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Popular Dissatisfaction With Judicial Restraint—Do Americans Really Want an Independent Judiciary?

MICHAEL S. GRECO*

It is a pleasure for me to be here with you. I thank Chief Justice Randy Shepard and the Conference of Chief Justices for inviting me to speak this afternoon. I am on my way westward from Boston, departing here tomorrow morning for Hawaii, where I hope to see many of you at the Annual Meeting of the American Bar Association. At the close of the Annual Meeting, I will bid farewell after serving as President of the Association. It has been a very full and productive year, as those of you, especially in recent months, may have read in the newspapers about the ABA's activities. This is my final non-Annual Meeting address, and one that I have been looking forward to very much, because I have some thoughts to share with you, the leaders of our state judiciaries.

I want to begin by acknowledging my colleague and long-time friend, Chief Justice Margaret Marshall of Massachusetts, and thanking her for her inspiring leadership of the judiciary in my home state and throughout the nation. I am pleased to join Professor Charles Geyh, a distinguished scholar of judicial independence, judicial administration, ethics, and many other subjects relating to the judiciary for this discussion of whether Americans really want an independent judiciary. Professor Geyh and I will each make brief remarks and leave time for questions and discussion.

I would be remiss if I did not extend thanks on behalf of the American Bar Association Task Force on Hurricane Katrina, which I appointed while that hurricane was still ravaging the Gulf Coast, for the response that so many of you made to the letter I sent to Chief Justice Shepard. In that letter I asked that you suspend, in your respective jurisdictions, unauthorized practice of law rules so that lawyers throughout the country could do what needs to be done to serve, pro bono, the legal needs of the hurricane victims. The job is not yet completed. Almost a year later, victims are still identifying legal problems. I suggest that you consider extending the orders that you entered to allow lawyers to continue helping people on the Gulf Coast get back on their feet.

To begin addressing the central question at hand, I believe that Americans *do* want an independent judiciary, although many may not know it. My statement reflects the fact that many Americans are of two minds about the judiciary. Several national public opinion surveys conducted by the American Bar Association, the National Center for State Courts, and the Justice at Stake campaign, as well as other state-specific surveys, show that Americans want judges who are free from political influence.¹ However, at

* President, American Bar Association. These remarks were given at the Conference of Chief Justices—Conference of State Court Administrators 2006 Annual Meeting.

1. See ABA, *American Bar Association Report on Perceptions of the U.S. Justice System*, 62 ALB. L. REV. 1307, 1341, 1345 (1999); JUSTICE AT STAKE CAMPAIGN, NATIONAL SURVEY OF AMERICAN VOTERS 7 (2001), available at <http://faircourts.org/files/JASNationalSurveyResults.pdf> (survey conducted by Greenberg, Quinlan, Rosner Research, Inc.); NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 42 (1999), available at http://ppc.unl.edu/publications/documents/how_public_views_the_state_courts.pdf; N. C. CTR. FOR VOTER EDUC., JUDICIAL CAMPAIGN REFORM POLL 5 (2002), available at http://www.ncvoterred.com/downloads/5_9_02_toplines.doc (survey conducted by American

the same time, many people favor judicial decisions that reflect their political preferences and values, and many express a desire to hold judges more directly accountable to the public.² The root cause of these conflicting and malleable attitudes towards the judiciary, I believe, is a fundamental lack of knowledge. Too many Americans are uneducated about our system of government, and particularly about the constitutionally prescribed roles and responsibilities of the judicial branch.

In a Harris Interactive poll commissioned by the ABA last July just before I took office as president, 45 percent of the respondents could not correctly identify our three branches of government. Forty-eight percent did not know what “separation of powers” means. Twenty-nine percent did not know the definition of “checks and balances.” Perhaps most troubling is that 44 percent of those surveyed did not know the core responsibilities of the judicial branch.³ Some think that judges declare war. Others believe that judges advise the President. That is why a major priority of my year as ABA president has focused on the need to enhance the civic education of all Americans on the roles and responsibilities of our three branches of government, with a particular emphasis on the vital role of an independent judiciary.

The ABA Commission on Civic Education and the Separation of Powers, led by Honorary Co-Chairs Supreme Court Justice Sandra Day O’Connor and former U.S. Senator Bill Bradley and Chair Robert H. Rawson, is examining the current state of civic education concerning the separation of powers doctrine to determine what improvements need to be made in educational policy, teaching techniques, and civics curricula throughout our nation. The Commission is bringing policy recommendations to the ABA House of Delegates next week that call on policymakers in each state to ensure that all students experience the kind of civic learning they need to become actively engaged and responsible citizens of our democracy.⁴

State bar associations have a tremendous role to play in this area. Earlier this year I had the pleasure of traveling to Florida, where I joined the president of the Florida Bar in meetings with newspaper editorial boards to make the point that civics education is lagging in our schools. As a direct result of the organized Bar’s activities and advocacy, Florida recently adopted new requirements for expanded civics education in the public schools.⁵ Similar proposals are under consideration in Washington State, where I met with editorial boards about a month ago, and in other states.

Another issue that the ABA Commission is addressing is the lack of constructive and respectful dialogue among the three branches of government at both the federal and state levels. When citizens hear their elected and appointed officials attacking the judiciary, they lose respect and confidence in our institutions of government. To be sure, a healthy tension among our branches is inherent in the genius of the Founders’ design, but the branches must work together with mutual respect as they have done for

Viewpoint, Inc.).

2. See JUSTICE AT STAKE CAMPAIGN, *supra* note 1, at 7.

3. AM. BAR ASS’N, CIVICS EDUCATION 5, available at http://www.abanet.org/media/docs/divisionofpowers_705.pdf (survey conducted by Harris Interactive).

4. See HOUSE OF DELEGATES, AM. BAR ASS’N, RECOMMENDATION REGARDING CONGRESSIONAL OVERSIGHT OF THE JUDICIAL BRANCH (2006), available at <http://www.abanet.org/leadership/2006/annual/dailyjournal/threehundredeight.doc> (adopted unanimously upon recommendation by the ABA Commission on Civic Education and the Separation of Powers).

5. Act of June 5, 2006, ch. 2006-74, 2006 Fla. Sess. Law Serv. 909 (West) (to be codified at FLA. STAT. § 1003.4156(1)(a)(3)) (providing standards for Florida grade school promotions).

more than two centuries for our democracy to work. When that tension turns into mistrust or hostility as it has in recent times, our republic is endangered.

A year ago, before I decided to appoint the Commission, I as you witnessed members of Congress attacking state court judges in the Terri Schiavo case for doing what judges are expected to do—find the facts, apply the law, and do justice. When we hear members of Congress irresponsibly bashing the judiciary, at the very least people are confused, and at worst people direct their anger towards the judiciary. When one considers the survey data that I cited a moment ago, that nearly half of the people in America do not know what judges do, and do not know what the separation of powers means, is it any wonder that those who want to mislead the public are having a measure of success? I believe that the Founders would be greatly distressed to see the deterioration of respect for our institutions of government, especially the judiciary.

I believe that the greatest danger to democracy is not an overzealous executive branch or a legislative branch that alternately is complacent or overreaching but a subservient judicial branch. We know that each branch of government has a vital role to play and that each exercises a balancing power in our democracy. The balance is broken when judges are intimidated into a passive or submissive role, or when their powers of analysis, training, and responsibility to do justice are usurped by another branch of government that, in its zealotry, may be overreaching or exceeding its constitutional boundaries. The critical role of the judiciary is to prevent that overreaching and those excesses of power by the other branches. The judiciary simply cannot perform its role unless it has the independence and the stature of a co-equal branch of government.

How do advocates for an independent judiciary and separation of powers make an effective case for enhancing public appreciation of these core principles? Some have suggested that we abandon the term “judicial independence” when communicating with the public about the role of the judiciary, because that term has been made into a term of approbation and a lightning rod by those who wish to have a weakened judiciary. Characterizing the judiciary as “fair and impartial” and “accountable” rather than “independent” may be more palatable to some members of the public. Judicial independence can conjure up for some people images of an unaccountable cadre of elites in black robes who have too much freedom to inject their own policy preferences into rulings that have far-reaching implications for everyone in society.

I firmly reject the notion of ceding the high ground represented by the concept of an independent judiciary to politically and ideologically motivated critics on both the left and the right who seek to sway the public to buy into their attempts to tear down the judiciary for ideological or other gain. We must constantly, patiently, but firmly, explain that “judicial independence” is not for the personal or collective benefit of judges, but for the benefit of the people. This principle has allowed our democracy to flourish for more than two centuries. We must oppose all efforts to abandon it as an “inconvenient” or “outdated” notion that does not sell in the realm of modern public relations. I am suggesting that we must accurately reframe the debate and seize the initiative from those who are irresponsibly attacking the judiciary and our legal system.

Without a doubt, it is important that Americans support a fair and impartial judiciary. However, without a deeper understanding of the need for a judiciary that is independent as well as fair, people will be susceptible to suggestions that judges must be “reined in” or punished in some way for the content of their decisions. We must define for the American people what “judicial independence” really means. To me, judicial independence means protecting judges from intimidation, from influence, from

reprisals by legislators or executives, and from control by any interest group, so that judges can dispense justice without fear or favor. If we can educate Americans as to what “judicial independence” really means, we will be able to counter the irresponsible attacks on the branch of government that Chief Justice Rehnquist rightly called the “crown jewel of our democracy.”

The American Bar Association constantly battles to protect the independence of the judiciary. We oppose measures such as the one now pending in Congress for the creation of an Inspector General position that would oversee judicial conduct. A policy resolution opposing that legislation will be debated next week by the ABA House of Delegates in Honolulu.⁶ Also troubling are state referenda initiatives such as one in South Dakota that would eliminate judicial immunity and would subject judges to lawsuits by citizens who are unhappy with judicial decisions.⁷ We must educate Americans that these measures threaten not only the judiciary, but also our constitutional democracy.

In addition to the work of the ABA Commission on Civic Education and the Separation of Powers, the ABA is engaged in several other projects and policy initiatives to promote better understanding of the characteristics of a judiciary that is both independent and deserving of the support and confidence of the people. One example is the State Court Assessment project, an ambitious effort of the ABA Standing Committee on Judicial Independence to help states determine how well they are addressing the needs and concerns of the people they serve by providing an independent assessment of the strengths and weaknesses of a state court’s system.⁸

The Standing Committee has collaborated with Missouri to conduct the first statewide assessment. I want to acknowledge and thank Chief Justice Michael Wolff of Missouri, who is in the audience, for his strong support of this project, one that I hope will help provide a blueprint for long-range planning for the state’s judiciary. The State Court Assessment Project focuses on judicial independence, judicial accountability, and judicial efficiency and effectiveness. It measures performance based on thirty-four factors within those areas to assess how well a state court system is operating.

The Standing Committee reviews publicly available information on the court system and conducts interviews with knowledgeable persons throughout the state. These interviews are kept confidential in order to ensure candid responses with interviewees drawn from both inside and outside the government. Efforts are made to ensure diversity in terms of employment, region, race, gender, and other criteria. For each factor, the court system is rated on a three-point scale (positive, mixed, or negative). It should be noted that a mixed or negative rating does not necessarily suggest a failure on the part of the state judiciary itself. Some factors crucial for a properly functioning court system, such as security for court personnel and effective provision of legal assistance to indigent defendants, may be under the control of other branches of

6. On August 8, 2006, the American Bar Association House of Delegates unanimously adopted the Commission’s policy resolution. HOUSE OF DELEGATES, *supra* note 4.

7. See OFFICE OF SECRETARY OF STATE, STATE OF S.D., SOUTH DAKOTA 2006 BALLOT QUESTIONS 4 (2006), available at <http://sdsos.gov/electionsvoteregistrations/electvoterpdfs/2006SouthDakotaBallotQuestionPamphlet.pdf>.

8. Standing Committee on Judicial Independence, Am. Bar Ass’n, The State Court Assessment Project, <http://www.abanet.org/judind/scap/home.html> (last visited Apr. 26, 2007).

government. Insufficient resources may cause other deficiencies, as the courts' funding is likewise beyond the judiciary's control.

Once the assessment is completed, the report is sent to the Chief Justice of the state who then determines further distribution of the report. If you are interested in learning more about the State Court Assessment Project, please contact the ABA Standing Committee on Judicial Independence and visit the ABA Web site at www.abanet.org.

You might be interested to know that the American Bar Association's international rule of law programs have been using a similar instrument—called a Judicial Reform Index—for the past fifteen years to assess the independence of judiciaries throughout the world, especially in emerging democracies in the former Soviet bloc. The State Court Assessment Project is utilizing that instrument. If we are going to measure the efficiency, impartiality, and independence of judicial systems around the world, why should we not use the same criteria to measure our progress as well?⁹

I want to mention another troubling issue that, I believe, relates closely to the preservation of judicial independence. We not only face threats to the independence of the judiciary and the public's appreciation of the role of courts in our tripartite system of government. In recent years, we have also witnessed a dramatic escalation in threats to the independence of the legal profession and to the lawyer's professional role as trusted counselor and advocate. A case in point is the erosion of the confidentiality of the attorney-client relationship by federal governmental policies that are destroying the attorney-client privilege and work product protections.

The ABA Task Force on Attorney-Client Privilege, created in 2004, has studied the current environment surrounding the privilege and has recommended policies to safeguard it from escalating assault by federal government agencies, particularly those of the U.S. Department of Justice and the U.S. Sentencing Commission. Those ill-advised and harmful policies and practices authorize and encourage prosecutors to require corporations and other organizations to waive the attorney-client privilege in order to qualify for "cooperation credit" in both charging and sentencing decisions.

From testimony presented at Task Force hearings by scores of witnesses, the Task Force has learned that when clients fear that what they share with their lawyers may be disclosed to the government, they withhold important information from counsel and end up substituting their legal judgment for that of counsel, often with disastrous results. Not only do clients hide potentially damaging information from their lawyers, but they also unwittingly conceal potentially exculpatory information. Moreover, such concealment hampers the lawyer's ability to counsel the client, to modify or rectify behavior, and achieve compliance with laws. Erosion of the attorney-client privilege, a bedrock principle since our nation's founding, also poses great risks to the administration of justice in our country.

Why should anyone outside the corporate world care about coercing waiver of the attorney-client privilege? We all should be very concerned because if left unchecked, it will ultimately have grave implications for all Americans. Erosion of the privilege hinders efforts to ensure thorough documentation of compliance with laws and regulations designed to protect all of us, such as product and workplace safety regulations and laws designed to protect investors from fraudulent or misleading business practices. It also jeopardizes the rights of Americans that are protected by the

9. See Am. Bar Ass'n, CEELI—Judicial Reform Index, <http://www.abanet.org/ceeli/publications/jri/home.html> (last visited Oct. 26, 2006).

Fifth and Sixth Amendments. In our efforts to defend the attorney-client privilege from attack, the ABA is educating and continually reminding the American people that the privilege belongs to them and not to lawyers. The American people, not lawyers, are harmed most when they can no longer rely upon the confidentiality of communications with counsel.

Fortunately, there are some positive developments to report on this front. On April 5, 2006, the U.S. Sentencing Commission unanimously and wisely voted to delete the privilege waiver provisions from the Sentencing Guidelines that it added in the fall of 2004.¹⁰ The ABA is continuing to work with the U.S. Justice Department to reach a similar result, but as recently as in a letter to me from the U.S. Attorney General dated July 18, 2006, the Department was refusing to reconsider its position. At my request Chairman Arlen Specter agreed that the Senate Judiciary Committee would hold hearings on the attorney-client privilege later this year, as the House of Representatives already has done.¹¹ The ABA will encourage Congress to act swiftly and decisively to instruct the Department of Justice to cease the damaging practice of coercing waiver of the privilege from targets of investigations and prosecutions.

Erosion of the attorney-client privilege is only one of the many current threats to the independence of the legal profession and the judiciary and ultimately to the legal rights and freedoms of all Americans. Over the past several years, we have seen several other unprecedented attacks on the legal profession. Let me give you just a couple of examples.

The Federal Trade Commission mystifyingly attempted recently to regulate lawyers as “financial institutions” under the Gramm-Leach-Bliley Act—an attempt that was defeated in federal litigation brought by the American Bar Association and the New York State Bar Association.¹²

Provisions of the Bankruptcy Abuse Protection and Consumer Reform Act of 2005¹³ require bankruptcy lawyers to certify the accuracy of debtors’ financial schedules and ability to repay debts, and if there are mistakes in those schedules, lawyers are being held liable—a previously unheard-of situation. One provision in the new Code, particularly offensive, requires bankruptcy lawyers to advertise and hold themselves out not as lawyers or counsel but as “debt relief agencies.”¹⁴ That provision restricts the information and advice that a lawyer may give a client, an unprecedented limitation of lawyers’ freedom of speech and professional obligations, and a direct interference with the lawyer’s role. Last month the State Bar of Connecticut sued to enjoin the “debt relief agency” provision of the new bankruptcy code.

The ABA is addressing these issues because we believe that if lawyers are not able to serve their clients effectively and provide fully informed advice and counsel, the people ultimately suffer at the hands of an overzealous and unchecked government. The traditional role of the judiciary as neutral arbiters and our adversary system are

10. See Amendments to the Sentencing Guidelines, 71 Fed. Reg. 28,063, 28,073 (May 15, 2006).

11. Senate Judiciary Committee Hearings on the Attorney-Client Privilege commenced on September 12, 2006.

12. ABA v. FTC, 430 F.3d 457, 467 (D.C. Cir. 2005).

13. Bankruptcy Abuse Protection and Consumer Reform Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 23, 30.

14. *Id.* §§ 226–229.

also harmed by the threats I am talking about. If people are not receiving adequate legal counsel, the deck is stacked in favor of the government, and that harms our system of resolving disputes.

From my vantage point, I am concerned for yet another reason that clients are becoming fearful of confiding in counsel: harm to the time-honored role of the lawyer in society.

It should be of concern to all Americans that, either inadvertently or intentionally, federal government agencies and other government leaders, joined by some members of a public of whom approximately half lack knowledge about our institutions of democracy, are targeting the independence of both the legal profession and the judiciary. Many people misuse the Shakespeare quote from *Henry VI*, part II, “let’s begin by killing all the lawyers.”¹⁵ Those who know that play know that Shakespeare was paying the highest compliment to lawyers and judges. His meaning was that, for tyranny and chaos to reign throughout the land, it is necessary to begin by killing all the lawyers, because they ensure the rule of law and stability in society.¹⁶ In the twenty-first century, it is a different kind of death for lawyers that some appear to have in mind—death by marginalization, by limitation, by diminishment, and, ultimately, by irrelevance.

Our country’s founders created a system of government unique in its design and devoted to protecting the rights and liberties of all—but it will not survive on its own. We must continually nurture and protect it and educate the American people about the precious gift that they have. An uneducated public is ill equipped to protect its democratic government and freedoms guaranteed by the Constitution. Only an educated public ultimately can protect the institutions of our democracy, foremost among them an independent judiciary.

Finally, I say that society must applaud and celebrate judges who allow the rule of law to flourish in our country by demonstrating the courage, and discharging their constitutional responsibility, to apply the law to the facts of the case and administer justice impartially.

I thank you for your leadership of our state courts, and for your kind attention.
[*Applause*]

15. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2.

16. *See id.*

