organizations, especially the participants in the American Civil Trial Bar Roundtable.

With respect to specific threats to judicial independence, ABOTA and its members need to inform and energize the public through public speaking before civic groups, press releases, op-ed pieces and letters to the editor. An expanded ABOTA Initiative would allow members to craft a message in terminology that resonates with current public attitudes: Fair and Impartial; Accountability; Individual Rights and Liberties; and Access to Justice. Finally, our members should be encouraged to actively join the political fray when elected officials exert undue influence upon the Courts. ■

The Skyrocketing Costs of Judicial Elections

The Issues

According to a 2012 editorial in the *New York Times*, 95% of the cases in the United States are resolved in state, not federal, courts.¹ And yet the vast majority of state court judges do not share the benefit of lifetime appointment that their federal counterparts do.² Thirty-nine states use elections as a means of judicial selection or retention.³ In 2012, there were contested elections or retention votes for judges on the highest courts in 32 states.⁴ Many of the races involved significant financial contributions from a variety of sources, including corporations, special-interest groups, and lawyers. The trend of dramatically increasing judicial campaign costs over the last decade is both a well-documented and disturbing one in terms of the preservation of judicial independence and the public's perception of a fair and impartial judicial system.⁵

Adam Skaggs, Senior Counsel in the Brennan Center for Justice's Democracy Program, stated in 2010:

Over the last 10 years, state judicial elections have been transformed from quiet, civil contests to expensive affairs featuring exorbitant spending, negative campaign advertising, and bitter personal attacks. As a result, even before *Citizens United*,⁶ there has been growing public apprehension about the influence of money in judicial elections. Concerns about money on the campaign trail, in turn, have spawned questions about the impact of money in our courtrooms—and the perception that, too often, justice goes to the highest bidder.⁷

High-court judicial-candidate fundraising in the decade between 1990 and 1999 in 20 states with competitive elections totaled \$83.3 million.⁸ By the decade of 2000–2009, judicial-candidate fundraising had increased to \$206.4 million.⁹ During the 2009–2010 election cycle, \$9.2 million was spent in the Michigan Supreme Court election alone.¹⁰ The Pennsylvania high-court election had the second highest total at \$5.4 million.¹¹ Ohio was third at \$4.4 million.¹²

The Michigan Republican party spent more than \$4 million in the 2010 election, and the State Democratic party \$1.5 million.¹³ Over and above that, special interest groups, such as the Virginia based Law Enforcement Alliance of America (LEAA), with ties

to the National Rifle Association, spent a substantial amount on television advertisements. These amounts were spent with little or no requirement for source disclosure and resulted in offensive Internet ads by the State Democratic party claiming that one of the Republican candidates was sexist and racist, as well as in an ad by the LEAA accusing one of the Democratic challengers of being soft on “rappers, lawyers and child pornographers.”¹⁴ After the election, there were numerous calls for election reform. Then Michigan Supreme Court Chief Justice Marilyn Kelly and Senior Appellate Judge James Ryan organized a non-partisan task force in 2011 to examine reforms for judicial selection in Michigan.¹⁵ Retired United States Supreme Court Justice Sandra Day O'Connor served as the task-force honorary chair. The task force released its report in early 2012, describing in its first sentence the problems with Michigan's judicial election system: “its excessive cost, its lack of transparency, and its damaging negativity.”¹⁶ The panel offered a number of recommendations which included, but were not limited to: (1) full disclosure of the source of funding for advertisements; (2) elimination of the partisan nomination system to undercut the power of party insiders; (3) publication of voter education guides; and (4) formation of non-partisan citizen campaign oversight committees, including fact checkers.¹⁷

Nationally, of the \$38.4 million spent in the state high-court elections in 2009–2010, \$16.8 million was spent on television advertising.¹⁸ And outside groups, which have no accountability to the candidates, were responsible for approximately 30% of all the money spent.¹⁹ Television ads funded by outside groups typically focus on character assassination of candidates as opposed to a fair assessment of their records or their courtroom conduct, including preparation and judicial demeanor.²⁰

Sadly, this infusion of big money into judicial selection is no longer limited to the context of contested elections. In Iowa, a state that since 1962 has had a system of merit appointment of judges followed by up-or-down retention elections, a judge had never been voted out—until 2010.²¹ That year, the three supreme court justices who were up for retention election were defeated based on a targeted \$1.4 million “Vote No” effort by Bob Vander Plaats, an outside conservative activist.²² The three justices were a part of a unanimous decision by the Iowa Supreme Court in 2009 that struck down as unconstitutional the state's prohibition on same-sex marriage.²³ In 2012, Vander Plaats targeted Justice David Wiggins, the next Iowa Supreme Court justice up for retention. But this time, the effort was unsuccessful. The Iowa State Bar Association, the

American Board of Trial Advocates (ABOTA), and other groups worked diligently to educate the Iowa voters, and Justice Wiggins was retained.

In Florida, Restore Justice 2012, a group linked to the Tea Party, campaigned to defeat three Florida Supreme Court justices who voted with the majority to reject a constitutional amendment that, if approved by voters, would have allowed the state to opt out of federal health-care reform.²⁴ The Executive Committee of the Florida Republican Party, with the encouragement of Governor Rick Scott, voted unanimously to actively oppose the merit retention of the justices. In addition, an out-of-state conservative activist group affiliated with the Koch brothers announced its effort to defeat the justices. In response to the targeted attacks, and in contrast to the justices in Iowa in 2010, the three Florida justices raised approximately \$1 million to mount a campaign.²⁵ As in Iowa, members of the state bar and ABOTA mobilized to educate the public and to support the retention of the justices.²⁶ In the end, all three justices were retained.

The cost of these heavily financed judicial elections extends well beyond the financial repercussions. As Justice O'Connor stated, the risks that unlimited campaign spending poses to fair and independent courts and the likelihood that the Supreme Court's ruling in *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), will exacerbate the problem:

If you're a litigant appearing before a judge, it makes sense to invest in that judge's campaign. No states can possibly benefit from having that much money injected into a political judicial campaign. The appearance of bias is high, and it destroys any credibility in the courts.

[After *Citizens United*], we can anticipate labor unions' trial lawyers might have the means to win one kind of an election, and that a tobacco company or other corporation might win in another election. If both sides open up their spending, mutually assured destruction is probably the most likely outcome. It would end both judicial impartiality and public perception of impartiality.²⁷

It cannot be overstated that the integrity and validity of our courts' decisions rest upon the public's trust and confidence in the system. Parties are entitled to a fair and impartial hearing by a judge. But if the judge's campaign receives a significant campaign

donation from one of the litigants, the other side's trust in the court's impartiality is likely to be compromised if not destroyed.

In a national poll conducted in 2009 by Harris Interactive, more than 80% of those surveyed responded that judges should avoid sitting on cases involving major campaign supporters.²⁸ And more than 89% of those surveyed in February 2009 by the USA Today/Gallup Poll believed that the influence of campaign contributions on a judges' rulings is a problem.²⁹ But the decision of whether to recuse on a particular case is, for the most part, left to the judge.

This issue was addressed by the U.S. Supreme Court in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), a case involving two coal companies in West Virginia. Hugh Caperton, the CEO of a small mining company, won a \$50 million judgment against A.T. Massey, the fourth-largest mining conglomerate in the U.S.

In the next West Virginia judicial election, Don Blankenship, Massey's CEO, donated \$3 million to Brent Benjamin's campaign for the supreme court.³⁰ Blankenship's contribution exceeded all of Benjamin's other contributions combined and constituted 60% of the total Benjamin received.³¹ Following Benjamin's victory, Massey appealed the \$50 million judgment against it. Caperton moved on three separate occasions to disqualify Benjamin from hearing the appeal. Each time Benjamin refused to recuse. The West Virginia Supreme Court ultimately reversed the judgment that Caperton had been awarded by the jury, with Benjamin casting the tie-breaking vote.

Caperton petitioned the U.S. Supreme Court to review the issue of whether Justice Benjamin's refusal to recuse on a case involving his most significant campaign donor violated the Due Process Clause of the Fourteenth Amendment. The Supreme Court took the case and held in a 5-4 opinion that Justice Benjamin's refusal to recuse did violate Caperton's due-process rights.³²

Writing for the majority, Justice Kennedy stated that the Due Process Clause has been implemented in the Court's prior disqualification decisions by objective standards. The standard is not proof of actual bias but

whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented." The Court concluded that such a serious and objective risk of actual bias exists—"based on objective and

reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”³³

The majority held that Justice Benjamin should have recused, stating that the case presented facts that were “extreme by any measure.”³⁴

The Solutions

What can be done to address these significant threats to the integrity of our judicial system? Several things. With respect to providing states with guidance on reforming standards for recusal or disqualification, the Brennan Center for Justice offers proposals that fall into three categories:

Procedural proposals

- Peremptory disqualification (currently approximately one-third of states allow counsel to strike one judge per proceeding)
- De novo review on interlocutory appeal
- Recusal advisory bodies (nonbinding authority but a source of guidance for judges)
- Independent adjudication of disqualification motions (recusal decisions made by a judge or panel of judges other than the subject of the motion)
- Effective mechanisms for replacing disqualified judges (particularly at the appellate level)

Substantive proposals

- Per se rules for campaign contributors (the ABA recommends mandatory recusal when a judge has received a contribution greater than a predetermined amount from a party appearing before the judge)

- Expanded commentary in the judicial canons

- Judicial education

Proposals for increased transparency

- Enhanced disclosure by judges of campaign contributions
- Enhanced disclosure by litigants (perhaps in the form of an affidavit at the outset of litigation)
- Transparent and reasoned decision-making on recusal motions that would facilitate appellate review
- Increased and uniform data collection and dissemination of the disposition of recusal motions³⁵

With respect to the issue of how to address the now-unlimited opportunity to pour money into judicial campaigns in the aftermath of Citizens United, the challenge may be more difficult. Again, the Brennan Center for Justice has excellent suggestions for states to consider:

- Adopting public financing for high-court judicial campaigns (as was recently implemented in North Carolina, New Mexico, Wisconsin, and West Virginia)
- Codifying robust disclosure/recusal rules
- Replacing contested elections with merit appointment and retention elections (not a perfect solution given recent events in Iowa and Florida, but as a former chief justice of the Minnesota Supreme Court was known to say—at least the big contributor can’t buy the seat!).³⁶

The threat of increasing efforts by political and special-interest groups to undermine the independence of the American Judiciary is real. In response, we who recognize and understand the vital role that the third branch of government plays in our system must be vigilant in our work to maintain its independence and impartiality. ■

¹ Editorial, *Judicial Elections and the Bottom Line*, N.Y. TIMES, Aug. 19, 2012, available at <http://www.nytimes.com/2012/08/20/opinion/judicial-elections-and-the-bottom-line.html>.

² Only Massachusetts, New Hampshire, and Rhode Island grant lifetime tenure to members of its judiciary. See AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Sept. 27, 2012) (listing judicial appointment and election practices of each state).

³ ADAM SKAGGS, BRENNAN CENTER FOR JUSTICE, BUYING JUSTICE: THE IMPACT OF *CITIZENS UNITED* ON JUDICIAL ELECTIONS 2 (2010); AMERICAN JUDICATURE SOCIETY, [http://www.judicial_selection/methods/selection_of_judges.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=).

⁴ Editorial, *Judicial Elections and the Bottom Line*, *supra* note 1.

⁵ See generally SKAGGS, *supra* note 3.

⁶ *Citizens United v. Fed. Election Commission*, 130 S. Ct. 876, 913 (2010) (holding that because political spending is a form of protected speech under the First Amendment, government cannot prevent corporate spending that influences the voting public).

⁷ SKAGGS, *supra* note 3, at 3.

⁸ SKAGGS, *supra* note 3, at 3.

⁹ SKAGGS, *supra* note 3, at 3.

¹⁰ Tim Anderson, *Supreme Costs*, THE COUNCIL OF STATE GOVERNMENTS, (Nov. 2011), http://www.csgmidwest.org/policyresearch/1111judicial_races.aspx.

¹¹ *Id.*

¹² *Id.*

¹³ ADAM SKAGGS ET AL., BRENNAN CENTER FOR JUSTICE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-2010 (2011).

¹⁴ *Id.* at 12.

¹⁵ Peter Hardin, *Panel Calls for Reform of Michigan Judicial Elections*, <http://www.gavelgrab.org/?p=35505>.

¹⁶ MICHIGAN JUDICIAL SELECTION TASK FORCE, REPORT AND RECOMMENDATIONS, 1 (2012).

¹⁷ See generally *id.*

¹⁸ THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-2010, *supra* note 13, at 1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Anderson, *supra* note 10.

²² Anderson, *supra* note 10; Press Release, Judicial Election Spending Entering a New Phase, Justice at Stake Campaign (Sept. 13, 2012), available at http://www.justiceatstake.org/newsroom/press-releases-16824/?judicial_election_spending_entering_a_new_phase&show=news&newsID=14390.

²³ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

²⁴ See Fla. Dep't of State v. Mangat, 43 So. 3d 642 (Fla. 2010); Press Release, Judicial Election Spending Entering a New Phase, *supra* note 22.

²⁵ Press Release, Judicial Election Spending Entering a New Phase, *supra* note 22.

²⁶ Editorial, *Politics, Principle and an Attack on the Courts*, *supra* note 24.

²⁷ SKAGGS, *supra* note 3, at 2.

²⁸ SKAGGS, *supra* note 3, at 4.

²⁹ SKAGGS, *supra* note 3, at 4.

³⁰ *Caperton*, 129 S. Ct. at 2257.

³¹ Brief for Petitioners at 2, *Caperton*, 129 S. Ct. 2252 (2009) (No. 08-22).

³² *Id.* at 2264-65.

³³ BRENNAN CENTER FOR JUSTICE, SETTING RECUSAL STANDARDS AFTER *CAPERTON V. MASSEY COAL COMPANY* 3, available at http://brennan.3cdn.net/a6252cfe16365afbb9_sim_6bxrdd.pdf (quoting *Caperton*, 129 S. Ct. at 2263-64.)

³⁴ *Caperton*, 129 S. Ct. at 2265.

³⁵ SETTING RECUSAL STANDARDS AFTER *CAPERTON V. MASSEY COAL COMPANY*, *supra* note 37, at 4-6.

³⁶ SKAGGS, *supra* note 3, at 12-13.

Judicial Independence Maintained Through Adequate Funding

On January 14th, 2012 the American Board of Trial Advocates resolved that:

The Congress and the legislatures of the respective states must adequately and fully fund the federal and state judicial branches of government so that the rights and access to justice guaranteed by the Constitutions are preserved.

ABOTA's resolution is predicated upon the constitutional principal of separation of powers and equality of the three branches of government. As Alexander Hamilton said in *The Federalist No. 78*:

“The judiciary... has no influence over either the sword or the purse; no direction either of the strength or wealth of society; and can take no active resolution whatever. It may be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

The current fiscal crisis in both state and federal government threatens more than judiciary salaries or court budgets. This fiscal crisis literally jeopardizes the existence, welfare, and viability of our judicial system. Without adequate funding, the people can expect longer trial delays, poorly maintained court facilities, little or no courtroom security, limited training for judges and outdated equipment. The protection of the courts would be unavailable to those who need it most, including battered women and children, injured persons seeking recompense, consumers seeking their rights, businesses seeking to enforce contracts, and citizens seeking resolution of personal and contractual disputes.

Inadequate funding of the judiciary encroaches upon and injures the independence of the judicial branch of government. A breakdown of the independent judiciary would result in its inability to check arbitrary or self-interested assertions of the other branches. The judicial branch, as one of the three branches of government, must claim and exert power to maintain its equality and integrity. The exertion of the power of equality is necessary to ensure the continuity and viability of the judicial system and its efficient administration of justice.

The crisis in inadequate judicial funding is exemplified by California and the Federal courts. In California the statewide court system has sustained four years of budget cuts of nearly \$653 million. These cuts have been diffused through the state's court system; every court and every county has been affected. In November the courts face an additional \$125 million cut in 2012-13 if voters do not approve temporary sales and income tax increases. In San Francisco alone, six courtrooms have been closed, 67

court personnel laid off including 29 court reporters. Courts are sharing court reporters resulting in only one matter being heard or tried at a time. Because of constitutional requirements, criminal cases have priority throughout the state and must be reported because of a defendant's right to appeal. Parties are required to hire their own court reporter resulting in those of poor or modest means to go without a reporter. Clerks' offices are open one hour less a day due to staffing reductions. California justices have warned that it may take up to five years to resolve a civil case.

California is not alone. In South Carolina courts sustained a 20% budget reduction in fiscal years 2009-2010. In Ohio, one county announced that litigants must bring their own paper to court as there was no budget for basic office supplies. In Texas, the judicial system is allocated only 0.50% of the total state budget, yet its courts face another round of budget cuts.

The federal system fares no better. Chief Judge David Sentelle of the U. S. Circuit Court of Appeals for the District of Columbia states if Congress does not forge a budget pact and avoid \$600 billion in automatic spending cuts next year, “civil jury trials would have to be suspended due to lack of funding.” Federal courts are being closed for lack of funding. Facing closure are Gadsen, AL, Pikeville, KY, Wilkesboro, NC, Beaufort, SC and Amarillo, TX. In addition to adequate funding issues, the politicization of the confirmation process has exacerbated judicial vacancies. There has not been an omnibus judge bill for years. Based upon workload statistics, the Administrative Office has requested 88 new judgeships. As of September 27, 2012, there were 76 Article III vacancies.

Fiscal crises must yield to the Constitutional mandate that the Judiciary shall be free and independent to provide an efficient and effective system of Justice. The Constitutional mandates of the First Amendment guaranteeing the right of the people to petition the government for redress of grievances, as well as the Seventh Amendment's right of a jury trial in civil matters, rests upon adequate and sufficient funding of the Judiciary — enabling the Judiciary to render an efficient administration of justice. ■

White Paper Conclusion

A fair and impartial judiciary is a cornerstone of Democracy, and the judiciary is a separate and equal branch of our Constitutional government, to be recognized and treated as such. Judges free of political or other influences are essential to the fair resolution of disputes, proper interpretation of laws to assure that legislation is in accordance with the Constitution, and review, when sought, of Executive Branch acts. Given the key role that an impartial judiciary plays in our government, this paper has identified some important steps to assure that an impartial judiciary can fully and completely perform its duty as a separate and equal branch of government, free from outside influences.

1) The judiciary must always be accorded the respect due an equal branch of the United States Government created by the Constitution.

2) *Judicial selection:* Judges must be selected in a manner that assures that well-trained, qualified, experienced judges are chosen in a manner that, so far as reasonably possible, is free of political influence.

a) Accordingly, where judges are appointed, impartial politically non-partisan boards or other safeguards, free from political influence, must be utilized to screen and recommend candidates.

b) Where judges are elected or are subject to retention vote, elections should be non-partisan and must be funded in a manner that assures that the candidate will not be influenced by the identity of his or her sources of contributions. All sources of contributions for or against a judicial candidate should be transparent and easily identified.

3) Funding: The judiciary must be so funded as to ensure:

a) Fair and reasonable compensation to encourage qualified candidates to want to serve as judges.

b) Sufficient judicial staffing to insure that citizens have ready and easy access to the courts.

c) Preservation of the Seventh Amendment right to a jury trial by fairly selected, reasonably compensated jurors, who can serve without undue financial hardship.

Unfortunately, as this paper has shown, many threats to the independence of a fair and impartial judiciary exist today. Hopefully it has demonstrated the importance of a fair, impartial and independent judiciary as a separate, equal branch of government created by the Constitution. ABOTA hopes that this paper will provoke discussions throughout the country so that it will raise awareness that it is imperative to ensure that the judiciary's impartiality in our constitutional democracy is assured.

Education at all levels should emphasize the vital role of the judiciary and the importance of assuring that judges are free from improper influence, so they can fulfill their obligations by fairly and impartially deciding all disputes that come before them. ■