

Preserving a Fair, Impartial and Independent Judiciary

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

Revised Version



American Board
of Trial Advocates



2001 Bryan St., Suite 3000
Dallas, Texas 75201
www.abota.org

Preserving a Fair, Impartial, and Independent Judiciary

TABLE OF CONTENTS

Introduction	3
Historical Background – How We Got Here.....	4
Notions of Judicial Independence are Rooted in Antiquity	4
The Constitution’s Plan for an Independent Judiciary.....	4
From <i>Marbury v. Madison</i> to <i>Cooper v. Aaron</i>	5
Challenges to the Supreme Court from Other Branches.....	5
Non-Acquiescence – Presidential Disagreement with the Supreme Court	5
Civil War Challenges	6
Eisenhower Backs Up the Supreme Court with Federal Troops.....	6
Jury Trials and Judicial Independence	7
Recent Threats to Judicial Independence	8
Political Interference and Intimidation	8
Court Packing.....	11
The Skyrocketing Costs of Judicial Elections	11
Proposed Solutions	12
Selection of Fair and Neutral Judges	13
Adequate Funding to Maintain Judicial Independence.....	13
Education and Combating Disinformation	15
Reform Standards for Recusal and Disqualification.....	16
Increased Transparency	16
White Paper Conclusion	16

The original version of “Preserving a Fair, Impartial and Independent Judiciary” was produced by the Judicial Independence Committee ©2013 by the American Board of Trial Advocates. All rights reserved. No part of this product may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying and recording, or by any information storage or retrieval system, without the express written permission of ABOTA unless such copying is expressly permitted by federal copyright law. Produced in the United States of America.

Acknowledgements: This version (2022) was prepared by the Judicial Independence Committee of the American Board of Trial Advocates. Special thanks to Co-Chairs Letty Litchfield and Judge Rosemary T. McGuire. Additional recognition to those who served as contributors to the revised version, including Judge David I. Brown (Ret.), Judge Nelly N. Khouzam, Letty Litchfield, Judge Rosemary T. McGuire, Kirby D. Shealy, III, as well as committee members Judge Jerome B. Abrams, Judge Caroline E. Baker, Angela Beranek Brandt, Amy Carlson, Mark B. Connely, Curtis W. Fenley, III, Judge Bryan F. Foster, Elizabeth M. Fraley, Judge Joe W. Hilberman, John D. Hourihan, Judge Patricia J. Kerrigan, Patrick E. Knie, Frank E. Lamothe, III, James McKibben, Judge Wendell Mortimer, Jr., Thomas K. Neill, Jeffrey Portnoy, Todd Presnell, William W. Price, Richard M. Rawdon, Jr., Elizabeth Ray, Susan C. Rosen, Leon Silver, Judge Daniel H. Sleet, S. Lester Tate, III, Jill P. Telfer, Gary P. Thimsen, and Judge Christopher J. Warner, (Ret.). Additional special thanks to Judge Morris Silbeman.

About ABOTA

ABOTA is an invitation-only national association of experienced trial lawyers and judges dedicated to the preservation and promotion of the Seventh Amendment to the U.S. Constitution, which guarantees the right to civil jury trials. ABOTA's primary goal is to educate the American public about the history and value of the right to trial by jury. The organization is dedicated to elevating the standards of integrity, honor and courtesy in the legal profession. Founded in 1958 with a membership of more than 7,300 experienced attorneys representing both the plaintiff and defense bars in civil cases, ABOTA is uniquely qualified to speak to the necessity of preserving and protecting our constitutionally-mandated jury system as the protector of the rights of persons and property. The ABOTA Foundation was established in 1991 to provide education to the American public about the right to trial by jury and to promote the professional education of trial attorneys.

The following white paper addresses the importance of having a fair and impartial judiciary as a separate, co-equal branch of government created by the Constitution. Today, there are many threats to the independence of a fair and impartial judiciary. It is ABOTA's goal, through this paper, to promote discussions throughout the country that will raise awareness of the importance of ensuring the judiciary's fairness and impartiality in order to preserve our constitutional democracy.

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.

But 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 identify 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 that 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 HERE

Notions of Judicial Independence are Rooted in Antiquity

Notions of judicial independence have roots far earlier than we traditionally think. For instance, the Book of Deuteronomy explicitly leaves the king out of the system of adjudging disputes. The king merely reads the Torah and is bound by the Torah’s law, as that law is interpreted by the judiciary. This dynamic of subjugating the supreme ruler to the rule of law, as interpreted by an independent judiciary, has of course been tested and, more often, flouted by those in authority throughout the history of Western civilization from the Magna Carta to the American Revolution.

In 1178 Henry II chose five members of his personal household “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 in England was a significant step toward judicial independence.

The 1689 English Bill of Rights ended royal commissions for judges and moved the country further toward an independent judiciary that would execute the laws as written rather than imposing the will of the King. Later, in 1701, England’s Act of Settlement formally protected judges from unilateral removal by the monarch, as the country began to consolidate power in its

Parliament. Until the Act of Settlement was passed, it was not unusual for British sovereigns to routinely attempt to influence judicial decisions and, in certain instances, to displace judges whose rulings were not in keeping with their own views.

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.

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 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. Alexander Hamilton, author of Federalist No. 78, famously argued that the judiciary is “the least dangerous” branch of government, having “no influence over either the sword or the purse.” In fact, history would later show that the “least dangerous” branch was also the most vulnerable to the other two branches’ efforts to undermine its authority by use of the sword and, at times, the purse.

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 barring bad behavior. The Constitution, they declared, made the judges independent. Chief Justice Marshall, in *Marbury v. Madison* (1803), 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.

Although the size of the Supreme Court was initially set at six by the Judiciary Act of 1789, it was reduced to five by the Judiciary Act of 1801, which the Federalists in control of Congress passed in hopes that incoming President Thomas Jefferson would not be able to nominate a justice to the Court during his term in office. The Judiciary Act of 1801 was repealed before it had any practical effect on the size of the Court.

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 or her political beliefs.

Challenges to the Supreme Court from Other Branches

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.

President Abraham 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 v. Sandford* (1857) decision is best understood as stating a “safe harbor” in which disagreement with Supreme Court precedent is legitimate while defiance is not. However, Lincoln did expand the size of the Court, which had grown from six to nine in light of America’s expansion into the West, by adding a tenth justice in 1863 in hopes of achieving an anti-slavery majority on the Court.

In sum, Jackson and Lincoln understood the difference between political disagreement with the Supreme Court and defiance of judicial authority, although neither was immune from the temptation to bring political solutions to disputes that had been decided unfavorably by the courts.

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 *United States v. Klein* (1871), which 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.

The power struggle between Congress and the President was also reflected in other changes to the size of the Supreme Court. In 1866, Congress cut the size of the Court back to seven, again hoping to limit the President’s ability to fill open seats. Upon the election of Ulysses S. Grant to the Presidency in 1868, Congress set the size of the Court at nine, where it stands today.

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 v. Board II* (1955), the Court called upon the southern states to desegregate their schools with “all deliberate speed.”

A constitutional crisis arose 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 Dwight 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 that was not just unanimous but was in fact signed by all nine justices.

Jury Trials and Judicial Independence

Jury trials are a critical means of ensuring judicial independence. 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. 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." But even though civil jury trials are a fundamental right, this amendment protects them 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.

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 influence 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. At a minimum, citizen participation in the justice system provides an element of transparency to court proceedings that significantly mitigates public suspicions and confusion concerning the judiciary.

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.

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.

State court judges do not have the same Constitutional protections as their federal counterparts. In 38 states judges run for election by the citizens, a practice that opens them up to improper political influence and, in certain cases, punishment. For example, in 2010, voters in Iowa removed three sitting members of that state’s Supreme Court following their ruling in 2009 striking down

the state’s same-sex marriage ban. In similar fashion, a 2016 campaign to unseat five members of the Kansas Supreme Court contended that the justices were “soft on crime” because of an earlier decision in which two brothers’ criminal convictions and death sentences had been overturned for what political advertisements called “a technicality.” Although the campaign ultimately failed, it saw an unprecedented amount of money spent on both sides to curry favor with voters.

“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 to 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.

President Donald J. Trump openly denigrated particular judges and entire judicial institutions throughout his tenure as head of the Executive Branch. Others have followed his lead.

The recent ideological shift toward strict construction among the members of the United States Supreme Court, orchestrated in part by the Senate majority leader’s refusal to hold hearings on a 2016 nominee along with the string of controversial opinions issued during the 2021–22 term, have renewed calls for changing the size and composition of the Court.

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.

In recent years we have witnessed a tremendous increase in attempts to assert political influence on the courts. These efforts come from politicians, political parties, and special interest groups with a political agenda. Frequently they amount to efforts at intimidation and retaliation. When elected officials engage in personal attacks on judges because they disagree with their analysis of our laws, they undermine the rule of law, threaten the independence of the judiciary, and interfere with fair and impartial administration of justice.

Judges are governed by the rule of law, not partisanship ideologies or special interests. Ethical standards established in model codes of judicial conduct generally preclude judges from speaking in public on matters over which they preside. As a consequence, when judges are the subject of unfair criticism, they often cannot defend themselves.

In 2011, politicians attempted to stack the Florida Supreme Court. The measure would have given the governor three new appointments and a majority on the court. 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 as well. In 2012, the Republican Party in Florida announced its opposition to the retention of three Supreme Court justices in nominally nonpartisan elections. The governor at that time launched a groundless criminal investigation of the three justices and a special interest group sued to remove them from the ballot based upon supposed criminal violations. These efforts constitute a persistent drive to impose political control over the courts and threaten the independence of the judiciary.

Another serious threat to judicial independence is the successful effort to recall a judge in California because of one sentencing decision. In 2016, 13 years after taking the bench, the judge in question presided over a criminal case in which a university student was convicted of sexual assault. The prosecutor requested a six-year sentence, whereas the probation department recommended a sentence of six months to one year in jail. The judge imposed a sentence of six months imprisonment, followed by three years of probation. He was not recalled based on any judicial misconduct, but on an unpopular decision. Subjecting a judge to recall for an unpopular decision undermines the independence of the judiciary.

Following the recall, the California Code of Judicial Ethics was modified to allow a judicial officer in connection with a judicial election or recall campaign to publicly comment about a pending proceeding, provided “(a) the comment would not reasonably be expected to affect the outcome or impair the fairness of the proceeding, and (b) the comment is about the procedural, factual, or legal basis of a decision about which a judge has been criticized during the election or recall campaign.” (Code of Judicial Ethics, Canon 3B(9))

In February 2022, a Tennessee State Representative filed a resolution to begin the process to remove a veteran judge appointed by the Governor in 1995, after she issued a ruling with which he disagreed. The case was about voting by mail in the 2020 presidential election. The judge had served more than 25 years in Davidson County as a state court chancery judge. She was recognized by her peers, both Republicans and Democrats, as one of the top judges in Davidson County and the state. Her independence is one of the reasons she was chosen by the Tennessee Supreme Court in 2015 to preside over its first business court. The case that resulted in criticism and her attempted removal from her position as state court chancery judge was randomly assigned to her court.

Essentially, lawmakers in Tennessee wanted this experienced and respected judge removed because they disagreed politically with one of her hundreds of decisions over a decades-long, distinguished career. Fortunately, the outcry against this effort from the legal, business, and judicial communities was swift, spontaneous, and unprecedented. The resolution was defeated; however, this case underscores the threat to the independence of the judiciary.

In April 2022, the Chief Judge of the Northern District of Florida ruled that substantial parts of a bill passed by the Florida Legislature in the 2021 session and signed into law by the governor were unconstitutional infringements on Florida citizens' right to vote. The judge also ruled in favor of the state of Florida in upholding parts of the legislation. The judge spent significant time weighing the evidence and analyzing the legal arguments. He authored a detailed, in-depth opinion setting forth his findings and analysis of the law. He was then personally attacked by state politicians. Personally attacking a judge because one

disagrees with a ruling is unprofessional and unbecoming of our elected leaders who have sworn an oath to uphold the Constitution. Not only is it wrong, but it undermines the independence of the judicial branch.

In addition to politically motivated criticism of decisions of judicial officers, recent violence and threats of violence against the judiciary strike at the core of our democracy. On July 19, 2020, the 20-year-old son of a federal judge in New Jersey was shot and killed at the front door of the family's home. The man who fatally shot the judge's son and wounded her husband had tracked down her address, church, and other personal information online. He was upset about the way she had handled his case.

On June 3, 2022, a Wisconsin judge was murdered by an individual he had previously sentenced. Also in June of 2022, an armed gunman was arrested outside the residence of Supreme Court Justice Brett Kavanaugh following the leak of a draft of the Court's decision in *Dobbs v. Jackson Women's Health Organization* (2022).

Through the years, politicians and special interest groups have repeatedly attempted to erode judicial independence, demonstrating a lack of respect for the vital roles of separation of powers and checks and balances within American constitutional governance. 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. We must relentlessly preserve and defend our independent judiciary.

Court Packing

Recent calls to expand the size of the Supreme Court have become a significant part of the debate over the Court and its role in American government. Although there is widespread agreement among legal scholars that Congress has the constitutional authority to expand the Court's size, there is significant disagreement over whether such expansion would be wise. While ABOTA presently takes no position on the wisdom of expansion, an accounting of past efforts to expand or contract the size of the Court, which occurred at various points in the nineteenth century and perhaps most famously during the New Deal era, reflects that the issue is still with us.

The Constitution is silent as to the number of justices on the Supreme Court. Article III, section 1 provides simply that “[t]he 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.” The term “court packing” is used to describe changes to the size of the Supreme Court, but is better understood as any effort to manipulate the Court's membership for partisan ends.

As a matter of perspective, nearly 90 years ago, President Franklin D. Roosevelt, frustrated by some of the Supreme Court's rulings on the New Deal, proposed expanding the Court beyond the nine justices that had been the rule since 1869. 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.

Public discussion of Court expansion surged noticeably between 2019 and 2020. In 2020, more than 400 articles appeared in the *New York Times*, *Wall Street Journal*,

Washington Post, and *USA Today* invoking the term “court packing” in the context of the Supreme Court, in contrast to approximately 100 articles in 2019.

The Skyrocketing Costs of Judicial Elections

In 38 states, supreme court judges must stand for election. These elections take various forms—partisan, nonpartisan, or uncontested retention elections, in which citizens vote simply to keep or remove a judge—but historically speaking, most of them were low-profile affairs. Spending on judicial elections has skyrocketed in many states. In recent elections, however, unprecedented amounts of money have poured into these campaigns. During the 2019–2020 election cycle, \$97 million was spent on judicial races nationwide, according to a Brennan Center report released January 25, 2022.

In 2019, Wisconsin held its most expensive state supreme court race, which was surpassed in 2020 when nearly \$10 million was spent to secure a single seat on the state's high court. North Carolina spent \$6 million on a single seat in 2020. The escalation of spending represents an escalation of influence, and a diminution in judicial independence, which will ultimately undermine public trust in state courts.

Campaign donations to elect state court judges often come with strings attached. The escalation of spending represents an escalation of influence, and a diminution in judicial independence, which will ultimately undermine public trust in state courts. The Brennan Center has documented attempts by state legislators to reduce judicial independence, making this a difficult time to be a state judge. While their importance is increasing, they are caught in a squeeze

between big donors and powerful politicians.

In tracking state supreme court elections for more than 20 years, the Brennan Center has found that the elections that attract the most money are often those that could flip the ideological or partisan majority on a court. The three states that have seen the highest spending in recent years are Illinois, North Carolina, and Ohio—all held multiple partisan judicial elections to determine whether Democrats or Republicans comprise a majority on those courts. Illinois has seen the most spending, including at least \$6.5 million from the two largest outside interest groups—\$1.5 million supporting the Democratic candidates and \$5 million supporting the Republican candidates. Montana is seeing its most expensive judicial election ever, with at least \$1.4 million in interest group spending as of October 2022.

There is a mix of familiar and new groups spending in judicial races. The biggest spender in state supreme court elections of the last decade has been the Republican State Leadership Committee, spending over \$21 million to influence judicial elections across the country since 2012. In February 2022, the group committed to spending more on state court races than any year prior. It has spent at least \$650,000 in Montana and \$375,000 in Kentucky as well as reserving \$2 million worth of TV airtime in Ohio.

There are conservative groups and groups on the left that have committed to spending significant money on judicial races. The amount of money that special interest groups spend in judicial elections and the content of their ads can have a significant impact on how those courts operate. Research shows that judges are more likely to rule in favor of donors and political parties in election years

and more likely to rule against criminal defendants out of fear of being portrayed as “soft on crime.” All of this nontransparent spending hides from voters crucial information about who is trying to sway their vote and what conflicts of interest their judges might have. At a time when the public is becoming aware of how important state courts are, people should know who is trying to influence who sits on their courts.

PROPOSED SOLUTIONS

Courts play a unique role in our democracy that requires them to be independent of the two political branches of government and to sometimes make politically unpopular decisions. This critical role has been under threat. State legislatures and governors across the country have regularly targeted state courts, often in retaliation for decisions they disagree with, in an effort to weaken courts’ power or gain more political influence over the judiciary.

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 will identify some important steps to ensure that an impartial judiciary can fully and completely perform its duty as a separate and equal branch of government, free from outside influences.

Selection of Fair and Neutral Judges

Judges must be selected in a manner that assures that well-trained, qualified, experienced judges are chosen in a way that, so far as reasonably possible, is free of political influence. Accordingly, where judges are appointed, impartial politically nonpartisan boards or other safeguards, free from political influence, must be utilized to screen and recommend candidates. Where judges are elected or are subject to retention vote, elections should be nonpartisan 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.

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 v. Federal Election Commission* (2010), the challenge may be more difficult. Some possible solutions are: 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; and 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!).

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.

Adequate Funding to Maintain Judicial Independence

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

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.

Lack of funding 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 or judicial 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, victims of crime, injured persons seeking recompense, consumers seeking to enforce 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. The judiciary must always be accorded the respect due an equal branch of the United States Government created by the Constitution. 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 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; and (c) preservation of the Seventh Amendment right to a jury trial by fairly-selected, reasonably-compensated jurors, who can serve without undue financial hardship.

Although California has received a significant increase in funding this fiscal year, in prior years the California court system has sustained significant budget cuts. These budget cuts have been diffused through the state's court system, and every court and every county has been affected. Lack of funding has resulted in courtrooms being closed, and personnel—including court reporters—being laid off. Because of constitutional requirements, criminal cases have priority throughout the state and must be reported because of a defendant's right to appeal. In civil cases, parties are often required to hire their own court reporter and must go without a reporter if they cannot afford it. This lack of funding thus extends the amount of time it takes to get a case

litigated and also negatively impacts litigants.

California has not been alone. In fiscal years 2009–2010, South Carolina courts sustained a 20% budget reduction in funding. 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 are still facing another round of budget cuts.

The federal system has fared no better. Chief Judge David Sentelle of the U.S. Circuit Court of Appeals for the District of Columbia stated if Congress did not forge a budget pact and avoid \$600 billion in automatic spending cuts, “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, Ala., Pikeville, Ky., Wilkesboro, N.C., Beaufort, S.C., and Amarillo, Texas. 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, 2021, there were 76 Article III vacancies.

In 1988, Florida approved an amendment to its Constitution to provide a uniform funding system for the trial courts within the state. Florida voters approved the amendment, known as Revision 7 to Article V of the Florida Constitution. Prior to Revision 7, each trial court was funded by the county over which the court had jurisdiction. In essence, each of the 67 counties had to decide on funding for the courts within that county, and each county had the discretion as to the amount of funding it would provide to its courts.

At the time (and continuing to the present), Florida's appellate courts were funded by the State. As a result of county-by-county funding variations, some counties could afford to provide better funding for court services, while others were able to provide lesser funding for fewer, and even bare minimum, services. Revision 7 required that both the appellate courts and the trial courts be funded through state appropriations, thus equalizing the funding levels across county lines. The actual implementation of state funding to effectuate Revision 7 did not take effect until July 1, 2004.

Thus, revision 7 changed the manner in which Florida's courts are funded, giving the Florida Legislature broad control over the judicial branch's budget, subject to the governor's approval or veto of budgetary items. Among other things, the legislature determines funding for judges' salaries, the number of staff positions, operating costs, facility construction and repairs, and court-ordered programs. Of course, legislative funding varies from year to year, based on a variety of factors. And in the normal course, funding for the courts may be increased, reduced, or kept stable during any given legislative session.

Apart from the usual budgetary factors, occasionally other factors come into play as part of the budgeting process. For example, there are times when courts make decisions that legislators view as contrary to the goals of the legislature. Similarly, a court decision may be viewed by the Executive Branch as contrary to that branch's policy decisions or goals. The resulting tension between the branches of government can create challenges to the Judicial Branch's efforts to obtain desired funding for the courts.

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.

Education and Combating Disinformation

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. Moreover, 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. Education is also helpful to combat misinformation regarding the role of the judiciary.

And it is not just the public that should be educated on the role of the judiciary. Judicial education is also important. Expanded commentary in the judicial canons could provide judges more helpful guidance, and additional continuing education opportunities would help as well.

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. Our members should continue to be encouraged to actively participate when elected officials exert undue influence upon the Courts. 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.

Reform Standards for Recusal and Disqualification

A number of procedural proposals could be helpful in reforming the standards for recusal and disqualification of judges. Recusal advisory bodies could provide nonbinding authority as a source of guidance for judges. It may be helpful for disqualification motions to be independently adjudicated, such that recusal decisions would be made by a judge or panel of judges other than the subject of the motion. There should also be effective mechanisms for replacing disqualified judges (particularly at the appellate level). And there should be per se rules regarding mandatory recusal in various circumstances, such as when a judge has received a contribution greater than a predetermined amount from a party appearing before the judge.

Increased Transparency

Increased transparency would be helpful to reduce influence over judges or, at a minimum, expose any such influence to scrutiny. Such proposals include 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; and increased and uniform data

collection and dissemination of the disposition of recusal motions.

CONCLUSION

As this white paper has shown, the independence of the judicial branch continues to be under threat from a variety of different sources. We hope that this paper has demonstrated the importance of maintaining a fair and neutral judiciary as free from political influence as possible and will spark discourse regarding this essential component of the United States' form of government.