INSIDE: A Jurist's Campaign For Civics Education • The Attack On Iowa Judges • And More

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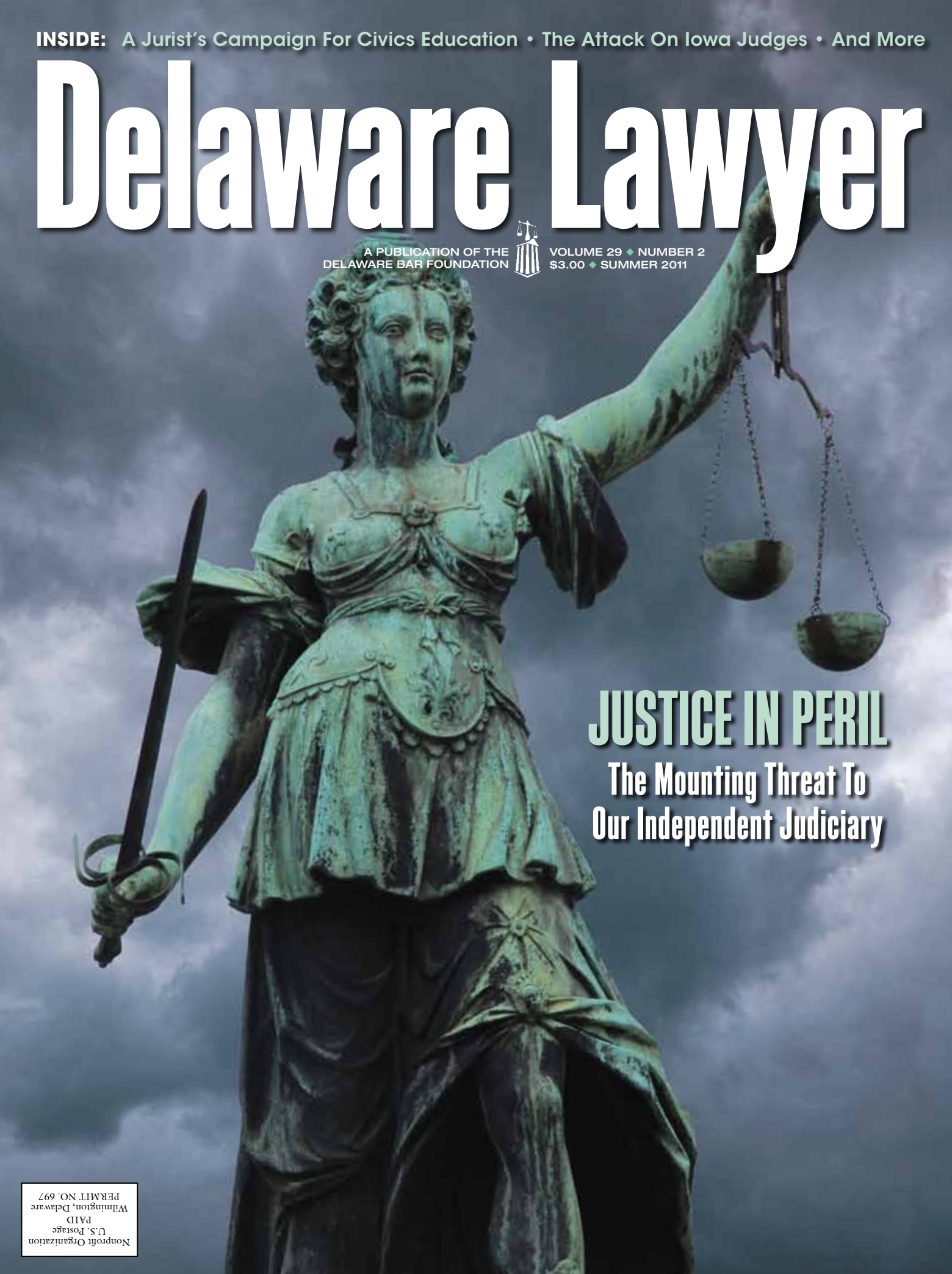

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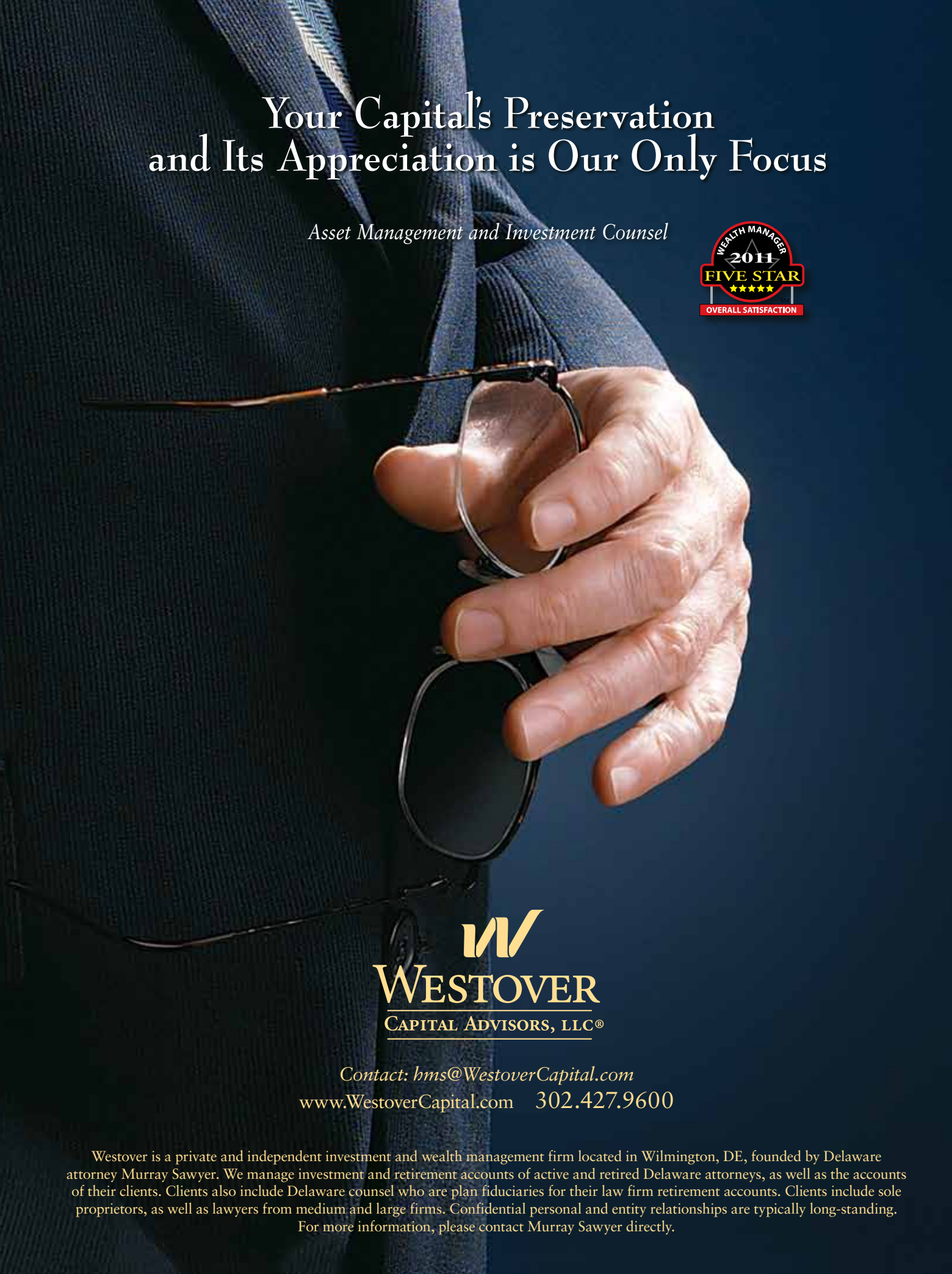
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Honorable Randy J. Holland, Justice, Delaware Supreme Court, and Honorable Sandra Day O'Connor, Retired Justice, U.S. Supreme Court.

William Chandler

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EDITOR'S NOTE

Hon. Randy J. Holland

Delaware's Judicial Selection System

On September 11, 1776, a constitutional convention enacted the Declaration of Rights and Fundamental Rules of the Delaware State. Section 22 provided: "That the independency and uprightness of judges are essential to the administration of justice, and a great security to the rights and liberties of the people." Delaware has retained its commitment to those principles to this day.

There was considerable debate at the 1897 Delaware Constitutional Convention over whether the members of the judiciary should be elected, as they were in many other states. Contrary to the popular trend in the United States at the time, the Framers of the 1897 Delaware Constitution decided that it was less political and, therefore, preferable to have an appointed judiciary.

Before the Constitution of 1897 was adopted, Delaware was the only state where the governor appointed judges without legislative involvement. The members of the convention concluded, however, that Senate confirmation of a judicial appointment would serve as a safeguard against improper political influences. Consequently, the 1897 Delaware Constitution established the judicial selection system that has endured to date: gubernatorial appointment of judges for 12-year terms, subject to Senate confirmation.

A unique provision in the Delaware Constitution is a requirement to maintain political balance within the Delaware judiciary. This requirement also originated from the debates at the 1897 Convention. The delegates concluded that it was important to eliminate political influence from the judiciary to the fullest extent possible. To achieve that result, it was successfully suggested that in addition to the appointive process, there should be a limitation on the number of judges appointed from a single political party. Accordingly, since 1897, the Delaware Constitution has mandated political party balance within its judiciary.

Delaware's constitutional scheme for the appointment of a judiciary with political balance requires that no more than three of the five Supreme Court justices can be from one major political party and the remaining justices must be from the other major political party. The 1897 Constitution also imposes an internal political balance requirement on the Superior Court. No more than half, if an even number, or a bare majority, if an odd number, of the total number of judges can be from one major political party. The remaining Superior Court judges must be of the other major political party.

Although there is no requirement in the 1897 Constitution for internal political balance on the Court of Chancery, the overall number of justices of the Supreme Court, chancellor, vice chancellors, and judges of the Superior Court must collectively meet an overall constitutional requirement for balance between the two major political parties.

These political balance provisions appear to prevent the appointment of persons belonging to a third political party or having no party affiliation. To date, however, there has been no court challenge to this requirement.

In 1978, Delaware enhanced its 200-year-old tradition of appointing judges with the establishment of a bipartisan merit selection Judicial Nominating Commission, created by an Executive Order from Governor Pierre S. DuPont IV. Similar Executive Orders have been entered by every subsequent Delaware governor to date. The Judicial Nominating Commission screens and then submits a list of merit-qualified candidates for each judicial position to the governor. The politically balanced Judicial Nominating Commission is comprised of lawyers and non-lawyers.

The Judicial Nominating Commission is required to submit not less than three candidates to the governor for each judicial vacancy in the absence of exceptional circumstances. Pursuant to each Executive Order, while retaining the final authority to make judicial nominations for all other courts, the governor must choose from the list of qualified candidates for judicial office prepared by the Judicial Nominating Commission. If the governor is not satisfied with the names that are submitted on the commission's list, the selection process continues and the commission generates another list.

This issue of the *Delaware Lawyer* contains articles that address current challenges to an independent judiciary that are occurring in other states. The articles by Justice O'Connor and Steven Puiszis demonstrate the breadth of current challenges to judicial independence and the need for civics education.

The article by Ryan Cicoski uses Iowa as a case study to demonstrate why politicians and the electorate should focus on changing unpopular judicial decisions through the appellate process, legislation or constitutional amendments rather than by removing a jurist of integrity from office.

The article by Cynthia Gray and me explains that judicial independence requires accountability for ethical behavior.

For a decade, the Delaware judicial system has been ranked first among state courts for creating a fair and reasonable litigation environment by the United States Chamber of Commerce Institute for Legal Reform. There appears to be a direct correlation between that ranking and Delaware's politically balanced, merit-based, appointive judicial selection system. Civics education about history and the judiciary's role as an independent branch of government is as essential in the 21st century as it was when Delaware adopted the 1776 Constitution and 1897 Constitution.

Hon. Randy J. Holland

Ryan C. Cicoski

is an associate in the Bankruptcy and Creditors' Rights practice group at Womble Carlyle Sandridge & Rice, PLLC. Prior to joining the firm, he served as a law clerk to the Honorable Robert B. Young on the Delaware Superior Court. Cicoski graduated *magna cum laude* from Widener University School of Law, where he spent his third year serving as a Wolcott clerk to the Honorable Henry duPont Ridgely on the Delaware Supreme Court.

Cynthia Gray

has been director of the American Judicature Society's Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline, since October 1990. She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes and edits the *Judicial Conduct Reporter,* and directs the Center's day-to-day activities and special projects. She has made numerous presentations at judicial education programs on judicial ethics topics. She is author of "How Judicial Conduct Commissions Work," *Justice System Journal* (2007); *Reaching Out of Overreaching: Judicial Ethics and Self-Represented Litigants*; and "The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability," *Hofstra Law Review* (Summer 2004). Gray also has written *Ethical Standards for Judges; An Ethics Guide for Judges and Their Families; When Judges Speak Up: Ethics, the Public, and the Media*; and *An Ethics Guide for Part-Time Lawyer Judges.* A 1980 graduate of the Northwestern University School of Law, Gray clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois and was a litigation attorney for eight years.

Randy J. Holland

is the youngest person to serve on the Delaware Supreme Court. In March 2011, he was reappointed by Governor Markell and unanimously confirmed by the Senate for an unprecedented third term. Justice Holland is the past national President of the American Inns of Court Foundation. He chaired the national Advisory Committee to the American Judicature Society's Center for Judicial Ethics. He also chaired the American Bar Association National Joint Committee on Lawyer Regulation. Justice Holland also has served on the ABA Presidential Commission on Fair and Impartial Courts, the Appellate Judges Conference's Executive committee, the Standing Committee on Client Protection and the Judicial Division's Ethics and Professionalism Committee. Justice Holland is a member of the American Law Institute. He has written, co-authored or edited six books.

Steven M. Puiszis

is a partner in the Chicago office of Hinshaw & Culbertson LLP, and is a noted trial attorney. He is a member of DRI's Board of Directors, serves as the Chair of DRI's Judicial Task Force and is a member of DRI's amicus committee. He also is a member of the Association of Defense Trial Attorneys (ADTA), the International Association of Defense Counsel (IADC) and is a past President of the Illinois Association of Defense Counsel. His publications include Illinois Governmental Tort and §1983 Civil Rights Liability (Matthew Bender, 3d ed. 2009).

Sandra Day O'Connor

was born in El Paso, Texas, March 26, 1930. She married John Jay O'Connor III in 1952 and has three sons, Scott, Brian and Jay. She received her B.A. and LL.B. from Stanford University. She served as Deputy County Attorney of San Mateo County, California from 1952 to 1953 and as a civilian attorney for Quartermaster Market Center, Frankfurt, Germany from 1954 to 1957. From 1958 to 1960, she practiced law in Maryvale, Arizona, and served as Assistant Attorney General of Arizona from 1965 to 1969. She was appointed to the Arizona State Senate in 1969 and was subsequently reelected to two two-year terms. In 1975 she was elected Judge of the Maricopa County Superior Court and served until 1979, when she was appointed to the Arizona Court of Appeals. President Reagan nominated her as an Associate Justice of the Supreme Court, and she took her seat September 25, 1981. Justice O'Connor retired from the Supreme Court on January 31, 2006.

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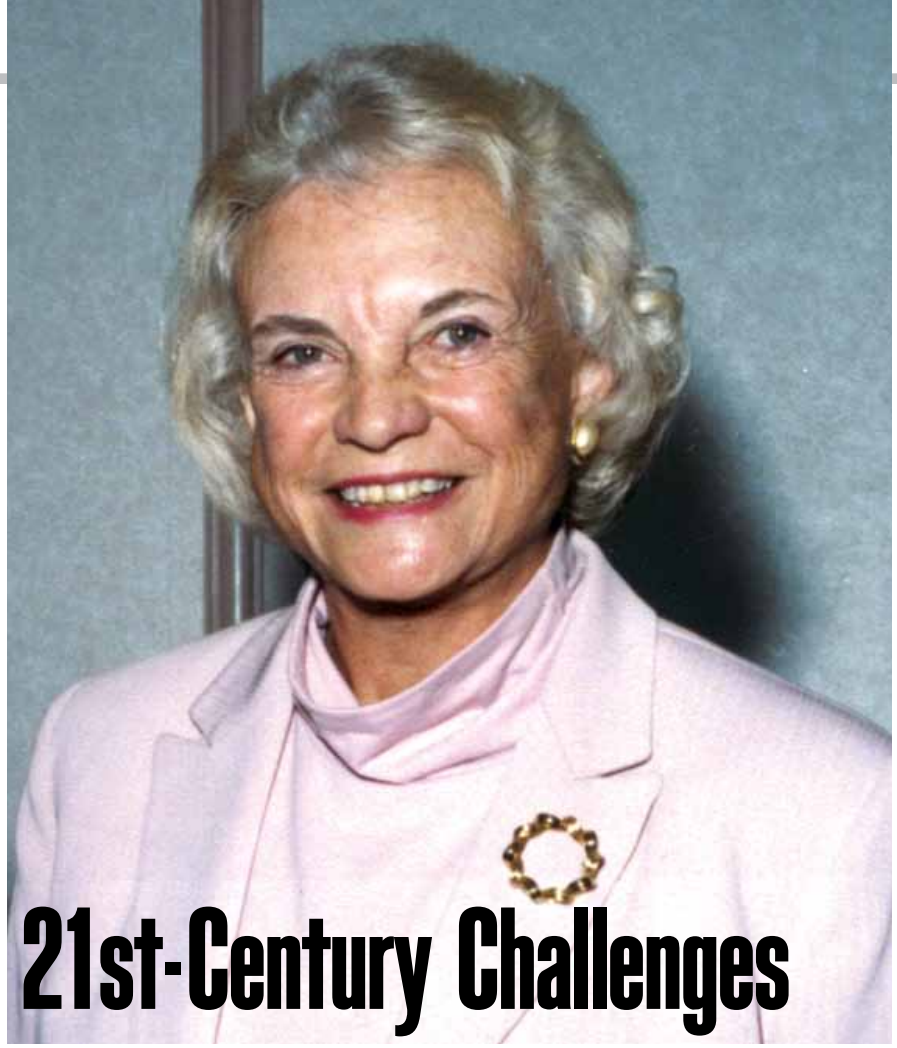

Judicial Independence and 21st-Century Challenges

Only a citizenry knowledgeable about civics and government can appreciate and protect judicial independence.[1]

The birth of the American Inns of Court is something I have been happy to observe first hand. I was a member of an Anglo-American Legal Exchange in 1979 chaired by former Chief Justice Warren Burger. He was an honorary Bencher in one of the British Inns of Court. After a few years I was also made an honorary Bencher in Gray's Inn.

We had an opportunity to see the legal education British barristers received first hand. I was impressed both with the ability and extraordinary courtesy and civility of the British jurists and barristers. It was this first-hand look that prompted Chief Justice Burger to start an American Inns of Court.

With some years of experience now, we can pronounce the American version a resounding success. With more than 25,000 members nationwide, the American Inns help to educate the American bench and bar while fostering a high degree of civility and professionalism.

To ensure a healthy judiciary, though, it is not enough to educate the bench and bar; the public has a critical role to play as well. It is in that spirit that, when I retired from the Supreme Court, I had two goals that were very high on my list of things to accomplish.

The first was to recast our national discussion about judges and courts into something more constructive than just hurling labels such as "activist" at judges who make decisions we do not like. I thought that was a pretty reasonable goal; the discourse really has nowhere to go but up.

Yet, it quickly became clear that the only way to achieve that goal was through a second one: restoring civics education in our nation's schools. With nothing but these two modest goals in mind, I must admit I expected retirement to be a little bit more leisurely. A

few years in, though, I am searching for a way to retire from retirement.

There is a lot of work to do, and because we need your help, I am going to focus on those two topics: judicial independence and the civics education necessary to protect it.

The independence of our judiciary was critical to our Founding Fathers. Two of the primary grievances that the colonists listed against King George in the Declaration of Independence involved the absence of judicial independence in colonial America. The Declaration charged that the King had "obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers" and had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

Having narrowly escaped the grasp of a tyrannical government, the Founders saw fit to render federal judges independent of the political departments with respect to their tenure and salary as a way of ensuring they would not be beholden to the political branches in their interpretation of laws and constitutional rights.

This revolutionary promise — that our government would be structurally restrained from the impulsive abuses of power that might otherwise occur — can only be fulfilled if the judicial power is kept distinct from the political branches. Otherwise the promise can be broken with impunity. I am confident that I am addressing a group of people that already knows this history and knows how critical an independent judiciary is.

Before going forward, I should note what judicial independence is not: It is not immunity from criticism. Indeed, criticism of courts can be a good thing when it is evidence that the public is engaged with the work of the courts and following legal developments. Of course, reasonable minds can and do disagree over many legal questions; we see that every time a court issues both a majority opinion and a dissent. But recent years have brought an escalation of attacks on the judiciary to levels far beyond productive criticism.[2]

Disagreement with judicial decisions has led to calls for impeachment, recall of judges, increasingly negative advertising in judicial campaigns, slashing of state court budgets, and curbing of state court jurisdiction by state legislatures.[3] Some states have also used the political process to try to regulate the sources of law judges can consult, specifically barring foreign, international, and sharia law.[4] In the most worrying development, judges and court officials have been subject to physical threats and violence.[5]

These troubling developments are, I think, a reflection of the fact that many Americans today do not see the need for independent judges. Many prefer a judiciary that acts merely as a reflex of popular will. No other nation has chosen to elect their judges. Close to half of our states currently elect their judges, and that practice has had harmful effects on how the public perceives judges and their role in our system of government.

As Roscoe Pound said more than 100 years ago, "Compelling judges to become politicians ... has almost destroyed the traditional respect for the bench." If I could do just one thing to improve the reputation of this country's judiciary, it would be to convince the states that select judges through elections to switch to a merit-selection system or some other appointment system.

The battle over how to select judges is not a new one; it has been with us from the beginning of this nation. But the single greatest threat to judicial independence is fairly modern and uniquely American. It is the flood of money coming into our courtrooms by way of increasingly expensive and volatile judicial campaigns.

One reason for this is that well-organized interest groups are now mobilized to help candidates run effective and quite expensive campaigns. These groups, from plaintiff's attorneys to corporations to cultural warriors, have strong preferences about the outcome of certain types of cases and have mobilized to finance judges who they hope will be sympathetic to their causes. The result has been an arms race in which funding a campaign for state judicial office is often as expensive as campaigning for a U.S. Senate seat.

The first judicial race that cost more than $1 million took place less than 30 years ago in Texas. At the time that was considered an obscene amount for a judicial race, but by today's terms it is fairly pedestrian. In 2008, more than $5 million was spent on a race for a single seat on the Supreme Court of Alabama. In 2004 there was a race for the Illinois Supreme Court that cost just over $9 million. As you might have guessed, the winner of that race received his biggest contributions from a company that had an appeal pending before the Illinois Supreme Court.

A similar case which I am sure many of you are familiar with made its way before the United States Supreme Court in 2008. The case was *Caperton v. Massey Coal*, and the facts involved a single donor who contributed more than $3 million to a campaign in order to oust a sitting West Virginia Supreme Court Justice. The donor was the CEO of a company appealing a $50-million verdict against it. It appeared that his campaign donation was a pretty good investment. The incumbent lost the election and the challenger ultimately cast the deciding vote in favor of overturning the $50-million verdict against his company.

The legal issue was admittedly difficult. The Supreme Court ruled five to four that under the circumstances of the case the Fourteenth Amendment's Due Process Clause required the judge to recuse himself from the case given that he had received such a substantial donation to his campaign from an interested party in the case.

But the bigger issue is the distrust that judicial campaigns and cases like *Caperton* breed in the citizenry. How can people have faith in the system when such large amounts of money are used to influence the outcome of judicial elections? We have no way of knowing whether or not the $3 million donation actually affected this judge's vote at the end of the day, but what matters is that these campaigns give the public a strong reason to doubt. The mere appearance of

such a gross impropriety drastically undercuts public respect for the judiciary.

All those campaign dollars are taking a toll. Voters in states that elect judges are more cynical about the courts, more likely to believe that judges are just politicians in robes. They are less likely to believe that judges are fair and impartial. While this massive spending gives rise to difficult constitutional questions, such as the ones the Supreme Court confronted in *Caperton*, the policy questions are easy.

Several studies have shown that roughly 70 percent of the public believes that judges are influenced by campaign contributions. And more than one quarter of judges themselves think campaign contributions affect their decisions. A number of recent studies tell us that the quarter of judges are right — judges are, in fact, influenced by campaign contributions.

Consider great U. S. Supreme Court decisions — the likes of *Brown v. Board* or *Loving v. Virginia* — would those decisions, which were hugely unpopular at the time, have come to pass if the justices faced upcoming elections?

Or ask yourself whether, as a litigant, you would want to be standing in front of a judge who faced an upcoming election if your cause was legally right but politically unpopular. The reason why judicial independence is so important is because there has to be a safe place where being right is more important than being popular; where fairness trumps strength.

That place, in our country, is the courtroom. It can only survive so long as we keep out political influences. In order to dispense the law without prejudice, judges must be assured that they won't be subject to retaliation for their judicial acts.

This is a national issue, because when the public hears stories of massive spending on and contributions to judicial campaigns, it tends to think of judges as a group. Not Illinois judges, West Virginia judges, or state judges — just judges. As a former judge on the Maricopa County Superior Court and the Arizona Court of Appeals, I can tell you that the health of our entire legal system, both state and federal, depends upon a competent and independent judiciary.

When individual citizens interact with a court system, it is exceedingly likely that it will be with a local or state court, rather than a federal one. People get speeding tickets more frequently than they are charged with a RICO offense. I firmly believe that States ought to avoid judicial elections and should implement merit-selection systems for selecting judges.

But the way to effect even more fundamental change is to address the root of the problem, which is ignorance about the role of the judiciary. The long-term solution is education. Children, voters, policymakers and lawyers all should be informed about the importance of a fair, impartial judiciary. In order to do this, we must bring real and meaningful civics education back into our classrooms. Knowledge of our system of government is not passed down through the gene pool. It must be learned by each new generation of Americans.

We are failing to impart the basic knowledge that young people need in order to become effective citizens and leaders in our democracy. According to the Annenberg Public Policy Institute, two-thirds of Americans know at least one of the judges on the Fox television show "American Idol," but only 15% can identify the Chief Justice of the United States. Nearly three quarters of Americans can name the Three Stooges, while that same 75% do not know the difference between a judge and a legislator.

On the last nationwide civics assessment test, two-thirds of students scored below proficiency. Not even a third of eighth-graders surveyed could identify the historical purpose of the Declaration of Independence and it is right there in the name. The most worrying statistic is that only about one-third of Americans can name the three branches of government, let alone describe their role in our democratic system.

Think for a moment about the implications of this ignorance for the continuing vitality of our nation. Two of those branches of government are democratically elected at the federal level. In almost half of the states, the judiciary is elected as well. And the voters that have to elect candidates have not been taught what role their representatives are supposed to play.

To address this serious problem, I have started a project that I hope can be of some assistance. I have been working with a team of experts in education and technology at Arizona State University and Georgetown Law School to design a way that students can use their technological skills while learning civics.

At first we launched a program called Our Courts, specifically to teach students about the judicial branch using online games. Our first three games were launched in 2009. In one of these games, students can play clerk to a Justice on the Supreme Court who must cast the deciding vote in an important case.

Though it is true that I may have been in that position a few times, I'll have you know that this Justice looks nothing like me. Actually, we've been told she looks somewhat like Justice Ginsburg, but that wasn't intentional.

In another game, students learn about their constitutional rights by running a law firm and advising clients about whether or not their rights have been violated. As they advise clients correctly, students gain "prestige," with which they can hire more lawyers to handle new kinds of cases, upgrade their office furniture, and even buy a cappuccino machine that helps the lawyers work just a little bit faster.

The response from teachers and students has been fantastic. We had an outside consulting firm formally evaluate the impact of the games, and we learned that students showed significant improvement in their understanding of civics concepts after playing the games and being taught from the corresponding lesson plans.

That's great news, but what's even more exciting is that the students called the games "fun," "cool," and "addicting," and they said that they are much like the "real" video games they play at home.

We also learned that around half of the students who were taught a game

during the evaluation went home that very night and, without anyone telling them to, played that game on their own free time.

In fact, the response was so good, that we decided we should probably pay a little bit of attention to the other two branches as well. So we recently launched iCivics.org. iCivics has all the same judicial branch games and lessons from Our Courts, but we've added games about each of the other branches. The games are really fun. I encourage you to try them out, or to show them to your children or grandchildren, especially if they are middle school students.

I truly believe that iCivics can help to educate an entire generation of citizens about the courts and our system of government as a whole. But to succeed, I need your help. Curriculum is adopted differently in each state, and we need individualized plans for implementation.

Lawyers and judges are in a great position to promote the project in their states so that it gets the visibility it needs. Justices in Georgia, Wisconsin, Delaware, and Indiana, as well as other judges, judicial officials, and prominent public figures outside the state court system, are helping to promote Our Courts to teachers and school administrators in their states. We need this replicated in every state. So please let me know if you are willing to help.

We must educate the future citizens of our country so that they can engage in informed and productive debate that will result in meaningful democratic action. Only a citizenry knowledgeable about civics and government can appreciate and protect judicial independence.

I hope each of you will help us accomplish this goal: to give the next generation the skills and knowledge they will need to preserve our system of government and lead us into the future. Thank you. ◆

FOOTNOTES

1. Remarks by Sandra Day O'Connor Associate Justice, Retired, Supreme Court of the United States, prepared for the AMERICAN INNS OF COURT, Symposium on the Status of the Legal Profession: Facing the Challenges of the 21st Century, Georgetown University Law Center, Washington, DC, April 1, 2011.

2. Burt Brandenburg & Roy A. Scholtland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS. 1229, 1249-50 (2008).

3. Alfred P. Carlton, Jr., Justice In Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary 31-33 (American Bar Association 2003), http://www.abanet.org/judind/jeopardy/pdf/report.pdf (accessed June 11, 2010).

4. For example, Oklahoma's "Save our State Amendment" was enacted by popular vote in November 2010. The Amendment directed that Oklahoma courts "shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international or Sharia law." See House Joint Res. No. 1056.

5. A recent report by the Department of Justice shows that threats and other inappropriate communications to federal judges, United States Attorneys, and Assistant United States Attorneys more than doubled between 2003 and 2008. Office of the Inspector General, U.S. Department of Justice, Review of the Protection of The Judiciary and the United States Attorneys (2009), http://www.justice.gov/oig/reports/ plus/e1002r.pdf (accessed June 11, 2010).

Steven Puiszis

Without Fear or Favor in 2011: A New Decade of Challenges To Judicial Independence

Myriad threats, from funding shortfalls to the politicization of judicial elections, endanger our independent judiciary.

In June 2005, the Defence Research Institute's (DRI) Judicial Task Force was formed to examine issues and problems facing the judiciary. The Task Force's mission statement was to research and identify issues that threaten to disrupt the independence of the judiciary. Its groundbreaking 2007 report, *Without Fear or Favor*,[1] identified a number of significant issues that threatened judicial independence.

Since that report was issued, several dramatic developments have triggered new and even greater challenges to judicial independence and accountability. The country spiraled into one of the worst recessions since the 1930s, causing state and local government tax revenues to plunge. As a result, funding for our court systems, already precariously low before the recession, has been further slashed.

The added pressure these economic conditions have imposed on our judiciary cannot be understated. They have placed "some court systems on the edge of an abyss," in the words of Georgia Chief Justice Carol Hunstein.[2] The financial crisis facing many states has triggered budget cuts "so deep they threaten the basic mission of state courts."[3]

Almost half of our state courts are operating under hiring freezes; others have instituted cost-cutting measures such as staff pay cuts, judicial furloughs, elimination of special court programs, and even the reduction of hours courts are open each week.[4]

While some of these measures may be unavoidable, "[a]t some point, slashing state court financing jeopardizes something beyond basic fairness, public safety and even the rule of law. It weakens democracy itself."[5] Continued increases in the number of cases filed in our state courts compounds these problems.[6]

Even before the recession, inad-

equate court funding was deemed a serious threat by 52 percent of a DRI survey group in 2005.[7] Further investigation revealed that significant numbers of the public had little or no interest in supporting increased court budgets or needed renovations to aging courthouses.[8] The examples outlined below in several sections of this 2011 report provide stark reminders of how precarious judicial independence can be when there is inadequate funding for our courts.

The controversy surrounding judicial elections reached new heights following the Supreme Court's decision in *Citizens United v. Federal Election Commission*,[9] which invalidated limits on union and corporate campaign contributions. While *Citizens United* did not involve judicial elections, the import of the decision was clear: unlimited monetary contributions to judicial campaigns were now fair game. In his dissent, Justice Stevens observed:

The consequences of today's holding will not be limited to the legislative or executive context. The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch… the Court today unleashes the floodgates of corporate and union general treasury spending in these races.[10]

Justice Stevens' concern has quickly been realized. Campaign contributions in 2010 state supreme court retention elections reached unheard-of heights. The vast sums being contributed to judicial campaigns create the appearance of a judiciary indebted to campaign contributors, who include attorneys and parties likely to appear before the winning candidate.

The explosion of special interest funds in judicial campaigns also brings with it heightened concerns over politicization of the judiciary and the appearance of fairness in the American legal system. The challenges to judicial independence triggered by campaign contributions and the impact that the flow of money into judicial elections has on the perceived fairness of our courts have reached a critical state.

These concerns, repeatedly expressed by legal commentators, were vividly acknowledged by the Supreme Court in *Caperton v. A.T. Massey Coal Company*,[11] which outlined a constitutional standard for judicial disqualification based on financial contributions to a judicial campaign. However, *Caperton's* constitutional standard is admittedly imprecise, and only intended to reach extraordinary cases. Thus, real reform is needed at the state court level to ensure that our legal system is perceived to be fair. If the perception of fairness is ever lost, the public will lose respect for the rule of law, a cornerstone of American democracy.[12]

As "independent" funding swept its way into judicial campaigns, the manner in which the campaigns are run also dramatically changed. Attack ads have become commonplace. One journalist graphically described his state's supreme court campaign in the following terms:

If you only saw the ads, you might think [the] State Supreme Court election pits a partisan pit bull dedicated to Republican causes against a trial lawyer's lapdog whose insider status helped contribute to one of the worst courthouse scandals in state history… the voters had to wade through a lot of mud to get to this [election] week.[13]

Because judges are asked to decide cases involving sensitive social and political issues,[14] they are being subjected to harsh and often unfair criticism with increasing frequency. In controversial cases, the losing side, whether they are labeled Democrats or Republicans, conservative or liberal, typically blame the outcome on "activist judges." However, judges must be allowed to decide cases based on the facts presented and the applicable law, free from ideological influence, even when their decision will likely be unpopular.

Judicial independence, however, does not mean a lack of accountability. While fair criticism of judicial decisions is to be expected and can be vital to the development of the law, threats, attempts to intimidate or influence judicial decisions are not, but frequently are made under the guise of holding judges accountable.

Judicial performance evaluations are being increasingly used in some states as a mechanism to improve the quality of judicial decision making and to establish fair accountability standards. Such evaluations can be used to educate the public on the factors and qualities to consider when evaluating a judge, rather than focusing on the outcome of a specific case. Accordingly, judicial performance evaluations can help to depoliticize the electoral process.

The Internet has provided a new venue for expressing severe and inappropriate criticism of judicial decisions and individual members of the judiciary. The World Wide Web provides a forum for every critic to speak his mind to an unlimited and potentially like-minded audience. The growing phenomenon of the Internet has also triggered a new threat to judicial security as the prosecution of Web radio talk show host Harold Turner aptly demonstrates.

Following the Seventh Circuit Court of Appeals' decision in *National Rifle Association of America, Inc. v. City of Chicago*,[15] rejecting a Second Amendment challenge to the City of Chicago's gun control ordinance, Turner expressed his disapproval of the decision. Turner posted several internet messages stating the judges who authored that opinion deserved to be killed. In one of those posts he provided the names, photos, work addresses and phone numbers of the panel that decided the case, writing: "Their blood will replenish the tree of liberty," and calling the potential murders "a small price to pay to assure freedom for millions."[16]

This type of rhetoric can often lead others to take action, which in turn creates a need for increased court security. Two events in 2005 — the murders of the husband and mother of United States District Court Judge Joan Lefkow by a man angered over the dismissal of his legal malpractice case, and a courtroom shooting in Fulton County, Georgia shortly thereafter — highlighted the need for greater security in both our state and federal courts. With increasingly tight budgets, providing adequate security for our judges and other court personnel often comes at the expense of other needed court programs.

The lack of diversity in our judiciary presents another challenge to the per-

ception of our legal system. Unless additional progress is made toward building a more diverse judiciary, the legitimacy of judicial decision making may be questioned by parties who do not share the same cultural or ethnic values as the judges who are hearing their cases.

Budgetary issues are also challenging judicial independence at the federal level. Federal judges haven't had a salary increase in more than a decade, and have received only sporadic cost of living increases. The goal of an independent federal judiciary through the provision of lifetime tenure is being frustrated by the failure to provide adequate compensation to judges who frequently handle some of the most challenging and constitutionally important cases in our court systems. When second- and third-year associates in some of the country's largest law firms are paid more than our federal judges, it is not difficult to understand why more federal judges are leaving the bench for private practice. ◆

FOOTNOTES

1. This is the Executive Summary of a larger report. The entire report can be downloaded or viewed on DRI's website: www.dri.org. DRI is offering the report as an e-publication which can be downloaded directly to an iPad, a Kindle or a Nook.

2. The Honorable Chief Justice Carol Hunstein, Supreme Court of Georgia, 2010 State of the Judiciary Address (Mar. 16, 2010), *available at* http://www.gasupreme.us/press_releases/2010_state_judiciary_address.pdf.

3. Richard Y. Schauffler & Matthew Kleiman, *State Courts and the Budget Crisis: Rethinking Court Services*, in Book of the States 2010, 289 (The Council of State Governments ed., 2010), *available at* http://knowledgecenter.csg.org/drupal/system/files/Schauffler.pdf.

4. National Center for State Courts (NCSC), Budget Resource Center, Cost-saving measures by state, *available at* http://www.ncsc.org/information-and-resources/budget-resource-center.aspx; David Rottman & Jesse Rutledge, *Facing Down a Budget Crisis, Rising Workloads, Two Judicial Elections and Living with Facebook:* The State Courts in 2009, in Book of the States 2010, 283 (The Council of State Governments ed., 2010), *available at* http://knowledgecenter.csg.org/drupal/system/files/Rottman_and_Rutledge.pdf.

5. Editorial, *State Courts at the Tipping Point*, N.Y. Times, Nov. 24, 2009, at A30, *available at* http://www.nytimes.com/2009/11/25/opinion/25weds1.html.

6. Rottman, *supra* note 4, at 284.

7. Dri Judicial Task Force, Without Fear or Favor 6 (2007).

8. *Id.* at 8, 10.

9. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 968 (2010).

10. *Id.* at 968 (Stevens, J., dissenting).

11. *Caperton v. A.T. Massey Coal Co. Inc.*, 129 S. Ct. 2252 (2009).

12. Stephen G. Breyer, *Judicial Independence In The United States*, 40 St. Louis U. L.J. 989, 996 (1996).

13. Charles Thompson, *Attack Ads Drown Out Issues in State Supreme Court Races*, The Patriot News, Oct. 31, 2009, *available at* http://www.pennlive.com/midstate/index.ssf/2009/10/attacks_drown_out_issues_in_st.html.

14. This phenomena can be attributed at least in part to the narrowing of the political question doctrine, a process that began with *Baker v. Carr*, 369 U.S. 186 (1962), and continued in *Powell v. McCormack*, 395 U.S. 486 (1969).

15. *Nat'l Rifle Ass'n of America, Inc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009).

16. *See* Mark Fass, 7th Circuit Judges Testify in Trial over Blogger's Web Threats, N.Y. Law Journal, Mar. 3, 2010, *available at* http://www.law.com/jsp/article.jsp?id=1202445365806.

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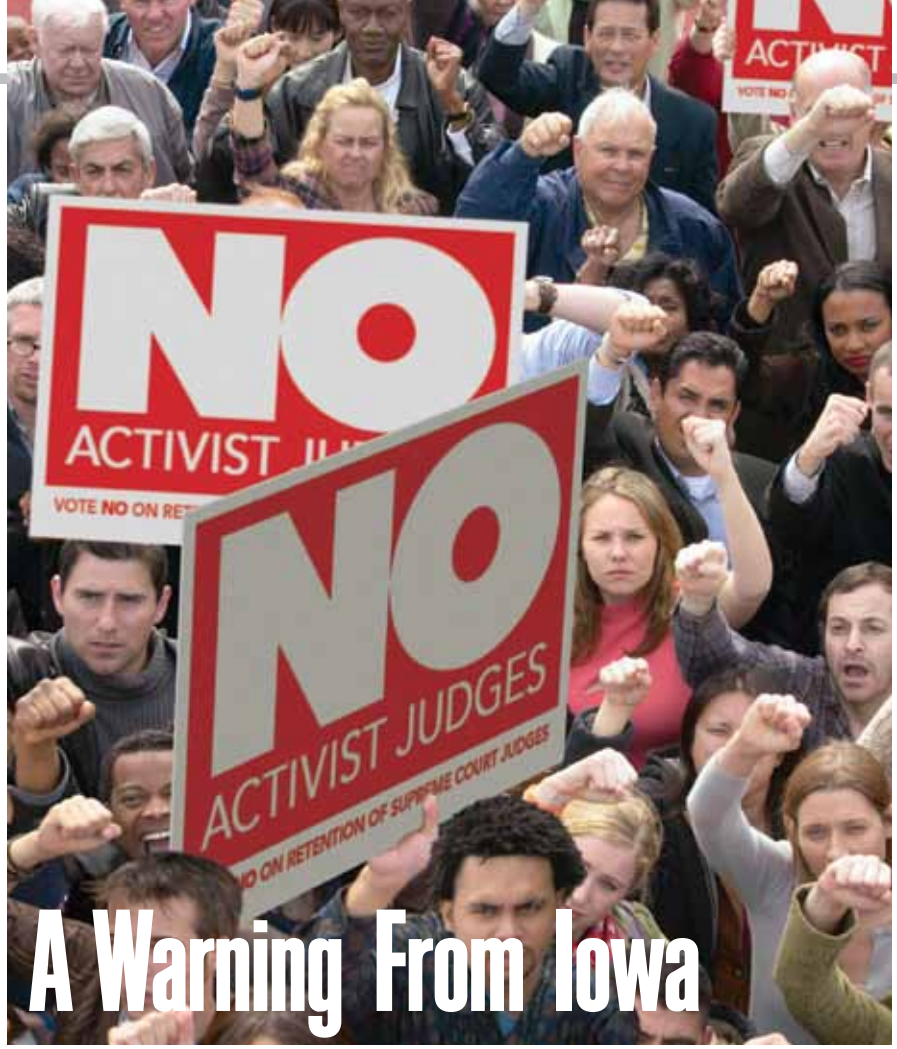
Ryan C. Cicoski

Judicial Independence and the Rule of Law: A Warning From Iowa



An electoral campaign against judges on the "wrong" side of a same-sex marriage ruling sets a chilling example.

Judicial Selection in Iowa[1]

"Since the American Revolutionary War, there have been heated debates about the best methods for state judicial selection."[2] From 1776 to 1830, states selected their judges by appointment.[3] In the mid-nineteenth century, however, "a wave of popularism spread across the land" and "[i]t came to be thought that all public officials should be elected, for short terms."[4] As a result, a number of states decided to change their judicial selection systems and began electing their judges by popular vote.[5]

Iowa became a state in 1846, during the period in which a number of states discarded their old appointive systems in favor of selecting judges by popular election.[6] Therefore, it is not surprising that the framers of the Iowa Constitution "hotly debated" the issue of whether or not Iowa judges should be directly elected.[7]

When the original Iowa Constitution was adopted in 1846, it reflected a sort of compromise between those who favored direct, popular elections and those who did not. The 1846 Constitution provided that district court judges would be selected by popular election but that supreme court justices would be elected by the general assembly.[8] This distinction did not last long, however. In 1857, Iowa adopted a new constitution that provided for the popular election of all state judges.[9]

Iowa continued to elect its judges for more than 100 years. In the 1950s, however, momentum began building for change. In 1957, one commentator noted that "Iowa . . . persists in the popular election of all members of the judiciary system, from the supreme court to the justice of the peace," and suggested

that an appointive system would "elevate the quality of the members of the bench . . . ."[10] In 1958, an Iowa district court judge proposed to change the procedure for judicial selection in an *Iowa Law Review* article.[11]

In that article, Judge Harvey Uhlenhopp called for, among other things, a "return to a nonpolitical judiciary."[12] Judge Uhlenhopp argued that, in order to promote justice, judges must be "beholden to no one."[13] He also argued that in a judicial selection system, "[t]he objective is to secure the best qualified individual for judge who is available. Hence, the choice must be made intelligently."[14] But, according to Judge Uhlenhopp:

> The trouble with the elective method is that this essential [of intelligent choice] is almost entirely lacking. Popular election, rather than careful selection, is a poor way to fill posts involving professional qualifications. The people have little opportunity to study the training, experience, and character of the various lawyers who want to be judge.... The people ... should only be called upon to select policy makers, such as the chief executive of the legislators. The people can and will learn how those candidates stand on the issues. But voters are not prepared for the choices they must make when they are asked to pick department heads, railroad commissioners, judges, and whatnot.... The people should decide between candidates who establish broad programs, but judges do not function in that area. We might as well pick our school teachers and highway engineers at the polls.[15]

Judge Uhlenhopp argued that Iowa's elective system also had "four side effects," namely: (1) discouraging talented lawyers from seeking judicial office; (2) preventing talented lawyers from becoming judges if they belonged to the minority political party; (3) discouraging judges from firmly managing their dockets for fear of offending powerful lawyers; and (4) inviting "the loss of public confidence which results from politics in the courts."[16]

To correct these defects, Judge Uhlenhopp proposed:

> In Iowa, there would be a statewide commission for the supreme court, and a separate commission in each district.... These commissions would have an important function, and they should be carefully composed. The governor on behalf of the public should select some of the members of each commission. The lawyers have special knowledge which is of value and they should select some of the commissioners, but not a controlling member. Judges too have valuable knowledge concerning candidates' qualifications. Hence the chief justice should serve on the state commission, and he should be its chairman.... Except for the judicial members, there should be no restriction respecting the occupation of commissioners.... They should be electors of the area in question, but their political affiliation should be disregarded.[17]

Judge Uhlenhoppp noted that a number of states had already adopted or proposed similar judicial selection systems, including Alaska and Kansas.[18]

Judge Uhlenhopp argued that once selected, all appellate judges and supreme court justices should have life tenure, subject only to good behavior.[19] Such a system would not only attract the best legal talent, but also "assure the State of a supreme court free to render right though temporarily unpopular opinions."[20]

For trial courts, however, Judge Uhlenhopp recommended that the judges serve subject to periodic retention elections.[21] Retention elections would provide a "practical compromise" between the competing interests of judicial independence and judicial accountability.[22]

In 1959, the Iowa Legislature passed a joint resolution proposing to amend the Iowa Constitution to replace Iowa's elective judicial system with an appointive system.[23] The proposed amendment resembled Judge Uhlenhopp's proposal, providing that all state judges would be nominated by a commission, appointed by the Governor, and retained subject to periodic retention elections.[24]

The proposed amendment was re-adopted by the Legislature in 1961 and put on the ballot for consideration by voters in 1962.[25] On June 4, 1962, the people of Iowa voted to adopt the amendment.[26] This system of judicial selection and retention remained undisturbed for 48 years, until the nationwide fight over same-sex marriage landed in Iowa, and proved its undoing.

The National Debate Over Same-Sex Marriage

The story of marriage equality under state constitutions is quite mixed.[27] A review of state high court opinions addressing same-sex marriage reveals deep divisions within the judiciary on the proper resolution of this polarizing issue.

The Massachusetts Supreme Judicial Court interpreted its state constitution to create a constitutional right to marriage equality, rejecting the argument that civil unions could substitute for the right of gays and lesbians to marry.[28] The Vermont Supreme Court disagreed: it found a right to same-sex civil unions, but not marriage for gay and lesbian couples.[29] And three years later, the New York Court of Appeals interpreted its constitution to reject marriage equality altogether.[30]

It is unsurprising that the courts in Massachusetts, Vermont, and New York each came to a different conclusion concerning the rights of same-sex couples. Each court was tasked with interpreting its respective state constitution to reach a definitive conclusion on a single legal issue, and the differing outcomes can be reconciled with each constitution's unique history, text, and prior construction.

That three courts could arrive at three different answers to the same question might confuse the public, but this outcome is precisely what a state constitutional scholar would expect. It is federalism operating at its finest. Beneath the surface of these conflicting state court decisions, however, partisan groups are pushing an increasing number of state courts to side with New York instead of Massachusetts. The most powerful of

these groups have already proven that a state high court's pronouncement in favor of same-sex marriage can quickly be made illusory.

In *Baehr v. Lewin*, the Hawaii Supreme Court held that a state statute restricting marriage to a male and a female warranted strict scrutiny review under the equal protection clause of the state constitution, and remanded the case to allow the trial court to apply that standard.[31] On remand, the trial court held that the statute violated the equal protection clause of the Hawaii Constitution, and enjoined the state from refusing to issue marriage licenses to otherwise-qualified same-sex couples.[32]

Before the trial court's ruling took effect, however, Hawaii voters amended their constitution to permit the legislature to reserve marriage to opposite-sex couples.[33] On appeal, the Hawaii Supreme Court took judicial notice of the amendment and reversed the trial court's prior ruling in favor of same-sex marriage.[34]

Events in California followed a similar path. In 2008, the California Supreme Court invalidated the state's ban on same-sex marriage pursuant to the language of the state constitution.[35] The California Supreme Court's decision lasted only six months before it was overturned by a voter initiative known as Proposition 8, which amended the state constitution and reinforced California's ban on same sex-marriage.[36]

That voters in Hawaii and California could succeed in overturning court decisions protecting same-sex marriage by amending their state constitutions demonstrates the remarkable organizational power of the forces opposed to same-sex marriage. Because judges must follow the law, opponents of same-sex marriage have traditionally concentrated their efforts on amending the highest law in the state. By the time the same-sex marriage controversy spilled into Iowa, however, this familiar strategy was recast. The spotlight now pointed directly at the state's judiciary; and by the time it turned elsewhere, many of Iowa's best judges had vanished.

Varnum v. Brien and Same-Sex Marriage in Iowa

In 1998, Iowa legislators enacted the state's Defense of Marriage Act, which prohibited marriage between gay and lesbian couples. In 2005, Lambda Legal filed a lawsuit in Polk County, Iowa, on behalf of six couples who were denied marriage licenses. In *Varnum v. Brien*, the couples claimed that Iowa's Defense of Marriage Act violated the liberty and equal protection clauses in the Iowa Constitution. Polk County District Judge Robert Hanson agreed, and overturned the law.[37] State officials immediately appealed Hanson's ruling to the Iowa Supreme Court.

As word of Lambda Legal's lawsuit spread across Iowa, several social and religious organizations decided that the easiest way to ensure the right ruling from a state court would be to elect the right judge to make it. These groups included Concerned Women for America of Iowa, Focus on the Family, the Iowa Christian Alliance, the Iowa Family Policy Center, and the Professional Educators of Iowa.[38] Together, they formed an alliance under the banner of "Iowans Concerned About Judges," or ICAJ.[39]

ICAJ sent questionnaires to all judges facing a retention election in 2006. The questionnaire asked respondents whether they supported "a judge's choice to display the Ten Commandments in his or her courtroom," and whether they agreed with a U.S. Supreme Court decision that posting the Ten Commandments in a public classroom violated the U.S. Constitution.[40] It asked, "as a matter of constitutional law," whether the judges agreed with the "result in *Roe v. Wade* that recognizes a Constitutional right to privacy that encompasses abortion."[41]

Presciently, it asked whether the judges believed that the Iowa Constitution permitted either same-sex marriage or civil unions, and if the Iowa Constitution required legal recognition of same-sex relationships sanctioned out of state."[42] It also asked whether the judges believed that homosexual relations themselves were permitted under the Iowa Constitution."[43]

The questionnaire so alarmed Louis Lavorato, at that time Chief Justice of the Iowa Supreme Court, that he issued a press release warning that "the public should be wary of voting for a judge who promises to rule a certain way. In our system of government, we expect judges to rule according to the law regardless of their personal views. We also expect them to make decisions free of political intimidation and influence."[44] The Chief Justice's warning went unheeded.

In April 2009, the Iowa Supreme Court issued a unanimous opinion in *Varnum v. Brien*, affirming Judge Hanson's decision and finding no overriding state interest in denying marriage licenses based on a person's sexual orientation.[45] The decision cleared the way for civil marriages of couples of the same gender and was, needless to say, highly controversial. With three of the Court's seven justices on the ballot for retention election in the fall, opponents of same-sex marriage saw their opportunity.

Bob Vander Plaats and Iowa for Freedom

The opposition to same-sex marriage in Iowa coalesced around Bob Vander Plaats, an unsuccessful candidate for the 2010 Republican gubernatorial nomination in Iowa.[46] On August 11, 2010, Vander Plaats announced the launch of a political interest group called Iowa for Freedom ("IFF").[47] IFF was bankrolled by groups from other states: Mississippi-based American Family Association ("AFA") and the New Jersey-based National Organization for Marriage ("NOM").[48]

Calling for an end to judicial tyranny, IFF declared that the Iowa Supreme Court had "legislated from the bench… governed from the bench… and even attempted to amend [the] constitution from the bench" by declaring Iowa a same-sex marriage state.[49] IFF's website swirled with dark rumors, and foretold a doubtful future for all Iowans if nothing was done. The website explained that "[i]f the Iowa Supreme Court will do this to marriage, every one of our freedoms, including gun rights and private property, is in danger of being usurped by activist judges who are unelected officials"[50] and closed with a call to take a

stand against the "radical judicial activism of the Iowa Supreme Court."[51]

Before long, money and support for Vander Plaats and IFF were pouring into Iowa from all over the country. Large conservative groups, including AFA and NOM, were veterans of the previous battles against same-sex marriage in other states, and had become adept at distilling years of history and legal scholarship into 30-second sound bites. Television and radio advertisements attacking the justices cropped up all over the state. With IFF leading the way, campaigns to vote "no" on retention spread like wildfire across the internet. Pastors joined in by encouraging their congregations to oust the "out of control" judges.

Iowans who hadn't thought about the judiciary in years suddenly found their opinions very much in demand: robocalls from IFF found their way onto many of Iowa's answering machines, and volunteers fanned out across the state to deliver IFF's message in person.[52]

The forces in favor of removing the justices conducted an effective and persuasive campaign throughout most of 2010. How the justices would defend themselves remained a mystery until the fall.

The Judiciary's Response

From the outset, those in favor of retaining the justices were confronted with two pernicious challenges. First, although no Iowa Supreme Court Justice had ever lost a retention election, IFF and its allies were attacking the court with a ferocity unlike anything they had ever seen. Second, those offering to assist the court were astonished to find that the justices were unwilling to defend themselves.

On September 30, 2010, Chief Justice Marsha Ternus confirmed that she and fellow justices David Baker and Michael Streit would not wage a campaign in support of their own retention. The three justices were as good as their word. They organized no campaign, and turned aside all requests for interviews.

The closest the justices came to advocating on their own behalf came in the election's final weeks, when Chief Justice Ternus delivered a series of speeches discussing the vital role that judicial independence plays in American society. As the Chief Justice surely knew, her speeches would do little to blunt the effectiveness of IFF's advocacy.

Even in the face of the justices' refusal to campaign on their own behalf, their supporters made a valiant effort to save them. Without any direct help from the justices, an in-state group called Fair Courts for US ("Fair Courts") headed by former Iowa governor Robert Ray spent nearly $400,000 in an effort to retain the justices.[53]

But Fair Courts bought no television or newspaper advertisements even as conservative groups were buying television and radio airtime and organizing a highly visible bus tour in Iowa's rural areas. By the end of the campaign, spending to oust the three justices exceeded $800,000.[54] This sum dwarfed the money raised by Fair Courts, and more than half of it came from out of state.[55]

Election Day

Election Day dawned on November 2, 2010, and the atmosphere surrounding the retention vote was electric. Despite the tremendous organizational and monetary advantages enjoyed by IFF and its allies, no one was able to predict the outcome with any amount of certainty. Less than two months before the election, the *Des Moines Register* found that less than half of all Iowans disapproved of the Court's decision in *Varnum*.[56] And, as was oft-repeated, no Iowa Supreme Court justice had ever been removed by Iowa voters since the state's merit retention system was adopted in 1962. But IFF had done its job, and done it well. By midnight, the results were in: all three justices were defeated, by an average of 55-45%.

By law, the justices' terms expired on December 31, 2010. IFF had achieved its goal: it had eliminated all three justices on the ballot, sent a clear warning to other state supreme courts, and scored a victory for its cause. But many campaigners were left unsatisfied: they could see all too clearly that they had attained only a hollow victory. They had won the battle, but lost the war in Iowa. Indeed, they had lost it the day the court's opinion in *Varnum v. Brien* was announced. Although they had succeeded in removing three of the justices who wrote the opinion, they could not eliminate the four remaining justices whose names were not on the ballot. And, in any event, the decision itself remained unaffected by a change in the court's composition.

Thus, IFF quite correctly feared its victory would be short-lived. New justices would have to be appointed, and IFF could continue to excoriate *Varnum*, but Iowa would inevitably become a same-sex marriage state unless something more could be done. IFF and its allies concluded that something more could be done, and quickly settled on a new plan of attack. First, they would overrule *Varnum* just as California and Hawaii had done — by amending the Iowa Constitution. Second, they would draft articles of impeachment to remove the remaining four Iowa Supreme Court justices, leaving every seat on the court vacant. Third, they would challenge Iowa's method for selecting state supreme court justices in federal court, by arguing that the citizens of Iowa should vote directly on the election of their judicial officials.

The Aftermath

The Challenge to Iowa's Judicial Selection System

At the time of this writing, these efforts are in various stages of development. However, there is some news to report. On December 8, 2010, four Iowa citizens (the "Plaintiffs") initiated a lawsuit against Iowa's State Court Administrator and members of the state's Judicial Selection Commission in United States District Court for the Southern District of Iowa.

The Plaintiffs alleged that "their Equal Protection rights [were] violated because they [were] excluded from participating in the elections of the Elective Members of the Commission."[57] They asked the court "to stop the elections from which they are excluded and also end the terms of the current [Elective Members] so that they cannot participate in the process of making nominations to fill the current vacancies."[58]

Specifically, the Plaintiffs argued that the portions of the Iowa Constitution and Iowa State Code enabling the Judicial Selection Commission violated two fundamental rights: (1) a right to equal participation in the selection of judicial officials; and (2) a right to vote for the Elective Members.[59]

In a 35-page memorandum opinion and order, Chief Judge Pratt patiently explained that he had no intention of recognizing the Plaintiffs' claim to an entirely new substantive Fourteenth Amendment right to equal participation in the selection of judicial officials.[60] Chief Judge Pratt also held that the Plaintiffs had no right to vote for Elective Members, for at least two reasons: first, because Elective Members do not represent the state's population, and second, because seating the Elective Members was not an election of general interest.[61]

Given this ruling, as well as a number of other federal court opinions rejecting challenges to state judicial selection systems, Chief Judge Pratt's decision should end this argument for the foreseeable future.[62]

The Campaign to Amend the State Constitution

On January 25, 2011, a joint resolution was read on the floor of the Iowa legislature. Known as Senate Joint Resolution 8, the Resolution proposed to amend Article I of the Iowa Constitution by adding a new section that reads: "Marriage. Marriage between one man and one woman shall be the only legal union valid or recognized in this state."[63]

On January 27, 2011, a motion by State Senator Kent Sorenson to suspend the Senate's rules to allow a vote on Resolution 8 was defeated in a party-line vote. Because there is no mechanism whereby Iowa senators, even a majority of senators, can override the democratic majority leader and bring a bill to the floor for a vote, Resolution 8's immediate prospects for success appear marginal.

The Campaign to Impeach the Remaining Supreme Court Justices

On December 17, 2010, *The Iowa Independent* newspaper reported that three freshmen Republican members of the Iowa House were drafting articles of impeachment for the remaining four justices on the state supreme court.[64] A month later, one of the legislators, Tom Shaw, issued a press release titled "Independent Does Not Mean Unaccountable."[65]

The press release was apparently issued in response to a speech given by Chief Justice Mark Cady on the floor of the Iowa House.[66] The Chief Justice spent considerable time speaking about the need for judicial independence, which Shaw took to be a kind of reprimand. In his press release, Shaw previewed his case for impeachment, writing:

> "I am one of several State Representatives who are currently drafting Articles of Impeachment against the four remaining Justices of the Iowa Supreme Court. Three of their colleagues were removed from the bench in the retention election on November 2nd. The people of Iowa rendered their verdict on the malfeasance of all seven of these judges who attempted to redefine marriage in their *Varnum v. Brien* decision of 2009. The opinion, written by Justice Cady, rendered that the definition of Iowa's law declaring that marriage is between one male and one female, was unconstitutional. Furthermore, they ordered that same-sex "marriage" licenses must be issued. They performed the duty of the Legislative Department by creating law and usurped the authority of the Executive Department to carry out the law. Article III of the Iowa Constitution specifically forbids one department from performing duties of the other departments. These violations constitute malfeasance and therefore the Justices must be impeached. It is the duty of the elected representatives of "We the People" to remove these Justices in order to maintain the checks and balances of power in our state government."[67]

Shaw purposefully mentions the word malfeasance twice in this portion of his statement, and once more in his closing remarks. He must do so to establish a link between the justices' actions and the rules governing impeachment proceedings.

Pursuant to the Iowa Constitution, the Iowa House has the sole power to initiate impeachment proceedings against Supreme Court Justices, but only for "misdemeanors and malfeasance in office."[68] It is difficult to imagine that the justices have committed malfeasance by writing a unanimous judicial opinion that House members happen to strongly disagree with.

Shaw also mentions Article III of the Iowa Constitution. In pertinent part, Article III reads "[t]he powers of the government of Iowa shall be divided into three separate departments — the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."[69] Shaw has not explained how the court's decision in *Varnum* violated Article III.

The court itself, however, took great pains to explain its fidelity to the Iowa Constitution. *Varnum* cites to Article III extensively, as well as Article I, the Bill of Rights, which grants citizens equal protection under the law, Article XII, which states that any law that violates the constitution shall be void, and to *Marbury v. Madison*, which established the precedent for judicial review.

The Court also cited to the *Iowa Civil Rights Act*, which recognized the need to address sexual-orientation-based discrimination. That law, which the legislature passed and the executive branch enacted, provided the keystone for the court's decision. Even the republican governor-elect agrees that the House's impeachment proceedings are unfounded:

> "I think if you look and read the Constitution, which I have, I think it's pretty obvious. The Constitution says what the grounds for impeachment are. My reading is it's not there. There's a difference between malfeasance and over-reaching, I think. I really think that if people look at the Constitution, I think the remedy is that when they come up for retention that the people have a chance to vote them out. I think that's the appropriate remedy. I don't think that impeachment is the appropriate remedy."[70]

At the time of this writing, it appears unlikely that the impeachment question will need to be answered. The majority of Iowa voters are opposed to impeaching the justices,[71] and most conservatives in the Iowa House believe it unlikely that the effort will get off the ground.[72]

IFF founder Bob Vander Plaats has echoed Newt Gingrich's call for the four justices to resign, but that possibility appears even more unlikely than impeachment.[73] Still, nothing is certain. Only time will tell if the four justices are allowed to serve out the remainder of their terms.

Conclusion

Iowa's experience with judicial elections is hardly unique. Many state courts still bear the scars of past elections and as courts become increasingly politicized, qualities like civility, collegiality and professionalism are gradually fading away. Even so, lawmakers from several states are pushing forward with plans to dismantle judicial merit selection systems and replace them with some type of election.

No matter how judges are selected, most people would agree that all Americans deserve access to a court system that is both fair and impartial. Can this ideal ever be realized by a judiciary subjected to periodic review in the court of public opinion? Perhaps. But Iowa's experience suggests a different answer. ◆

Ryan C. Cicoski would like to thank Justice Randy Holland and Judge Jan Jurden for sparking his interest in judicial independence and inspiring him to write this article.

FOOTNOTES

1. This section borrowed from Chief Judge Pratt's excellent opinion in *Carlson v. Wiggins*, Opinion No. 00587 at 3-8 (Pratt, C.J.) (Jan. 19, 2011).

2. Rachel Paine Caufield, Ph.D., *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 Fordham Urb. L.J. 163, 164 (2007) (hereinafter "Caufield").

3. *See id.* at 166.

4. Harvey Uhlenhopp, *Judicial Reorganization in Iowa*, 44 Iowa L. Rev. 6, 52 (1958-1959) (hereinafter "Uhlenhopp"); *see also* Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 Mo. L. Rev. 479, 483 (2009) (hereinafter "O'Connor") (noting that, during this period, "[m]any people felt that appointive systems had allowed governors and legislators to award judgeships based on party loyalty rather than on legal ability, judicial temperament, or fair mindedness").

5. *See* Uhlenhopp at 52-53; Caufield at 167.

6. *See generally* Uhlenhopp at 52-53.

7. *See id.* at 53 n.154.

8. *See* Iowa Const., art. V, §§ 3, 4 (1846).

9. *Id.*, art. V, §§ 3, 5 (1857).

10. *See* Uhlenhopp at 54-55 n.160 (quoting Russell Marion Ross, The Government and Administration of Iowa 356 (1957)).

11. *See* Opinion No. 94-7-2(L), 1994 WL 470468, at *1 (Iowa A.G. July 1, 1994) (citing Uhlenhopp at 54, 65-66).

12. Uhlenhopp at 11.

13. *Id.* at 51.

14. *Id.* at 54.

15. *Id.* at 54-56 (footnotes omitted).

16. *Id.* at 58-62.

17. *Id.* at 65-67 (footnotes omitted).

18. *Id.* at 66 n.164.

19. *See id.* at 68.

20. *Id.*

21. *See id.* at 69.

22. *See id.* at 71.

23. *See* Iowa Official Register 484 n.47 (Edward F. Mason, ed.) (Fiftieth Number, 1963-1964) (hereinafter "Register").

24. *See id.* at 484-85.

25. *See id.* at 484 n.47.

26. *See id.*

27. Edwin Chermerinsky, *Two Cheers for State Constitutional Law*, 62 Stan. L. Rev. 1695 (2010).

28. *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 948 (Mass. 2003).

29. *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999).

30. *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006).

31. 852 P.2d 44, 67-68 (Haw. 1993).

32. *Baehr v. Miike*, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 2006). The following day, the trial court stayed its ruling, acknowledging the "legally untenable" position couples would be in should the Hawaii Supreme Court reverse its decision on appeal.

33. Article I, section 23 of the Hawaii Constitution provides: "The legislature shall have the power to reserve marriage to opposite-sex couples." Haw. Const. art. I, § 23. For further information, *see* David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. Haw. L. Rev. 19 (2000).

34. *Baehr v. Miike*, 994 P.2d 566, at *6 (Haw. 1999) (Table).

35. *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008).

36. In *Strauss v. Horton*, 207 P.3d 48, 63-64 (Cal. 2009), the California Supreme Court upheld Proposition 8.

37. 2007 WL 2468667 (Iowa Dist. Ct. Aug. 30, 2007).

38. Bert Brandenburg and Amy Kay, Crusading Against the Courts: The New Mission to Weaken the Role of the Courts in Protecting Our Religious Liberties 13 (Justice at Stake Campaign).

39. *See id.*

40. Iowans Concerned About Judges, "2006 Judicial Voters' Guide Questionnaire for Judicial Candidates, Sponsored by Iowans Concerned About Judges" *available* at http://www.iowansconcernedaboutjudges.com/doc/Survey.pdf.

41. *See id.*

42. *Id.*

43. *Id.*

44. Louis Lavorato, "Chief Justice Reacts to Judicial Questionnaire," Iowa Supreme Court, Aug. 9, 2006, http://www.judicial.state.ia.us/news_service/news_releases/NewsItem221/index.asp

45. 763 N.W. 2d 862 (Iowa 2009).

46. Wikipedia, http://www.en.wikipedia.org/wiki/Bob_Vander_Plaats (last visited Jan. 29, 2011).

47. River Cities' Reader, http://rcreader.com/commentary/vander-plaats-launches-judicial-group/ (last visited Jan. 29, 2011).

48. The Brennan Center for Justice, http://www.brennancenter.org. A month before the election, the Brennan Center reported that IFF had already spent $158,000 running TV advertisements to unseat the three justices.

49. Iowa For Freedom, http://iowaforfreedom.com/about (last visited Jan. 29, 2011).

50. *Id.*

51. *Id.*

52. According to the *Des Moines Register*, the telephone script labeled the Iowa race one of the "top 10" elections in the country, adding, "Voting no on the retention of three Iowa Supreme Court justices will send a clear message that we are taking back control of our government from political activist judges."

53. *Id.*

54. *Id.*

55. *Id.*

56. Fact Check, http://www.factcheck.org/2010/10/court-watch-mudfest-2010/ (last visited Jan 29. 2011).

57. Pl.'s Op. Br. at 2.

58. *See id.*

59. Iowa Const., art. V, § 16; Iowa Code. §§ 46.2, 46.4, 46.5, 46.7, 46.8, 46.9, 46.9A, 46.10 and 46.14. Compl. at 15-16.

60. *Carlson v. Wiggins*, CV #00587 at 17 (Pratt, C.J.) (Jan. 19, 2011).

61. *Id.* at 24, 26.

62. *See Kirk v. Carpenti*, 623 F.3d 889 (9th Cir. 2010); *Dool v. Burke*, No. 10-1286, 2010 WL 4568993 (D. Kan. Nov. 3, 2010) (slip opinion); *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996), *aff'd on other grounds*, 154 F.3d 704 (7th Cir. 1998); *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105 (E.D. Mo. 1997), *aff'd per curiam*, 133 F. 3d 921 (8th Cir. 1998).

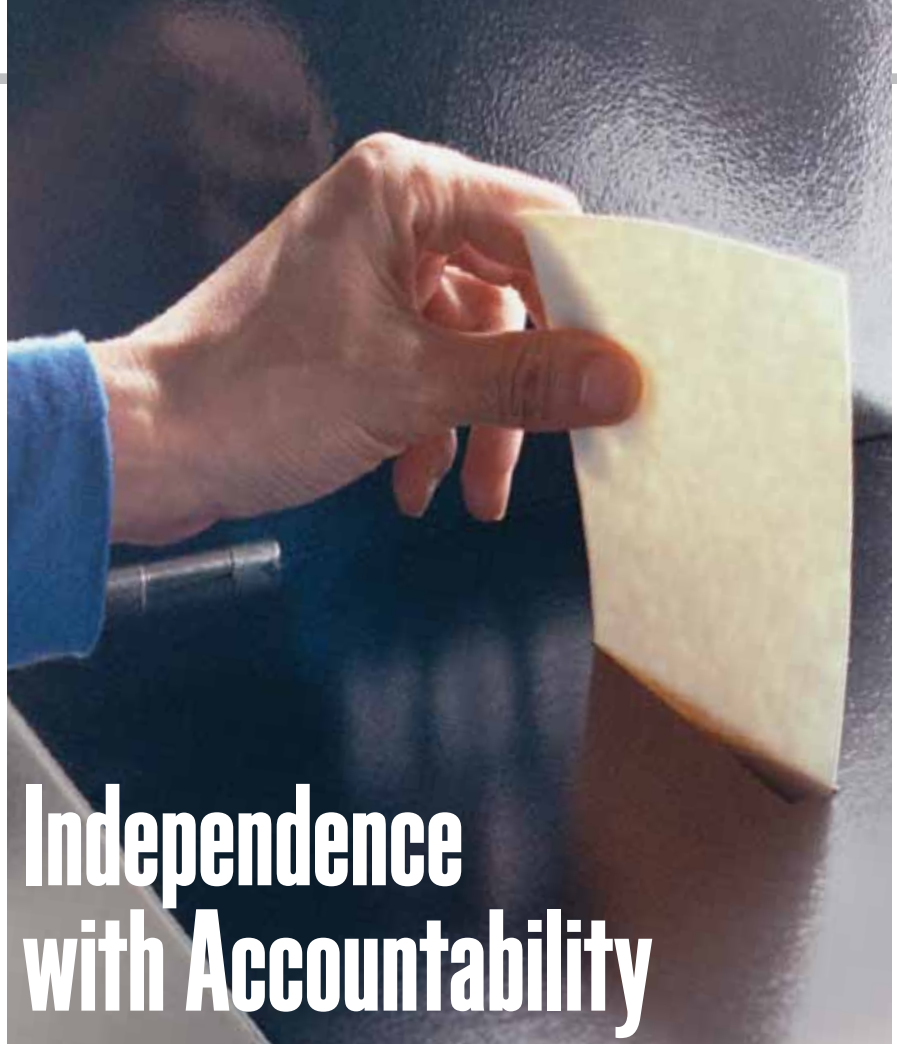
63. Iowa SJR 8.

64. *The Iowa Independent*, https://iowaindependent.com/49220/gop-lawmakers-drafting-legislation-to-impeach-supreme-court-justices (last visited Jan. 29, 2011). A fourth representative joined the drafting committee in January 2011.

(See **IOWA** *Continued on page 26*)

Hon. Randy J. Holland
and Cynthia Gray

This is an excerpt from an article that appeared in 25 Widener Law Symposium Journal (2000). The complete article, with accompanying end notes, is posted on the Delaware Bar Foundation's website, www.delawarebarfoundation.org.



Judicial Discipline: Independence with Accountability

Our political system has evolved to allow the removal of judges who fail to meet the highest standards of integrity.

Preserving the rule of law in the United States is dependent upon the public's trust and confidence in the judiciary. Federal and state judges are entrusted with construing, applying and developing legal precepts. Judicial pronouncements guide the conduct of private lives, public officials and the relationships between states with each other and with the federal government.

Judicial independence is a cornerstone of our legal system. The *sine qua non* of judicial independence is the freedom to decide cases without fear of retribution. Alexander Hamilton stated:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution.... Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Judicial independence fosters public confidence in the courts. This is essential to a legal system that depends upon voluntary compliance with judicial decisions.

It is equally important that independent judges discharge their duties with competence, integrity and impartiality. Public trust and confidence in the judiciary institutionally requires respect for the individuals who are jurists. Consequently, judges are held to the highest standards of professional and personal conduct in our society. Those standards require behavior both on and off the bench that would neither demean the judge's own stature nor reflect adversely on the integrity of the judiciary.

This article is a brief synopsis of how the United States has attempted to maintain an independent judiciary and, at the same time, hold individuals accountable for conduct that is inconsistent with the judicial office. There is a consensus that the proper focus of concern about judicial conduct should relate to ethical standards and not to whether the disciplinary authority agrees with the merits of a judge's decisions. The degree to which judicial independence with integrity can be maintained, however, depends on how the system of accountability is structured.

Removal of Federal Judges

When the Framers of the United States Constitution debated the establishment of a judicial branch of government, three historic methods of accountability were extant for their consideration: removal at the executive's pleasure; removal by the executive upon "address" from the legislature; and removal by the legislature through impeachment. Removal by the executive was summarily rejected. Address was considered, but impeachment was chosen as the model for the United States Constitution.

The Framers' summary rejection of having judges removed at the will of an executive is understandable. During the 17th century, prior to the Glorious Revolution, the Stuart monarchs frequently removed judges who rendered decisions that were "unfavorable to the Crown."

That early English system for removing judges was applied to judges in the American colonies. In fact, the ability of King George III to remove colonial judges at his pleasure was one of the express grievances set forth in the Declaration of Independence. Therefore, the Framers of the United States Constitution rejected having judges serve at the executive's pleasure, and adopted the "good behavior" standard from the 1700 Act of Settlement.

The concept of removing judges through the process of address to the executive by the legislature was contemplated by the Framers at the Philadelphia Convention and rejected. John Dickinson of Delaware proposed that judges be removable by "the Executive on the application [by] the Senate and House of Representatives." Dickinson's motion was opposed and defeated as being inconsistent with an independent judiciary.

The drafters' selection of impeachment for the United States Constitution as the only method for removing a federal judge was attributed by Alexander Hamilton to the Framers' commitment to judicial independence:

> The precautions for [judges'] responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges.

The only sanction against an impeached judge is removal from the "[o]ffice of honor, Trust, or Profit under the United States." Nevertheless, a judge is still "liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Today, impeachment is still the only procedure to remove an Article III federal judge from office.

Removal of State Judges

Prior to the Constitutional Convention of 1787, the former colonies had "debated, framed, adopted, rejected, modified, and continued to debate at least twenty state constitutions in the period since 1775." "The preservation of diversity in the legal and governmental systems of each state was expressly contemplated when the United States Constitution was framed and adopted." Accordingly, the United States Constitution did not prescribe a format for exercising or separating its own sovereign powers. In the famous words of Justice Louis Brandeis:

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

The current methods for removing judges in the 50 state constitutions reflect the continued diversity in how each state balances judicial independence with judicial accountability. In addition to impeachment, some state constitutions include removal of judges by executive action, address, recall and defeat at a retention election or a contest for re-election.

Almost all state constitutions provide for the removal of a judge by an impeachment process. Impeachment is a proceeding against a public officer, before a quasi-political court, initiated by written charges set forth in "articles of impeachment." In such a proceeding, the articles of impeachment constitute those charges that are approved by a majority vote in the lower house of the legislature. The charges are then tried in the upper house, which sits as a court for this purpose. Removal by the upper house usually requires a two-thirds vote. A judge who is impeached is either removed from office or not disciplined in any way.

Removal by action of the executive or monarch is the oldest method for disciplining judges. The removal of judges by executive action was not provided for in the United States Constitution because of the widespread abuse that accompanied judicial removal by the English monarchs. Today, removal by executive action has also almost disappeared in the states. There are, however, a few vestiges of that concept that have survived. For example, governors can perform the functional equivalent of removing an incumbent judge by not reappointing him or her to a new term of office in both Delaware and Maine.

Address, a means for removal of judges even though their conduct does not constitute an impeachable offense, is a formal request to the governor by both houses of the state legislature re-

questing a judge's immediate removal from office. Although the United States Constitution itself never provided for address to the executive, since 1776 address has been authorized as a means of removing judges at one time or another in a majority of state constitutions. Although address has not been used frequently in any state, the Chief Justice of New Hampshire was the subject of an unsuccessful attempted bill of address in 1999 because of a decision that was unpopular with some members of the legislature.

"Recall is a procedure by which [state] judges … may be removed from office by means of a special vote of the electorate." This process, which is authorized by some state constitutions, begins with the submission of a petition, signed by a certain percentage of qualified voters, requesting that the recall proposition be placed on the ballot. Recall of judges has been rare. It is a time-consuming form of judicial discipline and a potential threat to judicial independence if it is motivated by an unpopular decision rather than misconduct.

The election and removal of state judges by popular vote developed during the era of Jacksonian Democracy. Prior to that time, state judges were appointed by either the executive or legislative branch of government. This dramatic shift in selection practices for state judges is described as follows:

> In 1832 Mississippi became the first state to elect all judges. By action of its constitutional convention in 1846, New York led the change from gubernatorial and legislative appointment to direct popular election. For the century following New York's shift, all states that entered the Union did so with an elected judiciary. Even the four colonial states of Georgia, Maryland, Pennsylvania and Virginia joined the movement from an appointed to an elected judiciary. By the time of the Civil War, judges were elected in twenty-four of the thirty-four states. For the first time in Anglo-American history, the judicial office became an integral part of the political elective process.

Judicial elections have an obvious impact on judicial independence if an incumbent judge is not re-elected or not retained because of an unpopular decision. The countermajoritarian state constitutional limits on the majoritarian branches of government are meaningless without enforcement by an independent judiciary. There is a grave potential for compromising judicial independence when a judge's tenure in office is subject to a majority of the populace's direct control.

The election of state judges constitutes a paradigm shift in both the method for selecting judges and the procedure for imposing the ultimate form of discipline — removal from office. State constitutions that provide for the election of judges subject the judiciary to majoritarian political influences that the Framers eschewed for Article III judges in structuring the United States Constitution. Concerns about state judicial elections, both partisan and nonpartisan, gives rise to a new proposal for state judicial selection known as the "merit plan."

During the 20th century, reformers have advocated merit selection and retention as a means of extricating state judges from partisan politics. Merit selection and retention is generally defined to include: an initial screening of applicants for judicial vacancies on the basis of merit by a nonpartisan nominating commission; a gubernatorial appointment of one individual from a list of nominees provided by the commission; and an uncontested, nonpartisan retention election held after the completion of the appointee's initial term in office. In 1940, Missouri adopted the first merit plan for judicial selection and retention.

The Missouri Plan has been examined carefully by "judges, lawyers, politicians, political reformers and academicians who study the judicial process." To the extent that states are reluctant to completely eliminate any role for the electorate in the selection and retention of judges, reformers have embraced the Missouri Plan. Almost half of the states now use merit selection and retention at some level.

At the present time, 38 states either select or retain at least some of their appellate court judges and trial judges of general jurisdiction in partisan, nonpartisan or retention elections. In purely elective systems, "judges are both elected and re-elected in partisan or nonpartisan contests between competing candidates." In retention elections, "voters are asked to vote yes or no on whether the judge should be retained in office."

The corollary to electing judges by popular vote is removal by popular vote as a result of defeat for reelection or retention. The electoral process has not been an effective method of judicial discipline. Moreover, the election of state judges compromises judicial independence when an unpopular decision is the basis for an incumbent jurist's defeat at the polls.

State Judicial Conduct Organizations

Today, the removal of a judge by impeachment, address, recall or election contests continues to be time-consuming, frequently becomes partisan and provides for only one sanction — removal. The states have responded to these problems by developing a system of judicial discipline that simultaneously recognizes both the need for judicial independence and the need to hold judges accountable for misconduct that does not warrant removal and is unrelated to the popular merits of a decision.

State judicial conduct organizations provide a concurrent constitutional means of disciplining judicial officers for misconduct. These organizations are more than an alternative to impeachment, address or recall because their primary function is to provide a procedure for the enforcement of each state's code of judicial conduct. Many violations of a code of judicial conduct, however, would not be considered either an impeachable offense or an impropriety for a legislative or executive officer. Thus, the concept of having state judicial conduct organizations

raised concerns about their implications for judicial independence.

In the spirit of Justice Brandeis's view of states as laboratories, California amended its constitution in 1960 and was the first jurisdiction to create a permanent agency to regulate judicial conduct. By 1981, all 50 states and the District of Columbia had established a judicial conduct organization. Depending on the jurisdiction, the judicial conduct organization may be called a commission, board, council, court or committee, and it may be described by terms such as inquiry, discipline, qualifications, disability, performance, review, tenure, retirement, removal, responsibility, standards, advisory, fitness, investigation or supervisory. This article will use the general term "state judicial conduct organizations" to describe all 51 entities.

State judicial conduct organizations have jurisdiction over supreme court justices, trial and intermediate appellate court judges, and other judicial officers (depending on the state court structure) including court commissioners, referees, magistrates, masters, part-time judges, retired judges subject to recall or available for assignment and temporary judges.

In some states, judicial conduct organizations also have jurisdiction over employees of the state court system and administrative law judges. In a few states, the judicial conduct organization is an independent state agency, but in most states it is part of the judicial branch.

Every state judicial conduct organization is authorized to perform several basic functions: to investigate claims of misconduct; to bring and to prosecute formal charges; to hold an adjudicative hearing and to make findings of fact; and to recommend or to order a final disposition. Most state judicial conduct organizations also "have the constitutional authority to take immediate action whenever a judicial officer is indicted or charged with a felony or a serious misdemeanor."

The sanctions that may be ordered or recommended by state judicial conduct organizations include "private admonition, reprimand, or censure; public reprimand or censure; suspension; mandatory retirement; and removal from office." In some states, the state judicial conduct organizations are also authorized to discipline judges as attorneys; to assess costs or fines; and to impose limitations or conditions upon the judicial office.

While some theoretical overlapping remains between the impeachment power of a state's legislature and the removal authority of a state judicial conduct organization, the establishment of state judicial conduct organizations represents a shift in branch authority under state constitutions. This constitutional transfer of power within the structure of state constitutions from the legislative branch to self-regulation by the judicial branch has contributed to judicial independence. By simultaneously providing a mechanism for accountability through the receipt and processing of complaints about judicial conduct, state judicial conduct organizations have also enhanced the public trust and confidence in the judiciary.

Federal Judicial Councils

In 1922, Congress created the Judicial Conference of the United States. The creation of this conference initiated the movement toward self-regulation within the federal judiciary. The Judicial Conference convenes annually and its members are the Chief Justice of the United States, the chief judges of each circuit and a district judge selected by the judicial conference of each circuit.

In 1980, Congress passed the Judicial Councils Reform and Judicial Conduct and Disability Act (the "1980 Act"). This legislation was both a federal response to Congressional concerns about the efficacy of impeachment and an acknowledgment of the states' favorable experiences with judicial conduct organizations. The statute was "born out of controversy about [the] constitutional means for achieving judicial accountability, preserving independent decision making powers for Article III judges, and the practical ability of the judicial branch to regulate itself."

The federal statute authorizes judicial councils in each of the 13 federal circuits to review complaints against federal judges and to order sanctions for judicial misbehavior. The judicial councils operate under the direction of the chief judge of each circuit and are composed entirely of judges. Council decisions are reviewable by the Judicial Conference of the United States.

The 1980 Act applies to circuit judges, district court judges, bankruptcy judges and magistrates, but not to the Justices of the United States Supreme Court. The House of Representative's report on the 1980 Act gave two reasons for this exclusion:

> First, high public visibility of Supreme Court Justices makes it for [sic] more likely that impeachment can and should be used to cure egregious situations. Second, it would be unwise to empower an institution such as the Judicial Conference, which actually is chaired by the Chief Justice of the United States, to sit on cases involving the highest ranking judges in our judicial system. The independence and importance of the Supreme Court within our justice system should not be diluted in this fashion.

There is no "standing" requirement for filing a complaint. The 1980 Act provides that "[a]ny person" may file a written complaint with the clerk of the court of appeals for the relevant circuit, alleging that a circuit, district, bankruptcy or magistrate judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." The complaint must contain "a brief statement of the facts constituting such conduct."

Conclusion

The dilemma posed by any system of judicial discipline is how to achieve a proper balance between accountability and independence. In our democratic system of governance, most public officials are held accountable to the will of the majority. At the same time, however, the individual rights or liberties afforded by the federal and state

constitutions can only be preserved against majoritarian influences by an independent judiciary.

The state and federal systems of judicial discipline are a study in contrasts that demonstrate the vitality of dual sovereignty in the United States. The United States Constitution emphasizes judicial independence with an appointed tenure for life during good behavior. The state constitutions emphasize judicial accountability with service generally limited to a term of years and subjected to continued tenure at the will of a majority vote by the populace.

Nevertheless, it is noteworthy that state and federal judiciaries have self-imposed virtually the same high standards of professional and personal conduct. The state judicial conduct organizations and the federal judicial councils are institutional responses to the need for diligent enforcement of those high ethical standards through a panoply of disciplinary sanctions. Both the state and federal models of judicial discipline recognize that some conduct may be inconsistent with the judicial office and yet not necessarily warrant removal.

This nation made its Declaration of Independence, in part, because the King of England "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Approximately 100 years later, in 1871, the United States Supreme Court wrote:

> It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences.

As we enter the next century, hopefully the populace and their elected representatives will continue to recognize the benefit of retaining a decisionally independent judiciary.

The 1776 Declaration of Rights and Fundamental Rules of the Delaware State provided in Section 22 that: "the independency and uprightness of judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people."

The federal judicial councils and the state judicial conduct organizations both seek to achieve decisional independence with accountability for conduct that is inconsistent with the judicial office. This dual process will continue to enhance public trust and confidence in both state and federal judges. This should lead politicians and the electorate to focus on changing unpopular judicial decisions through the appellate process, legislation or constitutional amendments rather than by removing a jurist of integrity from office. ◆

(IOWA *Continued from page 21*)

65. Press Release of Tom W. Shaw, *available at* www.freerepublic.com/focus/f-news/2657922/posts (last visited Jan. 29, 2011).

66. After Chief Justice Ternus' term expired, the remaining justices chose Justice Cady, the author of *Varnum v. Brien*, to be their new Chief Justice. Conservative members of the Iowa legislature were not amused.

67. *Id.*

68. Iowa Const., art. III, § 19. The constitution requires a majority vote in the house, with a subsequent trial conducted in the Senate. Conviction requires approval of two-thirds of the senators present.

69. Iowa Const., art. III, § 1.

70. *Cedar Rapids Gazette*, http://www.easterniowagovernment.com/2011/01/03/brands-tad-courts-same-sex-marriage-ruling-was-not-malfeasance-that-warrants-impeachment/ (last visited Jan. 29, 2011).

71. *Des Moines Register*, http://blogs.desmoinesregister.com/dmr/index.php/2011/01/18/polls-iowa-voters-oppose-impeachment-for-supreme-court-justices/ (last visited Jan. 29, 2011).

72. *Des Moines Register*, http://desmoinesregister.com/article/20110113/NEWS10/101130349/Bid-to-impeach-remaining-high-court-justices-seen-stalling-in-House (last visited Jan. 29, 2011).

73. *Wall Street Journal*, http://blogs.wsj.com/law/2010/11/18/gingrich-on-iowa-supreme-court-the-other-justices-should-resign/ (last visited Jan. 29, 2011); Iowa for Freedom, http://iowaforfreedom.com (last visited Jan. 29, 2011).

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Jacqueline Mette

OF COUNSEL: William Chandler

Bill Chandler's career path wasn't evident early in his life. Born and raised in Dagsboro, Delaware, his love for Delaware would prove to be a guiding force, shaping his distinguished career.

Bill grew up in Sussex County, attending the newly consolidated Indian River High School, where he met his wife, Gayle. They were co-editors of their high school yearbook and have been together ever since. They both graduated from the University of Delaware in 1973, and headed to the University of South Carolina where Bill obtained his Juris Doctorate and Gayle obtained her Masters in Library Science.

They returned to Delaware, and lived in Wilmington while Bill clerked for Chief Judge James L. Latchum of the United States District Court for the District of Delaware for two years and Gayle worked at Winterthur Museum.

"Judge Latchum was an incredible lifelong mentor," says Bill. "He moved my admission to the Delaware Bar – what a thrill that was for me." Bill explains that while Judge Latchum had a clear direction for his life's work, that same crystal-clear focus didn't always exist for Bill. While most law clerks would segue into a law firm after a clerkship, Bill decided that he wanted to earn his Masters of Law in order to teach. "That confused Judge Latchum initially, but he was very supportive of my choice and helped me gain admission to Yale Law School."

In 1979, Bill graduated from Yale with his Masters, and was hired to teach Remedies, Legislative Process and Commercial Law at the University of Alabama. While Bill taught, Gayle also worked at the university. And although both enjoyed Alabama, they missed Delaware.

Enter Bill Manning. When Bill Chandler clerked for Judge Latchum, Bill Manning clerked for Judge Layton; the two became friends. In 1981, Bill Manning was Chief of Staff to Governor Pete DuPont. He called his friend, Bill Chandler, and asked him if he was ready to come home. The Governor needed to hire a Chief Legal Counsel, and Bill Manning thought Bill Chandler was the right man for the job.

Hired by the Governor, Bill and Gayle came back to Delaware in 1981. They soon had the first of their two children. This proved to be the ultimate game-changer for Bill's career, and the Chandlers decided to stay in Delaware.

Working for the Governor — described by Bill as another mentor who played a pivotal role in his life — was "a tremendous learning experience for me." In particular, he learned a great deal about the legislative process.

After two years, Bill decided to enter private practice. He wanted to tap into his Sussex County roots, while also being able to work on client matters in the upper counties (by this point, the Chandlers had lived or worked in all three counties during their marriage).

One firm had offices in all three counties and a robust, richly diverse practice: Morris, Nichols, Arsht & Tunnell. It was 1983, and Bill was still looking for his niche. Working for Morris, Nichols gave Bill the opportunity to practice in almost every court in Delaware and handle a large array of cases — from criminal, to corporate to other civil matters.

A few cases stand out for Bill. During his time with Morris, Nichols, he represented a man in a vehicular homicide case — the driver's fiancé was killed in the crash. "My client's future, as well as his liberty, was at stake." Bill raised several novel constitutional challenges to the criminal statute on which the prosecution was built, and found that he really enjoyed brief writing.

The defining moment in his career came in the *Wilgus v. Salt Pond* case. Bill was second chair to Randy Holland, another of Bill's lifelong mentors. "Randy was the consummate professional, incredibly smart, and one of the nicest people you'll ever meet; I was lucky to work for him," Bill says. "In that case, I knew I had found my niche — writing briefs, being in the trial court and thinking about challenging and interesting legal problems under the pressure of time and events."

Just two short years later, in 1985, Governor Mike Castle appointed Bill to the Superior Court where he served until 1989 when he was appointed Vice-Chancellor. In 1997, then-Governor Carper appointed Bill to the position of Chancellor.

Bill has no particular favorite case from his tenure on the bench — "I worked hard on all of them, so each one of them, in its own way, is my favorite." While he may be best known for his corporate cases, the sheer breadth of his cases is astounding. Asked to identify his most memorable moment on the bench, he describes a case where the pedigree of a herd of hogs was at issue (the basis of ownership was in dispute). "I thought to myself, is someone actually going to suggest a DNA analysis on a herd of hogs?"

His retirement from the bench began June 18, but the next chapter of Bill's life is just beginning. The new managing partner for the Georgetown offices of Wilson, Sonsini, Goodrich, & Rosati, P.C., Bill will travel across the country and world to his firm's offices, meeting with clients and working with members of his new firm. "I will have the opportunity to spread the word about Delaware to a broader community and in a different way than in the past, and I am very much looking forward to that — to the opportunity to give something back to the state that has given so much to me."

Bill is also interested in working with Governor Markell's initiatives to bring technology firms and jobs to Delaware. As a University of Delaware Trustee, he also looks forward to giving his alma mater more of his time.

It won't be just work for Bill. Gayle plans to travel with her husband and their children are poised to enjoy more time with their dad too. At the conclusion of this interview, Bill was off to catch some waves with his son and daughter on the Delaware beaches. Happy surfing, Bill — you've earned it. ◆

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