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The Assault on Judicial Independence and the Uniquely Delaware Response

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I. INTRODUCTION

In the early years of the American democratic experiment, one of the foremost observers of American democracy, Alexis de Tocqueville, wrote that "the courts correct the aberrations of democracy and . . . though they can never stop the movements of the majority, they do succeed in checking and directing them."[1] Tocqueville's writings resonated greatly at the time, as many states moved towards the popular election of judges in the name of Jacksonian Democracy.[2] Sadly, more than 170 years after they were first spoken, Tocqueville's words remain relevant and of vital importance as federal and state courts face increasingly virulent assaults on their constitutionally-guaranteed independence. As in the 1830's, these attacks tend to emanate from the populist cries of elected and appointed members of the legislative and executive branches of government, with editorial support from segments of the news media and, in recent years, the newly empowered blogosphere. Unlike Tocqueville's era, or perhaps any other era in U.S. history, the rhetoric of the past decade has sparked more frequent campaigns to remove judges from the bench or to pressure judges to decide cases according to the whims of the majority, or the most vocal of the minority, rather than the established and tested law.

In this article, we assert that a subservient judiciary is an affront to constitutional democracy as we know it, not an expression of the people's will. We believe it is critical to the health of our democracy for the lawmakers and the public to understand, in the clearest terms, that the

1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 264 (George Lawrence trans., J.P. Mayer & Max Lerner eds., Harper & Row 1966) (1835).

2. *See* David B. Bogard, *Republican Party of Minnesota v. White: The Lifting of Judicial Speech Restraint*, 26 U. ARK. LITTLE ROCK L. REV. 1, 4 (2003).

judiciary is the final interpreter of the law and a *co-equal* branch of government. Delaware can serve as a model for other states—an illustration of co-equal branches of government, working together to reach an understanding that sovereignty lies with the people, and that each branch must play a unique and vital role in guarding that sovereignty.

We begin our discussion by examining the Separation of Powers Doctrine as it has developed throughout our nation's history. Next we discuss how judicial elections politicize the judiciary, minimize the rule of law, and erase the lines separating the branches of government. We then offer our view of how best to guarantee the independence of judicial systems nationwide. Equally as important, we address how to ensure that the American people understand the independent judiciary's role as the *sine qua non* of democracy.

II. A BRIEF HISTORY OF THE SEPARATION OF POWERS

A. Introduction

The judicial branch was established in the federal and state constitutions as a co-equal branch of government in response to the oppressive British Crown's manipulation of judges who did not rule as the king desired, and a British parliament that interpreted the laws it wrote and passed.[3] As the Supreme Court of Delaware said in *Evans v. State*,[4] "The defining principle of the American constitutional form of government is separation of powers. . . . The first state constitutions reflect the desirability of separating the legislative from the judicial power, prompted by royal and legislative interference with judgments of the American colonial courts."[5] The American colonists' deep distrust of governmental authority led to a system of checks and balances in which each branch has strictly delineated ways to control each other, as well as strict delegations of power.

Given that judicial independence as we know it had never before been practiced in Great Britain or elsewhere,[6] the state and federal

3. For more extensive treatment of the development of federal judicial independence and challenges that have arisen throughout U.S. history, *see* Charles Gardner Geyh, *The Origins and History of Federal Judicial Independence*, in AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997), *available at* http://www.abanet.org/poladv/documents/indepenjud.pdf.

4. Evans v. State, 872 A.2d 539 (Del. 2005).

5. *Id.* at 545.

6. *See* Hillman, *infra* note 59, at 1300-01 ("The founders of our country . . . relied to a large extent on Montesquieu, who, earlier in the century, was the first modern writer

judiciary has had to establish itself as a co-equal branch both under the Constitution *and* in practice. In 1780, the Commonwealth of Massachusetts adopted a constitution that included in its declaration of rights the following article:

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.[7]

That same year, the New Jersey Supreme Court, in *Holmes v. Walton*, became the first court to exercise judicial review by striking down as unconstitutional a statute permitting six-man juries for persons accused of trading with the British.[8]

At the federal level, Chief Justice John Marshall first articulated what it meant to have an independent judiciary under the Separation of Powers Doctrine in *Marbury v. Madison*. In words that are as meaningful today as they were in 1803, Chief Justice Marshall wrote:

> [i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[9]

In addition to recognizing that the judiciary is *the* interpreter of the law, Marshall stressed in *Marbury* that an affront to the separation of powers is equally an affront to the fundamental tenets of the Constitution. He continued:

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to recognize the judiciary as an independent branch of government. . . . He argued, and the framers of the Constitution agreed, that the preservation of liberty depended on the three functions being kept separate and independent.").

7. MASS. CONST. art. XXIX. *See* REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 1, 6 (2003), http://www.abanet.org/judind/jeopardy/pdf/report.pdf.

8. *See* Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601, 1604-05 (2001); *see also* Wilentz v. Hendrickson, 38 A.2d 199, 203-04 (N.J. 1944) ("New Jersey was among the very first of the states of the Union to recognize the right of our courts, with proper regard and respect for the action of the co-ordinate branches of our government, to strike down legislation that contravenes the constitution, the fundamental law of our state.").

9. Marbury v. Madison, 5 U.S. 137, 177-78 (1803).

> The Constitution of the United States establishes certain limits not to be transcended by the different departments of the government. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. *To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.* It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.[10]

Marshall's words in *Marbury* have been cited and relied upon as fundamental tenets of the separation of powers. But inevitably, challenges have arisen to the separation of powers, as Marshall established it, throughout the nation's history. One of the more egregious examples was President Franklin D. Roosevelt's "court-packing" plan in 1937. In an effort to reduce the U.S. Supreme Court's opposition to social and economic legislation intended to produce jobs and financial security at the height of the Depression, Roosevelt threatened to increase the number of Justices and fill the new seats with more favorable judges (presumably those who already had firm positions on the New Deal legislation).[11] Ultimately, Associate Justice Owen Roberts switched to the majority in cases that upheld New Deal legislation, thereby mooting Roosevelt's need to pack the court with ideologues.[12] Today, this incident is relevant to show what can happen when one branch of government exerts undue pressure on another to achieve what are essentially political results. Laws that arguably ran afoul of the Commerce Clause were, nevertheless, upheld to avoid a Constitutional crisis that threatened separation of powers.[13]

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10. *Id.* at 176-77 (emphasis added).

11. *See* Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 435-36 (1999) ("Roosevelt, like Lincoln in his moment of desperation, proposed to enlarge the Court to dilute the influence of the Nine Old Men whose willful resistance threatened the ability of the Republic to make a serious response to the economic calamity.").

12. Jacob G. Hornberger, *FDR's Infamous Court-Packing Scheme,* The Future of Freedom Foundation, Jan. 15, 2009, http://www.fff.org/blog/jghblog2009-01-15.asp.

13. *Compare* U.S. v. Butler, 297 U.S. 1 (1936) (Justice Roberts sides with the majority to strike down New Deal legislation as violative of the Commerce Clause) *with* West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (Justice Roberts inexplicably switched his position after President Roosevelt leaked his "court packing" scheme and upheld New Deal legislation with a broader reading of the Commerce Clause in a move now called "the switch in time that saved nine.").

In response to Roosevelt's actions, a Pennsylvania attorney and observer of the Court, Ruby R. Vale, noted in June 1937 that:

> Article 3 Section 1 of the Federal Constitution [establishing an independent judiciary] is the tendon of Achilles of the American system of government and also may be its safety valve. . . . It is this dual legislative and executive power to create the courts and to determine the number and personnel of the judges that in full understanding and proper exercise has made a free and independent judiciary; and figuratively, is the tendon which maintains the equilibrium of justice and sustains the weight of order as administered under our dual Federal and State governments. *But this vital tendon is exposed to the possibility that executive dominance over a subservient Congress may atrophy or cut it, with resultant collapse of equilibrium and the executive becoming the dominant authority in government and in its administration of justice.*[14]

Vale foresaw the harm that could occur when the branches of government do not counter-balance or check each other as the Constitution mandates, regardless of whether they claim to act according to the people's will. He especially feared the prospect of a king-like President abusing his Article I powers in order to express his version of the people's will, while a submissive Congress stood by silent. In Roosevelt's case, Vale feared that the President would substitute his "conception" of the Constitution for that of the Supreme Court and seek to expand the Court, thereby bypassing the public referendum required to amend the Constitution.[15] Vale wrote:

> The power that makes the courts can unmake American representative democracy. If the President can persuade or coerce the present Congress to accept as truth his unwarranted assumptions and to enact into law his revolutionary proposals, he will have usurped the people's prerogative to change the Constitution and can make himself the supreme power in the Nation.[16]

President Roosevelt's "court-packing plan" is a textbook example of the kind of threat to the Constitution that the Founders envisioned and planned for in outlining the amendment process in Article V.[17] Of

14. Ruby R. Vale, *Observations on the Proposals of the President to Change the Personnel of the Judges*, 41 DICK. L. REV. 195, 195 (1937) (emphasis added).

15. *Id.* at 198.

16. *Id.* at 199.

17. "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three

course, a more fitting ending would have entailed Justice Roberts staying in the dissent, Roosevelt sending legislation to Congress to expand the Court's membership, and Congress checking the president's powers by failing to return the necessary two-thirds vote needed under Article V. But history, while instructive, does not always provide such perfect lessons to guide us. As a result, the mistakes of the past are being repeated today in the form of conflicts between the branches of government that are shocking not for the differences in opinion that they spawn—the sign of a healthy democracy—but for the virulence with which many members of executive and legislative branches at the state and federal levels are assaulting the constitutionally-guaranteed independence of the judiciary. The assaults today—often led by highly visible elected officials with tall soap boxes and deep pockets—are dangerous in that they are typically the only voices the public hears. After all, who reads judicial opinions? Absent more balanced voices in the mainstream, the attacks of public officials can become gospel to a vulnerable citizen.

B. Roots of the Separation of Powers Doctrine

The Delaware Supreme Court in *Evans*[18] traced the roots of the three branches of American government to Aristotle, who studied Greek city states in his *Politics* and identified three main government agencies: the general assembly, public officials, and the judiciary.[19] The political climate of Colonial America was immediately influenced by more contemporary philosophers, such as Charles Montesquieu,[20] Jean Jacques Rousseau,[21] and John Locke,[22] who expounded on the importance of separating the powers of the branches. The influence of those philosophers is evident in our country's written history and our modern form of government, and the common thread between these past and present governments is the Separation of Powers Doctrine. The bridge

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fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate." U.S. CONST. art. V.

18. *Evans*, 872 A.2d at 539.

19. *See id.* at 543 n.15 (citing ARISTOTLE, POLITICS bk. IV, ch. 14, *cited in* John A. Fairlie, *The Separation of Powers*, 21 MICH. L. REV. 393, 393 (1922)).

20. *See id.* at 544 (citing BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Thomas Nugent trans., 1949)).

21. *See id.* (citing Paul M. Spurlin, *Rousseau in America*, 1 FRENCH-AM. REV. 8-16 (1948)).

22. *See id.* (citing JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 221, 254 (T. Peardon ed., 1952)).

that transformed political philosophy into our modern form of government, and "elevated the Separation of Powers Doctrine into what is now known as 'a first principle of free government,'" was the Declaration of Independence.[23] The Declaration of Independence marked the colonists' break from King George III of England.[24] Notably, the colonists identified the King's interference with the authority of the judiciary, as well as deprivation of the benefits of a trial by jury, as reasons for separating from the Crown.[25]

The direct result of the colonies' newly claimed independence was their status as nascent sovereign entities, which brought the need to establish forms of government.[26] In response, each colonial state drafted its own constitution.[27] The early constitutions, including Delaware's 1776 Constitution, provided for three branches of government: legislative, executive, and judicial.[28] These state constitutions "reflect the desirability of separating the legislative from the judicial power, prompted by royal and legislative interference with the judgments of the American colonial courts."[29]

Eventually, the newly formed federal government also needed a formal framework, and public debate began on how that government would be organized. The doctrine of separation of powers rose to the forefront of that discussion.[30] Thomas Jefferson emphasized that "'the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.'"[31]

The public discourse on the new federal government was memorialized in *The Federalist Papers*, written by Alexander Hamilton, James Madison, and John Jay.[32] *The Federalist Papers*, which supported the proposed federal Constitution, responded to the states' concerns, including whether the proposed Constitution contained strong mechanisms for separating the powers of government.[33]

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23. *Evans*, 872 A.2d at 544 (citing PHILADELPHIA NAT'L GAZETTE (Gaillard Hunt ed., Feb. 6, 1792) (quoting VI JAMES MADISON, THE WRITINGS OF JAMES MADISON 91 (1900-1910)); William B. Gwyn, *The Meaning of the Separation of Powers* IX TULANE STUDIES IN POLITICAL SCIENCE (1965)).

24. *See Evans*, 872 A.2d at 544.

25. *See id.*

26. *See id.*

27. *See id.* at 545.

28. *See id.*

29. *Evans*, 872 A.2d at 545.

30. *See id.*

31. *Id.* (citing THOMAS JEFFERSON, NOTES ON VIRGINIA, 120 (Peden ed., 1954); 3 JEFFERSON'S WORDS 424-25 (Ford ed., 1892)).

32. *See id.*

33. *See id.*

Federalist No. 81 addressed that concern by illustrating the separation of the legislature and judiciary and by explaining that like the state constitutions, the federal Constitution would prevent the national legislature from interfering with a "particular case."[34] "'A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases.'"[35] In addition, Federalist No. 81 reassured the states that the Constitution's formulation for separating powers was modeled after similar provisions in the existing state constitutions, including Delaware's 1776 Constitution.[36]

Although Delaware's 1776 Constitution was replaced in 1792, when Delaware adopted a new Constitution, the concept of separating the powers of government was not lost.[37] In fact, it was substantially strengthened. John Dickinson, who presided over the Delaware constitutional convention, noted that the 1792 Constitution maintained the Separation of Powers Doctrine "by keeping [the powers of government] both 'distinct in department' and 'distinct in office, and yet connected in operation.'"[38] Dickinson also observed that "'in a well-regulated state, judges ought to be equally independent of the executive and legislative powers.'"[39]

C. *Early Challenges by State Legislatures to the Separation of Powers Doctrine*

Following ratification of the United States Constitution and the 1792 Delaware Constitution, the state and federal courts were vigilant in their efforts to protect the province of the court against encroaching legislatures. Early federal and state court decisions reflect "a consensus that 'the principle of separation of powers prohibited legislative interference with the judgments of American courts in specific cases.'"[40] In *Calder v. Bull*,[41] the United States Supreme Court considered the constitutionality of a statute enacted by the Connecticut legislature,

34. *See Evans*, 872 A.2d at 546.

35. *Id.* (quoting THE FEDERALIST NO. 81, at 545 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

36. *See id.*

37. *See id.*

38. *Id.* (quoting THE POLITICAL WRITINGS OF JOHN DICKINSON (1801); JOHN DICKINSON, *Letters of Fabius*, *in* PAMPHLETS 182-83 (Ford ed., 1788); *Jefferson to John Adams Sept. 28, 1787*, *in* THOMAS JEFFERSON, XII JEFFERSON PAPERS 189 (Boyd ed.); *Lectures on Law*, *in* JAMES WILSON, 1 WORKS OF WILSON 435 (Wilson ed.); In re Request of the Governor for an Advisory Opinion, 722 A.2d 307 (Del. 1998)).

39. *Evans*, 872 A.2d at 597.

40. *Id.* at 547.

41. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

which set aside the final judgment of a state court in a civil case. The Supreme Court ultimately rejected the argument that the statute was an unconstitutional *ex post facto* law.[42] The case is significant, however, as a precursor to *Marbury v. Madison* for its discussion on judicial review and the Separation of Powers Doctrine. In his concurring opinion, Justice Iredell emphasized that "the power to grant, *with respect to suits depending or adjudged,* new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions. . . . *The power . . . is judicial in its nature*; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority.'"[43]

State courts of this era also protected the role of the judiciary. In *Bates v. Kimball*,[44] the Vermont Supreme Court struck down an act of the Vermont legislature that authorized a party to appeal from the judgment of a court even though the time for appeal had expired.[45] In doing so, the Vermont Supreme Court denounced the legislature for overstepping its authority and stressed the "'necessity of a distinct and separate existence of the three great departments of government.'"[46]

D. *The Judiciary's Exclusive Powers as Enunciated in the United States Constitution and the State Constitution of Delaware*

The United States Constitution "'vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish.'"[47] The Delaware Constitution contains a similar provision: "'The judicial power of this State shall be vested in a Supreme Court . . . and such other courts as from time to time by law [be] established.'"[48] The judiciary has the power to "interpret the law and apply its remedies and penalties in particular cases."[49]

One of the judiciary's functions is to bring finality to legal controversies. "The judiciary has 'the power, not merely to rule on cases but to decide them . . . with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a "judicial power" is one to

42. *See id.* at 387.
43. *Evans*, 872 A.2d at 547 (quoting *Calder*, 3 U.S. at 398) (emphasis added)
44. Bates v. Kimball, 2 D.Chip. 77 (Vt. 1824).
45. *See Evans*, 872 A.2d at 547.
46. *Id.* (quoting *Bates*, 2 D.Chip. 77 at *7).
47. *Id.* at 548 (quoting Marbury v. Madison, 5 U.S. 137, 173 (1803)).
48. *Id.* (quoting DEL. CONST. art. IV, § 1).
49. *Id.* (citing John A Fairlie, *The Separation of Powers*, 21 MICH. L. REV. 393 (1922)).

render dispositive judgments.'"[50] The Delaware Constitution also grants the courts dispositive power over matters.[51] "The Supreme Court shall have jurisdiction . . . to determine finally all matters of appeal on the judgments and proceedings of said Superior Court in criminal causes."[52]

If the legislature disagrees with a court decision, its power is limited to enacting prospective measures.[53] Contrary to the beliefs of judicial independence opponents,[54] the legislature cannot exercise control over the court by retroactively affecting a decision.[55]

> If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry.[56]

The legislature cannot interfere directly in litigation.[57] The legislature "cannot annul, set aside, vacate, reverse, modify, or impair the judgment of a competent court. It cannot compel the courts to grant new trials, order the discharge of offenders, or direct what particular steps shall be taken in a particular judicial proceeding."[58]

III. JUDICIAL ELECTIONS: DETRIMENTAL IMPACT ON THE PUBLIC'S PERCEPTION OF JUSTICE

A. Introduction

In the spring of 2005, the Florida Supreme Court declined to reconsider a trial court's decision to remove Terri Schiavo's feeding tube. In doing so, the Court declared unconstitutional a Florida state law ordering reinsertion of the tube, thereby "checking and directing the majority" in the name of state law and the Florida Constitution, just as Tocqueville would have expected.[59] In *Bush v. Schiavo*, the Florida

50. *Evans*, 872 A.2d at 548 (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995)) (emphasis and citations omitted).
51. *See id.*
52. *Id.* (quoting DEL. CONST. art. IV, § 11).
53. *See id.*
54. *See supra* Part III.B.
55. *See Evans*, 872 A.2d at 547.
56. *Id.* at 548 (quoting *Plaut*, 514 U.S. at 225).
57. *See id.* at 549.
58. *Id.* (quoting BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE POWERS OF GOVERNMENT 117 (1963)).
59. *See Bush v. Schiavo*, 885 So.2d 321, 324 (Fla. 2004)); TOCQUEVILLE, *supra* note 2, at 264.

Supreme Court resisted calls to turn a case governed by indisputable facts and Florida's traditionally strict application of the Separation of Powers Doctrine into a political trophy.[60] By its order, the Court sent a strong message that it would not acquiesce to legislation to placate the political views of some at the expense of the rule of law. Simply stated, the Court told all who were listening (at the time, the entire nation) that it would uphold its role as *the* independent arbiter of the law.[61]

Negative responses to the Florida Supreme Court's carefully crafted opinion in *Schiavo* ranged from the predictably political (albeit factually absurd) to the threatening. Former United States Senator Rick Santorum (R-PA) derided the courts' actions as "unconscionable."[62] He told reporters "[this is] routinely done by the courts—deciding they are now a super-legislature. I'm not sure if the press realizes how serious this conflict is between the branches of government and how gravely concerned members of Congress are with [the] kinds of judicial tyranny we've seen."[63] Not to be upstaged, former United States Representative Tom DeLay (R-TX) vowed that "[t]he time will come for the men responsible for this to answer for their behavior."[64]

The well-orchestrated media campaign that followed the Santorum and DeLay attacks on the Florida Supreme Court added fuel to the fire that was meant to weaken the independence of the judiciary. The Florida Supreme Court held firm as the attacks grew in number and ferocity. Santorum, DeLay, and many of their contemporaries—of all political and ideological stripes—were right about one thing: conflicts between the three branches of government had risen to heights that exceeded even the "aberrations" that Tocqueville foresaw and that the country had experienced in its brief history.[65] At the heart of this conflict and what has long plagued our government and country, is a fundamental misunderstanding of the Separation of Powers Doctrine as it was created by our Founding Fathers and as it has developed through over two hundred years of trial, tribulation, and threat.

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60. *See Bush*, *supra* note 59, at 330.

61. *See id.* at 330-31.

62. Liza Porteus, *GOP Goes on Judicial Offensive*, FOXNEWS.COM, Apr. 1, 2005, http://www.foxnews.com/story/0,2933,152095,00.html.

63. *Id.*

64. *Id.* Unfortunately, veiled threats of violence against the judiciary are not new. For instance, Texas Senator John Cornyn has suggested that "'there may be some connection between the perception in some quarters, on some occasions, where judges are making political decisions yet are unaccountable to the public, that builds up and builds up and builds up to the point where some people engage in violence.'" Todd David Peterson, *Oh, Behave!*, LEGAL AFF. 16 (Nov./Dec. 2005).

65. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 264 (George Lawrence, trans., J.P. Mayer & Max Lerner, eds., Harper & Row 1966) (1835).

As a people living under dual sovereigns, we also live under two constitutions which, depending on one's state of residence, may provide for the separation of powers in varying degrees. At the same time, we all must understand that without an effective system of checks and balances between the branches of government, these branches will assume powers never intended for them. A branch of government that usurps power from other branches does so for its own benefit, not in the name of the voting public. As Douglas W. Hillman, a former judge in the U.S. District Court for the Western District of Michigan, wrote, "[G]overnment has a way of increasing its power at the expense of its citizens, often in incremental steps. Consequently, it is crucial that one truly independent institution be able to curb that ever creeping enlargement of power."[66]

B. The Separation of Powers Today: Assault and Retreat

Today, the breakdown of the separation of powers is marked by elected and appointed officials who assault judges with Tom DeLay-esque statements that judges will have to "answer for their behavior" or look over their shoulders when rendering future opinions.[67] Those firing the warning shots toward judges typically retreat to the safety of statements that their words were taken out of context or that they were simply responding to "judicial activism"[68] in the name of their constituents. The harm, however, is already done to a public that relies on its elected officials and news sources to inform them of the facts. In some instances, judges are subjected to retention elections in which they

66. Douglas W. Hillman, *Judicial Independence: Linchpin of Our Constitutional Democracy*, 76 MICH. BUS. L.J. 1300, 1301 (1997).

67. Mike Allen, *DeLay Wants Panel to Review Role of the Courts*, WASH. POST, Apr. 2, 2005, at A9, http://www.washingtonpost.com/wp-dyn/articles/A19793-2005Apr1.html; Phyllis Williams Kotey, *Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence While Ensuring Judicial Impartiality*, 38 AKRON L. REV. 597, 604 (2005) (quoting *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUM. RTS. L. REV. 123, 140 (1999)).

68. "A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, [usually] with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent." BLACK'S LAW DICTIONARY 850 (7th ed. 1999). *See also* Adam Cohen, *Psst . . . Justice Scalia . . . You Know, You're an Activist Judge, Too*, N.Y. TIMES, Editorials/Op-Ed, Apr. 19, 2005,http://www.nytimes.com/2005/04/19/opinion/19tue3.html?ex=1271563200&en=aff420b604578872&ei=5090&partner=rssuserland&emc=rss ("When it comes to judicial activism, conservative judges are no better than liberal ones—and, it must be said, no worse. If conservatives are going to continue their war on the judiciary, though, they should be honest. They do not want to get rid of judicial activists, a standard that would bring down even Justice Scalia. They want to rid the courts of judges who disagree with them.").

cannot respond effectively to their critics, often because they are bound by the Judicial Code of Ethics, and cannot reveal how they would decide future controversies. Some judges respond to these threats by adjusting their views of the law, while others stay silent in accordance with their duty to speak primarily through their court opinions, rather than through their campaigns as politicians.

Former Justice Joseph T. Walsh of the Delaware Supreme Court wrote in 1999:

> In recent times . . . the functioning of the judiciary, particularly the conduct of individual judges in high-profile cases, has been subject to close public scrutiny, often accompanied by strident criticism in the news media and by public officials. . . . [I]n an age of instantaneous communication, criticism of the conduct of individual judges quickly becomes an institutional indictment. In states where judges are elected, public perception can even result in terminating the career of incumbent judges.[69]

Justice Walsh may have had former Tennessee Supreme Court Justice Penny White in mind when he wrote the above statement. Justice White, a 1995 appointee to the five-member Tennessee Supreme Court, joined the majority in a June 1996 capital case that affirmed the court of appeal's reversal of a death sentence.[70] In *State of Tennessee v. Odom*,[71] the Tennessee Supreme Court found that the defendant received a fair trial, and it affirmed the defendant's conviction for first-degree murder and aggravated rape.[72] The Court found reversible error, however, in the lower court's reliance upon the jury's finding that the murder was committed under aggravating circumstances (because the murder was "heinous, atrocious, or cruel" and committed during an escape from lawful custody), and in the trial court's refusal to permit the defendant to present certain mitigating evidence.[73] The Tennessee Supreme Court vacated the death sentence and remanded for a new sentencing hearing, explaining that, "we find the errors found therein involve substantial rights and more probably than not affected the sentencing judgment or would result in prejudice to the judicial process."[74]

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69. Joseph T. Walsh, *Judicial Independence: A Delaware Perspective*, 2 DEL. L. REV. 1, 16 (1999).

70. *See* Phyllis Williams Kotey, *Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence While Ensuring Judicial Impartiality*, 38 AKRON L. REV. 597, 603 (2005).

71. State of Tenn. v. Odom, 928 S.W.2d 18, 21 (Tenn. 1996).

72. *See id.*

73. *Id.*

74. *Id.*

Two months after the three to two decision in *Odom*, Justice White (and Justice White, alone) was subjected to a contested retention election.[75] In Tennessee, a nominating commission appoints state supreme court justices, who must stand for reelection in the next biennial general election and retention election every eight years thereafter.[76] White was given two months to campaign, and she faced opposition from a special interest group and the governor of Tennessee, who denounced White as "soft on the death penalty and weak on victim rights."[77] As a result, White lost her retention election, fifty-five to forty-five percent.[78] Voter turnout was eighteen percent.[79] In the days following White's removal from the bench, the governor proclaimed, "Should a judge look over his shoulder to the next election in determining how to rule on a case? I hope so. I hope so."[80]

Justice White's retention debacle is a prime example of the kind of single case-driven witch hunt to which judges should never be subjected. While the Tennessee governor could assault White's record without revealing specifics and then retreat to the safety of "tough on crime" and "victims rights" sound bites, White, constrained by judicial ethics and without a campaign war chest, was unable to defend herself.[81] There was nothing democratic about Justice White's retention vote. As *Washington Post* reporter Joel Achenbach wrote two years before White was removed from the bench, "I think . . . that democracy is a poor name for a system in which voters routinely vote for people they know nothing about."[82]

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75. *See* Kotey, *supra* note 70, at 603.

76. *See id.*

77. *Id.* Justice White was opposed by Tennessee Senators, the Governor, and the Republican party, which sent a mailing to 2500 party leaders, encouraging them to reject Justice White's "liberal record" in criminal cases. John D. Fabian, *The Paradox of Elected Judges: Tension in the American Judicial System*, 15 GEO. J. LEGAL ETHICS 155, 156-57 (Fall, 2001).

78. *See* Robert L. Brown, *From Whence Cometh Our State Appellate Judges: Popular Election Versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L.J. 313, 316 (Winter, 1998).

79. *Id.*

80. *See* Kotey, *supra* note 70, at 604.

81. Stephen B. Bright, *Political Attacks On The Judiciary: Can Justice Be Done Amid Efforts To Intimidate And Remove Judges From Office For Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 314 (1997).

82. Joel Achenbach, *Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise?: Why Reporters Love Judicial Elections*, 49 U. MIAMI L. REV. 155, 158 (1994). Achenbach sarcastically explained his affinity for judicial elections: "I like judicial elections. Indeed, I cherish judicial elections. This is because I am a newspaper reporter, and newspaper reporters love anything farcical, funny, structurally absurd, or silly." *Id.* at 155.

A more recent example of this brand of single-case driven histrionics by lawmakers and the media is the firestorm that erupted when a district court judge in Montpelier, Vermont, Judge Edward Cashman, suspended a convicted sex-offender's ten-year prison sentence for sixty days.[83] In that case, the Vermont Commissioner of Corrections classified the defendant as one who was less likely than other sex offenders to commit another crime.[84] The Commissioner decided that the defendant would not, however, receive any treatment while he was in prison.[85] As a result, Judge Cashman was forced to choose between two imperfect sentences: a long prison term with no rehabilitation for the offender, or a short prison term followed by sex offender rehabilitation and probation for life.[86] Judge Cashman, a former prosecutor known for tough sentencing in his nearly twenty-five years on the bench, handed down the sixty-day sentence to guarantee that the defendant "would get into sex offender rehabilitation quickly or face a possible life sentence."[87] According to the judge, he chose the option that would best serve society: rehabilitation of the offender, rather than punishment alone.[88] The media misconstrued Judge Cashman's remarks at the sentencing hearing, concluding that he no longer believed in punishment.[89] The transcript clearly demonstrates that Judge Cashman actually stated that "punishment is not enough," indicating that treatment in addition to punishment was the appropriate course.[90]

In response to Judge Cashman's judgment call, some Vermont lawmakers called for his resignation.[91] Although legislators voted Cashman into a new six-year term in 2001 by a margin of 137-15,[92] some wanted to subject the judge to a retention election a year earlier than his regularly scheduled 2007 review by the state legislature's Judicial Retention Committee. After co-sponsoring the resolution in the legislature calling on Judge Cashman to resign, Representative Duncan

83. *See* Louis Porter, *Judge Defends Sex Sentence Amid Firestorm*, RUTLAND HERALD, Jan. 11, 2006, *available at* http://www.rutlandherald.com/apps/pbcs.dll/article?AID=2006601110357&template=printart.

84. *Id.*

85. *See id.*

86. *See id.*

87. *See* Brian Joyce, *Sex Offender Sentence Criticized*, 3 WCAX-TV NEWS, Jan. 5, 2006,http://www.wcax.c om/global/story.asp?s=4325804&ClientType=Printable.

88. *See* Porter, *supra* note 83.

89. *See e.g.*, Lisa Rathke, *Judge Steadfast About Sex Offender Case*, ABCNEWS, Nov. 13, 2006, http://www.foxnews.com/wires/2006Nov13/0,4670,JudgeSexualAssault,00.html.

90. *Id.*

91. *See* Joyce, *supra* note 87.

92. *See* FoxNews.com, *Light Sentence for Child Molester Leaves Vermont Judge Under Fire*, Jan. 12, 2006, http://www.foxnews.com/story/0,2933,181498,00.html.

Kilmartin said, "It's time to stop allowing judges in general . . . to hide behind the claim that the sentence has to protect society and not the individual victim."[93] Meanwhile, Fox News columnist John Gibson wrote the following in his column titled "Moronic Judges":

> Let's see if there's a sudden change in the faces wearing black robes in Vermont. See if people wake up and notice who's down at the courthouse playing judge this week. Is it somebody who doesn't believe in jail? I would think that's a basic question when you're considering who should be a judge.[94]

The controversy quieted, and the calls for an early retention election ceased after Judge Cashman increased the defendant's controversial sentence from 60 days to a term of three to ten years in jail.[95] Judge Cashman's decision to revisit the sentence was prompted by a decision by the Vermont Human Services Secretary, which ordered the Department of Corrections to change its policy regarding low-risk sex offenders and eligibility for treatment in jail.[96] After the defendant's sentence was increased, the resolution demanding Judge Cashman's resignation was amended, and any references to him were removed.[97] Ironically (and laughably), the amended resolution included a provision "that the General Assembly 'recognizes the importance of an independent judiciary to the rule of law in our constitutional system of government.'"[98]

In September 2006, Judge Cashman announced his retirement from the bench.[99] Judge Cashman officially stepped down in April 2007 when his term expired and when he would have been subject to a retention election.[100]

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93. *See* Porter, *supra* note 83. Acknowledging that Judge Cashman's sentence did not violate a sentencing guideline or statute, the resolution cited as one of the bases for the call for Judge Cashman's resignation that "Judge Cashman . . . declared that after 25 years, he no longer believes in punishment." J.R.H. Res. 52, 2005-2006 Leg. Sess. (Vt. 2006) *available at* http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/resolutn/JRH052.HTM.

94. *See* John Gibson, *Moronic Judges*, FOXNEWS.COM, Jan. 6, 2006, http://www.foxnews.com/story/0,2933, 180915,00.html.

95. *See Judge Adds Years to 60-Day Term for Molester*, CHICAGO SUN-TIMES, Jan. 27, 2006, at 5.

96. *See Judge Increases Molester's Sentence*, SOUTH FLORIDA SUN-SENTINEL, Jan. 27, 2006, at 12A.

97. *See A Review of State Legislation Affecting the Courts*, GAVEL TO GAVEL (Nat'l. Ctr. for State Courts, Williamsburg, Va.), Jan. 25, 2007.

98. *Id.*

99. *See Vermont Judge Blasted for Short Sex-Offender Sentence to Retire*, FOXNEWS.COM, http://www.foxn ews.com/story/0,2933,211679,00.html.

100. *See id.* Judge Cashman did not cite the controversial sentence as the impetus for his retirement but cited his age and family issues.

Both the Penny White and Edward Cashman incidents involved respected judges who, ironically enough, would objectively be considered "tough on crime" based on the totality of their records.[101] Neither judge was able to effectively mount a response to unsubstantiated accusations of judicial activism and, in White's case, furious and highly organized efforts to kick the judge off the bench. The common thread in these cases is a breakdown in the separation of powers to the extent that judges are pressured to do what is popular and result-oriented, rather than what is just and process-oriented—the duty of a judge as a member of an independent judiciary.

C. *The High Price of Judicial Elections*

In jurisdictions where judicial candidates are elected rather than nominated, judicial independence is eroding. By participating in the campaign process, judicial candidates must "sell themselves" to garner the votes and financial support needed to win elections. Inevitably, the lines between judge and politician blur, and, in many cases, it seems that political debts acquired on the campaign trail are having a deleterious effect on court decisions and the public perception of judge.

The cost of judicial elections is high, not just in terms of money, but more importantly, in terms of the cost to society—the loss of a truly independent judiciary and the loss of public confidence. A successful bid for office depends in large part on a candidate's ability to solicit large donations from wealthy, influential contributors.[102] All too often those contributors are lawyers who will appear frequently before that judge, or litigants in cases presided over by that judge. There can be little question that conflicts of interest arise when contributors litigate before the judge whose campaign they funded. What effect does this political indebtedness have on a successful candidate's ability to remain impartial on the bench? What effect does it have on the public's perception of the independence, impartiality and fairness of the judge?

Such questions surfaced in the 2004 contest for a seat on the Illinois Supreme Court. In that race, then-Circuit Judge Lloyd Karmeier and his opponent, Illinois Appellate Judge Gordon Maag, set a national fundraising record for a single state Supreme Court campaign.[103] Together, the two candidates raised over $9.3 million in campaign funds,

101. *See* Christopher Graff, *Cashman Best Known for Pro-Law Stands,* Jan. 12, 2006, http://www.timesargus.com/apps/pbcs.dll/article?AID=/20060112/NEWS/60112001/1002.

102. *See* James Sample, *The Campaign Trial: The True Cost of Expensive Court Seats*, SLATE, Mar. 6, 2006, http://www.slate.com/id/2137529.

103. *See id.*

far exceeding the previous national record of $4.9 million set in Alabama in 2000.[104] Karmeier received $350,000 in campaign contributions from employees, lawyers, and representatives of the insurance company State Farm.[105] At the time of the campaign, State Farm had an appeal pending before the Supreme Court of Illinois seeking the reversal of a $1 billion trial court verdict, including $456 million in contractual claims.[106] Karmeier also received an additional $1 million from State Farm affiliates.[107] Regarding the exorbitant campaign donations he received, Karmeier stated, "[T]hat's obscene for a judicial race. What does it gain people? How can people have faith in the system?"[108] Karmeier won the election.

Remarkably, shortly after taking the bench, and despite the campaign money he took from State Farm, Justice Karmeier refused to recuse himself from hearing the State Farm appeal.[109] He voted to overturn the lower court's $456 million award for contractual damages against State Farm.[110] Commenting on Karmeier's decision, an editorial in the *St. Louis Post-Dispatch* stated, "Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will cast doubt over every vote he casts in a business case."[111]

A high profile case in West Virginia illustrates the conflicts of interest produced by corporate campaign donations. In November 2007, the West Virginia Supreme Court of Appeals reversed a $50 million jury verdict against the country's fourth largest coal company, Massey Energy.[112] In that case, Chief Justice Elliot Maynard voted in the 3-2 majority decision to overturn the verdict against Massey Energy.[113] Shortly thereafter, pictures surfaced of Chief Justice Maynard vacationing on the French Riviera with the CEO of Massey Energy, Don Blankenship.[114] The pictures were taken in the summer of 2006, while

104. *See* JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS IN THE GREAT LAKE STATES, 2000-2008 12 (2008), *available at* http://www.mcfn.org/pdfs/reports/NPJE_GreatLakes_2000-2008.FINAL.pdf.

105. *See* Sample, *supra* note 102.

106. *See id.*

107. *See id.*

108. Ryan Keith, *Republican Lloyd Karmeier Wins Supreme Court Seat*, ASSOCIATED PRESS, Nov. 3, 2004, *available at* http://www.illinoisyr.com/detail_content.asp?id=197.

109. *See* Sample, *supra* note 102

110. *See id.*

111. James Sample, Op-Ed., *Justice for Sale*, WALL ST. J., Mar. 22, 2008, at A24, *available at* http://online.wsj.com/article/SB120614225489456227.html?mod=opinion_main_commentaries.

112. *See* Justice at Stake Campaign, Caperton v. Massey Resource Page, http://www.justiceatstake.org/node/ 107 (last visited July 21, 2009).

113. *Id.*

114. Sample, *supra* note 111, at A24.

Massey's appeal was pending before the court.[115] The pictures spurred charges of impropriety, prompting the court to rehear the case. Maynard recused himself from participating in the rehearing.[116] Justice Larry Starcher also recused himself.[117] Although Starcher voted against overturning the verdict against Massey, he stated that his public criticisms of Blankenship could create the appearance of bias.[118] Starcher furthermore demanded that his colleague Justice Brent Benjamin recuse himself as well, since Benjamin had received over $3 million in campaign contributions from Blankenship during his 2004 campaign.[119] Justice Benjamin, who earlier voted with the majority to overturn the verdict against Massey Energy, refused to recuse himself.[120] Outraged, Justice Starcher wrote, "Just think about it—$4 million! I know hardly a soul who could believe that a justice who benefited to this extent from a litigant could rule fairly on cases involving that litigant or his companies."[121]

In April 2008, the West Virginia Supreme Court of Appeals again reversed the jury verdict against Massey Energy, and again Justice Benjamin voted in favor of Massey Energy.[122] Three months later, the plaintiff Harman Mining Co. filed an appeal with the United States Supreme Court asking the Court to consider whether Justice Benjamin should have recused himself from presiding over Massey's appeal.[123]

In June 2009, the United States Supreme Court issued a 5-4 opinion reversing the decision of the West Virginia Supreme Court of Appeals on the ground that Justice Benjamin should have recused himself from hearing Massey's appeal.[124] Although the Court did not find that Justice Benjamin was actually biased by Blankenship's large campaign contributions, it found that "there was a serious, objective risk of actual bias that required [his] recusal."[125] In this landmark decision, the Court

115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. Sample, *supra* note 111, at A24.
120. *Id.*
121. Editorial, *Bravo: Starcher, Maynard acts*, THE CHARLESTON GAZETTE, Feb. 16, 2008, http://wvgazette.c om/Opinion/Editorials/200802150735.
122. *See* Caperton v. A.T. Massey Coal Co., Inc., 2008 WL 918444 (W. Va. Apr. 3, 2008).
123. *See Cecelia Mason and Scott Finn, Plaintiff Speaks Out in Caperton v. Massey Supreme Court Case,* West Virginia Public Broadcasting, Mar. 2, 2009, http://www.wvpubcast.org/newsarticle.aspx?id=8407.
124. *See* Caperton v. A.T. Massey Coal Co. Inc., 129 S.Ct. 2252 (2009). Justice Kennedy delivered the opinion of the Court, and was joined by Justices Stevens, Souter, Ginsburg and Breyer. Chief Judge Roberts issued a dissenting opinion that was joined by Justices Scalia, Thomas and Alito, and Justice Scalia also filed a dissenting opinion.
125. *See Caperton,* 129 S.Ct. at 2256.

held that Due Process requires judges to recuse themselves when the circumstances of a case create a "probability of bias."[126] The Court's decision states, in part,

> [t]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.[127]

In applying this analysis, the Court found that "Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case."[128] Although the four dissenting justices challenged the workability of the Court's new "probability of bias" standard,[129] it is clear that the Court's majority decision and its application to the circumstances presented in the Massey case is an enormous step forward on the path to restoring the public's confidence in an independent judiciary. "This is a major victory for the rule of law," stated James Sample, Counsel at the Brennan Center for Justice. "The Supreme Court has reaffirmed the fundamental principle that money should not influence the courts, and that justice should not be for sale."[130]

These are but two examples. The inherent conflicts of interest that exist when judges preside over cases involving litigants that financed their elections are undeniable. Even if the judge's decision is not financially motivated, there exists an overwhelming appearance of *quid pro quo,* which undermines the public's confidence in the judiciary. As the Supreme Court acknowledged in the *Massey* case, it ultimately does not matter whether bias in judicial decision-making is real or perceived. The appearance of impropriety is sufficient to perpetuate the public's perception that "justice is for sale on some clearance rack parked behind the courthouse."[131]

IV. CURRENT EFFORTS TO REPEL (AND REDUCE) ATTACKS ON JUDICIAL INDEPENDENCE

Discussions enumerating the threats to judicial independence abound; solutions, however, are elusive. After the dust settles, one thing

126. *See id.*
127. *Id.* at 2255.
128. *Id.* at 2264.
129. *Id.* at 2256-75.
130. The Brennan Center for Justice at New York University School of Law, *Supreme Court Reverses Decision in Caperton v. Massey,* June 8, 2009, *available at* http://www.commondreams.org/newswire/2009 /06/08-4.
131. John Gibeaut, *Caperton's Coal,* A.B.A. J., Feb. 2009, *available at* http://abajournal.com/magazine/capertons_coal/.

is clear—the real battle is the fight over public opinion. The forces on the other side have successfully engaged the media to their advantage, often distorting and exploiting issues to advance their purpose. As members of the bench and bar, we spread the message and educate the public that judicial independence is essential to maintain the rule of law. We must make them understand that "judicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must."[132]

Fortunately, some efforts are underway to educate the public about the threats to judicial independence and to combat those threats. Several groups have established task forces to promote an independent judiciary, including the American Judicature Society's Center for Judicial Independence,[133] the American Bar Association's Least Understood Branch,[134] and Justice At Stake, a non-partisan coalition "working to keep courts fair and impartial."[135] These groups offer many approaches—from education, with Law Day as the notable success story, to public relations rapid response teams.[136] These teams, composed of members of local bar associations, are organized and prepared to address controversial court decisions, and they use the media to educate the public.[137] Some believe that judges should do more public speaking, not about specific cases, but about the role of the judiciary in general.[138] All of these suggestions have been met with varying degrees of acceptance and controversy, and no one proposal has been identified as the silver bullet.[139] Reactive solutions are one approach, but we must not lose sight of the major underlying cause of these attacks on judicial independence.

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132. *Judicial Security and Independence: Hearing Before the Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Justice Anthony M. Kennedy), *available at* www.uscourts.gov/testimony/JusticeKennedy021407.pdf.

133. American Judicature Society, Judicial Independence Home Page, http://www.ajs.org/cji/default.asp (last visited July 21, 2009).

134. American Bar Association, ABA Standing Committee on Judicial Independence, http://www.abanet.org/judind/home.html (last visited July 21, 2009).

135. Justice at Stake, About Justice at Stake, http://www.justiceatstake.org/node/12 (last visited July 21, 2009).

136. *See generally* ABA COMM. ON JUDICIAL INDEPENDENCE, RAPID RESPONSE TO UNFAIR AND UNJUST CRITICISM OF JUDGES (2008), *available at* http://www.abanet.org/judind/toolkit/impartialcourts/Rapid_Response_Pamphlet.pdf (providing guidelines for the establishment of public relations programs).

137. *See id.*

138. *See* ALFRED P. CARLTON, JR., JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY (July 2003), http://www.abanet.org/judind/jeopardy/pdf/report.pdf; C.J. Shirley S. Abrahamson, *Judicial Independence as a Campaign Platform*, WASH. ST. B. ASS'N (2005), http://www.wsba.org/media/publications/barnews/2005/mar-05-abrahamson.htm.

139. *See* Jan Pudow, *Kennedy: Our Judiciary is the Envy of the World*, 33 FLA. B. NEWS 7 (July 15, 2005), *available at* http://goliath.ecnext.com/coms2/gi_0199-4523987/Kennedy-our-judiciary-is-the.html.

A. Election of Judges is a Major Underlying Cause of Attacks on Judicial Independence

At the state court level, as evidenced by the events in the *Schiavo*, Penny White, and Edward Cashman incidents, the root cause of the problem is the manner in which some state judges are selected and the length of their terms. "Over 80% of state trial and appellate judges are elected by the people, and most state judges have limited terms, some as little as four years."[140] The first line of defense in maintaining an independent judiciary is to insulate the judicial officers from a political selection process. A system that appoints rather than elects members of the judiciary, similar to the federal system, is optimal. States should also consider modeling their judicial selection process after the Delaware system, which not only appoints judges, but also ensures that the bench is politically balanced.[141] This approach can only enhance the public's perception (and the reality) that the Court is politically neutral.

Of course, appointed judges, just like elected judges, are subject to criticism and may face retribution for unpopular decisions. But in the case of appointed judges, the "retribution" is the impeachment process set forth in the Constitution.[142] Given the rise in attacks on judicial independence, it is not surprising that there has been a significant increase in recent years in impeachment proceedings.[143] In our nation's history, "only 13 federal judges have been faced with articles of impeachment, and only seven have been convicted and removed from office. Three of those seven convictions and removals have taken place in the last 20 years."[144] Not surprisingly, the climate for state judges (most of whom are elected)[145] is worse than that for federal judges (all of

140. C.J. Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3, 9 (2003) (citing AM. BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS: PART TWO 3 n.1 (1998); Roy A. Schotland, *Comment, Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149, 154-55 (1998)).

141. *See* DEL. CONST. art. IV, § 3.

142. "[A]ll civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4.

143. *See Judicial Impeachment: History and Current Trends*, JUSTICE AT STAKE, Sept. 18, 2006, http://www.faircourts.org/default.asp (follow "Press Room" hyperlink; then follow "Press Releases" hyperlink; then follow "9/18/06" hyperlink).

144. *Id.*

145. Over 87 percent of state judges are either elected or subject to retention elections. *Judicial Impeachment: History and Current Trends*, JUSTICE AT STAKE, Sept. 18, 2006, http://www.justiceatstake.org/contentViewer.asp?breadcrumb=7,55,890. We believe the politics involved in state judiciary selection process contributes to the disparity in the number of impeachment proceedings initiated against state judges versus federal judges.

whom are appointed), with 48 documented impeachment threats from 2001-2005, which is almost double the rate from the previous four-year period.[146] "The most frequently cited issues involve decisions on criminal sentencing, education, abortion, and gay and lesbian legal issues."[147]

A perfect example is the recent statement by an opponent of gay marriage in response to the California Supreme Court decision[148] allowing homosexuals to marry in California. James Dobson, chairman of Focus on the Family, announced that the California Supreme Court Justices had "arrogantly" declared the will of the people null and void.[149] Other opponents of the ruling indicated that the decision would make California Supreme Court Chief Justice Ron George, who is up for reelection in 2010, the "chief target of California voters."[150] This and similar attacks levied at judges for doing their jobs, *i.e.* construing the law, damage the public trust in the judiciary, inflame an already incendiary issue, and distract the public from the real issues and productive debate on the merits.

Another troubling example of an assault on judicial independence is the attack on the justices in the majority in *Kennedy v. Louisiana.*[151] Opponents of the majority decision striking down the death penalty in a vicious child rape case found it to be "appalling" and "terribly flawed."[152] Louisiana Governor Bobby Jindal said that "[t]he opinion reads more like an out-of-control legislative debate than a constitutional analysis."[153] Justice Kennedy, the author of the decision, was the object of most of the critics, some of whom have even called for his impeachment.[154] One journalist wrote, "The intellectual backflips Justice

146. *See id.*

147. *Id.*

148. In re Marriage Cases, 183 P.3d 384 (Cal. 2008).

149. *See* Devon Williams, *California Rules in Favor of Same-Sex "Marriage"; Dr. Dobson Outraged*, CITIZENLINK.COM, May 15, 2008, http://www.citizenlink.org/content/A000007441.cfm.

150. Campaign for Children and Families, *California Pro-Family Response to State Supreme Court Ordering Homosexual "Marriage" Legalization*, SAVECALIFORNIA.COM, May 15, 2008, http://savecalifornia.com/ca-release-05-15-08-california-pro-family.html.

151. 128 S.Ct. 2641 (2008).

152. Matthew Continetti, *An Indecent Decision*, WKLY STANDARD, July 7, 2008, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/015/269gzinz.asp.

153. BayouBuzz.com, *Louisiana Gov. Jindal Outraged Over Child Rape Case*, June 25, 2008, http://www.bayoubuzz.com/News/Louisiana/Politics/Louisiana_Gov._Jindal_Outraged_Over_Child_Rape_Case__6661.asp.

154. *See e.g.*, Posting of Greg to http://rhymeswithright.mu.nu/archives/267386.php (June 25, 2008, 02:26 EST).

Kennedy performed in his opinion would be impressive if they weren't so offensive to constitutionalist sensibilities."[155]

In *Kennedy*, the Supreme Court Justices in the majority rendered a very unpopular decision, no question. As Justice Kennedy acknowledged, the rape "was one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on [the] victim or to convey the revulsion society, and the jury that represents it, sought to express by sentencing petitioner to death."[156] People can and will vocalize their disagreement with this decision.[157]

We certainly do not suggest that it is improper to criticize judicial decisions. "To the contrary, [such criticism] is a healthy sign for democracy that the public is engaged with the workings of the judicial system."[158] Judges make mistakes. They err. If they err on the law or facts, the appellate process enables those aggrieved by that error to have it corrected. If they err by engaging in wrongful conduct, they are subject to discipline or impeachment. As Justice O'Connor reminds us, no one is above the law and "members of the judiciary cannot sincerely believe that they should be regarded as above the very laws they are charged with interpreting."[159] The problem is when criticism "cross[es] over into intimidation."[160]

Fortunately, in Delaware, threats to judicial independence are not as plentiful or virulent as those in other parts of the country. We believe this is attributable, in large part, to our judicial selection process and the unique atmosphere our small geographical stature creates.

B. "The Delaware Way"

Thomas Jefferson characterized Delaware as a "jewel among states."[161] We believe this to be true in many respects, not the least of which is the effective working relationship, collegiality and respect

155. Matthew Continetti, *An Indecent Decision*, WKLY STANDARD (July 7, 2008), *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/015/269gzinz.asp.

156. *Kennedy*, 128 S.Ct. at 2646.

157. As Chief Justice Thomas Moyer of the Ohio Supreme Court noted: "We know that almost from their creation, the courts have been criticized for their judgments. That is a part of life in a democracy. It is a rare court decision that does not displease someone." C.J. Thomas Moyer, Address at the Columbus Metropolitan Club (June 28, 2006), *available at* http://www.abanet.org/judind/toolkit/impartialcourts/metropolitanclub.pdf.

158. J. Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Oct. 1, 2006, *available at* http://www.opinionjournal.com/extra/?id=110009019.

159. *Id.*

160. *Id.*

161. ENCYCLOPEDIA BRITANNICA *Delaware, available at* https://edit.britannica.com/getEditableToc?tocId=9 273954.

between the branches of government. Unlike many other states, in Delaware the lines of communication between the branches of government are open, and open wide. This open communication is largely due to our small size. There is no question that the ease of communication and the long-standing cooperation between the branches unquestionably improves the functioning of each branch. For example, it is not unusual for legislators to solicit the Attorney General's input before proposing legislation that which would affect criminal penalties or establish new crimes. With regard to proposed legislation affecting penalties, the legislature might also solicit input from the Department of Corrections and/or the judicial branch. Communication flows in more than one direction, too. The Delaware judiciary invites members of the legislature to visit the courts and attend educational programs.[162] The three branches of government in Delaware frequently participate in joint projects, such as the Three-Branch Personnel System Reform Task Force.[163] According to our former Chief Justice, E. Norman Veasey, this interbranch cooperation is directly attributable to the "intelligence, approachability, and integrity" of Delaware public officials.[164] And, according to Delaware Supreme Court Justice Henry DuPont Ridgely:

> There is really a constancy of purpose here. We are committed to doing what is necessary to have the best state court system in the United States. I hasten to add that it is not merely the judiciary which is committed to this effort. This is a collaborative undertaking and involves the judges and their staff people, the members of the Delaware Bar, the General Assembly and the Governor.[165]

At home and nationally, the Delaware judiciary commands respect. "All three branches of government in Delaware are keenly aware of the reputation of the judicial branch of government and of the enormous contribution that the judicial branch makes to Delaware's economy and to the well-being of our citizens."[166] The judiciary is nationally recognized for its excellence, not controversy.[167]

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162. *See* C.J. E. Norman Veasey, State of the Judiciary Address (April 6, 2004), *available at* http://courts.delaware.gov/Courts/Supreme%20Court/pdf/?StateJudiciary 04.pdf.

163. *See id.*

164. C.J. E. Norman Veasey, *I Have the Best Job in America*, 13 DELAWARE LAWYER 20 (Winter 1995).

165. *Delaware Courts Still at the Top: A Constancy of Purpose*, 11 METRO. CORP. COUNS. 55 (Nov. 2003) (Interview of The Hon. Henry DuPont Ridgely, former President Judge, Superior Court of Delaware and current Justice, Supreme Court of Delaware).

166. Veasey, *supra* note 162.

167. *See* HARRIS INTERACTIVE, INC., LAWSUIT CLIMATE 2007: RATING THE STATES (2007), *available at* http://www.instituteforlegalreform.com/lawsuitclimate2007/pdf/ Climate_Report.pdf [hereinafter LAWSUIT CLIMATE 2007].

C. *Replace Elections with the Delaware Model of Judicial Appointment*

1. The Delaware Judicial Appointment Process Strikes a Balance that Has Proved to be Effective

Delaware judges are appointed, not elected. Article IV of the Delaware Constitution provides that judicial officers of the Supreme Court, Court of Chancery, Superior Court, Family Court, and the Court of Common Pleas "shall be appointed by the Governor, by and with the consent of a majority of all the members elected to the Senate, for the term of 12 years each."[168] In order to ensure that the courts are fair and impartial, the Delaware system goes one step further and requires that the courts be politically balanced.[169] The courts must have an equal number of members from each of the major political parties.[170] A court with an odd number of members must not have "more than a bare majority . . . of the same major political party."[171]

The Governor's choice for the judicial nominee is selected from a list submitted by the Judicial Nominating Commission.[172] The Commission reviews all of the applicants for the open position and selects at least three individuals for submission to the Governor.[173] The stated purpose of the Commission is to select

> men and women of the highest caliber, who by intellect, work ethic, temperament, integrity and ability demonstrate the capacity and commitment to sensibly, intelligibly, promptly, impartially, and independently interpret the laws and administer justice. The Commission shall seek the best qualified persons available at the time for the particular vacancy at issue.[174]

The Commission itself is a testament to the Delaware's "commitment to a bipartisan judiciary composed of judges of high

168. DEL. CONST. art. IV, § 3.
169. *See id.*
170. *See id.*
171. *Id.*
172. *See* Exec. Order No. 4 (Mar. 27, 2009) (Gov. Markell), http://governor.delaware.gov/orders/exec_order_4.shtml. *See also* Guy v. Judicial Nominating Com'n, 659 A.2d 777, 779 (Del. Super. 1995) ("The Judicial Nominating Commission was first established by Governor Pierre S. du Pont, IV, pursuant to Executive Order No. 4 , approved on February 24, 1977. His successor, Governor Michael N. Castle, continued the Commission pursuant to Executive Order No. 1, approved on February 21, 1985. Governor Castle preceded Governor Carper in office.").
173. *See* Exec. Order No. 4 (Mar. 27, 2009) (Gov. Markell), http://governor.delaware.gov/orders/exec_order_ 4.shtml.
174. *Id.*

integrity, independence and excellent legal abilities."[175] Like the composition of the judiciary, the Commission is politically balanced.[176] The Commission is composed of nine members, eight of which are appointed by the Governor.[177] No more than five of the Governor's appointees can be from the same political party.[178] The ninth member of the Commission is appointed by the President of the Delaware State Bar Association.[179] The Commission is not only politically balanced but also strikes a balance between members of the Delaware Bar and the citizenry of the State of Delaware. The Governor's appointees are composed equally of "distinguished attorneys and laypersons."[180] The Delaware judicial nominating process goes to great pains to ensure a balanced and independent judiciary, and, therefore, it is no surprise that the public perceives Delaware courts as fair arbiters of justice.[181]

2. Delaware Judicial Canons Ensure the Integrity of the Judiciary

"A judge should uphold the integrity, independence and impartiality of the judiciary." So states Canon 1 of the Delaware Judges' Code of Judicial Conduct which was adopted in 1993.[182] The Comment to Canon 1 states:

> Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they should comply with the law, as well as the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.
>
> The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The

175. *Id.*
176. *See id.*
177. *See id.*
178. *See* Exec. Order No. 4, *supra* note 173.
179. *See id.*
180. *Id.*
181. *See* LAWSUIT CLIMATE 2007, *supra* note 167, at 3.
182. DEL. JUDGES' CODE OF JUDICIAL CONDUCT Canon 1 cmt. [hereinafter CODE]. The Code consists of four canons and is set forth with commentary in Appendix A.

> Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.[183]

The Code is strict, and strictly enforced by the Delaware "Court on the Judiciary."[184] Any Delaware judicial officer "may be censured or removed" by the Court on the Judiciary for violating the Code:

> A judicial officer may be censured or removed . . . for willful misconduct in office, willful and persistent failure to perform his or her duties, the commission after appointment of an offense involving moral turpitude, or other persistent misconduct in violation of the canons of Judicial Ethics as adopted by the Delaware Supreme Court from time to time.[185]

The Court on the Judiciary is comprised of the Chief Justice and Associate Justices of the Delaware Supreme Court, the Chancellor of Chancery Court, the President Judge of Superior Court, the Chief Judge of Court of the Common Pleas, and the Chief Judge of Family Court.[186] The Court on the Judiciary need not be unanimous to censure or remove a sitting judge for misconduct; only the "affirmative concurrence of two-thirds of the members" is necessary.[187]

The Code is not the only mechanism in place in Delaware to preserve and ensure "an independent and honorable judiciary."[188] In 1994, the Court on the Judiciary created a committee of judges and lawyers to render advisory opinions on proper judicial conduct with respect to the Code.[189] If a judge has a question or concern about whether he or she can engage in a certain activity, the judge may request an opinion from the Committee. This resource is frequently utilized and has pre-empted many potential Code violations and the appearance of impropriety.[190] The Code, the Court on the Judiciary, and the Judicial Ethics Advisory Committee are integral to maintaining the reputation of the Delaware Judiciary for fairness, impartiality, integrity, and independence.

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183. *Id.*
184. *See* DEL. CONST. art. IV, § 37.
185. *Id.*
186. *See id.*
187. *Id.*
188. CODE, *supra* note 182, at Canon 1.
189. *See* In re Adoption of Rules of Procedure, slip op. (Del. . 1994), http://courts.delaware.gov/rules/?DJCJC _101608a.pdf. *See* Appendix B for a summary of the Advisory Opinions issued by this committee.
190. *See id.*

V. CONCLUSION

We believe that an appointed, politically-balanced judiciary insures judicial independence and instills public confidence. Election of judges invites conflicts of interest and a perception of bias, and prompts attacks on judicial independence. We recognize, however, that change in state judicial selection processes will not happen overnight. In those states which choose to maintain their system of judicial elections, there are steps that can be taken to promote and preserve judicial independence, such as: removing judges from fundraising, lengthening terms, establishing strong disciplinary counsel, and public education on the importance of separation of powers and an independent judiciary.

We must work to change the misconception that proponents of judicial independence do not hold judges accountable for their decisions. "[J]udicial independence does not mean that the judge is a loose cannon on the deck of justice, shooting in any direction he or she wishes."[191] All public officials, including judges, are accountable, but judges must be able to exercise their judgment within a framework that allows them to make decisions without knee-jerk retribution.[192] An independent judiciary is indispensable and is what retains our status as a free democracy. We cannot stand by idly and watch it erode. Justice White's comments in Section VI make clear that there is much we can do to combat assaults on judicial independence. We urge jurists, lawyers, and lawmakers to consider these efforts and undertake a committed approach to promoting and protecting judicial independence.

VI. POSTSCRIPT: AN INTERVIEW WITH JUSTICE PENNY WHITE[193]

We recently had the opportunity to speak with Justice White about her experiences as a Tennessee Supreme Court Justice and the current state of the judiciary. Justice White shared her thoughts on how to reinforce an independent judiciary and the Separation of Powers

191. C.J. Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3, 4 (2003).

192. *See id.*

193. The Honorable Penny J. White, former Tennessee Supreme Court Justice, is presently the Director of the Center for Advocacy and Associate Professor of Law at the University of Tennessee College of Law. Justice White, who has written extensively on the subject of judicial independence, graciously granted us an interview on June 16, 2008. This section memorializes Justice White's opinions on the current state of the judiciary, and what we can do to ensure that the judiciary preserves its independence. The authors are very grateful to Justice White for her willingness to speak with us and share her observations. In addition, the authors thank Justice White for her valuable contributions as a jurist, scholar and teacher, and to this article.

Doctrine. According to Justice White, these are "bad times."[194] In the last decade, respect among the branches of government has eroded. And as that trend continues, the balance shifts farther away from an independent judiciary.

Attacks on judicial independence are not new, but they are becoming more fervent. Justice White attributes the United State Supreme Court decision in *Republican Party of Minnesota v. White*[195] with elevating the detractors' zealous tone. In that case, the Supreme Court held that candidates for judicial office could announce their views on disputed legal or political issues.[196] *White* created the perfect environment for interference with the courts, and special interests groups have seized the opportunity by trying to control those state courts with an elected judiciary. All the special interest groups need is to find a pliable soul who wants to be a judge and then get that person elected.

In their attempts to control the judiciary, the most common method the special interest groups employ is to target judges who do not share their views. Minorities and women are disproportionately the focus of such attacks, because they are easier marks. One reason may be the stereotypical views held for those groups. Women, for example, are expected to take a "woman's position" in cases involving rape, custody, or family issues.[197]

The tone of these attacks is also becoming increasingly vicious. In a recent Wisconsin Supreme Court election, Justice Louis Butler's opponent, Judge Michael Gableman, used a Willie Horton-style campaign ad that juxtaposed a photo of Justice Butler next to a mugshot of an inmate, who was convicted of rape.[198] Justice Butler represented the inmate when he was a public defender.[199] The side-by-side placement of the images was purposely done to show the men's physical resemblance.[200] Not only did the ad make both photos look like mugshots but implied to the viewer that Justice Butler is responsible for the inmate's horrible crimes.[201]

194. Telephone Interview with Justice White, Director of the Center for Advocacy and Associate Professor of Law, University of Tennessee College of Law (June 16, 2008).

195. 536 U.S. 765 (2002).

196. *See id.* at 788.

197. Telephone Interview with Justice White, Director of the Center for Advocacy and Associate Professor of Law, University of Tennessee College of Law (June 16, 2008).

198. *See* FactCheck.org, Wisconsin Judgment Day, the Sequel, http://factcheck.org/elections-2008/wisconsin_judgment_day_the_sequel.html.

199. *See id.*

200. *See id.*

201. *See id.*

What can we, as a legal community, do to prevent these attacks? The most obvious way to address the influence of special interests is to go to the source of their power—money. Ideally, a cap on special interest group spending would equalize those influences. But, as in *White*, any attempts to "suppress" the special interest groups' political speech would potentially face a First Amendment challenge.

So how can we change the pendulum's swing? Justice White observed that all too often judicial independence is taken for granted. Education must be the cornerstone of any effort to reinforce judicial independence and to curb the special interest groups' influence. Moreover, education has to start at the earliest levels by teaching school children at a young age about the doctrine of separation of powers and the rule of law.

Education is one step. But we must also take these attacks on judicial independence as an opportunity to go on the offensive and institute measures that will restore and reinforce the public's confidence in the judiciary and provide tools so voters can make educated decisions about the judicial candidates. The public deserves good judges, and voters should be presented with the best candidates. Some member of the public, however, will be tempted to vote based on the judicial candidates' views on certain individual issues. But voters must be persuaded that they should not elect judicial candidates the same way they elect legislators. Judges must understand the rule of law. Accordingly, there are criteria that are better indicators for selecting judges. Justice White advocated three approaches: (1) judicial performance evaluations; (2) recusal standards; and (3) judicial conduct commissions.

A. Judicial Performance Evaluations

For two decades, the ABA has worked on judicial performance evaluation guidelines that address demeanor, punctuality in written work and at trial, composure, treatment of parties, knowledge, and articulate legal rulings. Currently, there are 17 States that use these guidelines.[202] Of those states that use judicial performance evaluations, some of them, such as Colorado, Alabama, New Jersey, and Tennessee, publish the results on websites, in voter guides, or in newspapers.

202. *See* National Center for State Courts, Judicial Performance Evaluation (2005), http://www.ncsconline.org/wc/CourTopics/statelinks.asp?id=46&topic=JudPer.

B. Recusal Standards

Ideally, states should select judges through judicial appointment systems, not elections. A complete overhaul in most states, however, is not realistic or practical, because the public has a valid fear of dramatic change. Justice White used to say that she would be comfortable with a hybrid system that elects trial judges and appoints appellate judges, but according to Justice White, the Supreme Court's decision in *White*[203] changed the landscape. But if there must be judicial elections, we have to institute strong recusal standards. This can be done in two ways: (1) peremptory challenge or (2) automatic recusal. The peremptory challenge would operate like a challenge to a juror with one party having a limited ability to strike a judge. Likewise, an automatic recusal would require judges to recuse themselves when they have made public statements about an issue that is later raised in a case. Recusal would be automatic, not optional.

Justice White noted that the Supreme Court in *White* also advocated for recusal standards. "Minnesota may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. It may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."[204] Some doubt, however, that recusal alone can redress the consequences of *White*. In his dissent, Justice Stevens criticized the majority's recusal remedy as limited and recalled an early decision of the Court that found that recusal standards may be useful to cure individual bias, but "'no such mechanism can overcome the appearance of institutional partiality.'"[205]

C. Judicial Conduct Commission

Composed of non-lawyers and lawyers, a judicial conduct commission would evaluate judicial candidates' ads and claims. When there is a false or derogatory ad, the commission would ask the candidate to remove the bad ad or to appear before the commission. Although the commission would not have any binding authority over the candidate, commissions like these have been effective.

The composition of the commission is also an important consideration. The members of the commission must be volunteers, preferably community leaders, and could also include bar association

203. *White*, 536 U.S. at 765.
204. *Id.* at 794 (citing Brown v. Hartlage, 456 U.S. 45, 60 (1982)).
205. *Id.* at 802 (quoting Mistretta v. U.S., 488 U.S. 361, 407 (1989)).

presidents or retired judges. But the commission must draw-in non-lawyers, because the public is cynical and may tend to believe that commission members who are lawyers may use their positions to earn favors from judges.

There are other means that can be employed to preserve judicial independence, such as eliminating life tenure for state judges. The ABA has recommended that judges be elected to one lengthy term, such as a 15-year term. The alternative would be a 2-term system: one short term, four years, with a judicial performance evaluation at the end of the first term, followed by a longer term. We can also change the way we talk about judicial independence, a term that opponents have given a bad connotation. In response to the negative connotation, the ABA has taken a Madison Avenue approach by promoting "judicial fairness" and "fair courts"—not "judicial independence."[206]

Finally, we can go out and talk to the public. Judges, especially role-model judges, and lawyers have to speak out. Local judges can start at the grass roots level, by speaking at community groups or at schools. The Terri Schiavo case, for example, would be a very good tool for teaching the public about the importance of separation of powers and the rule of law. As Justice White suggested, "[Schiavo] is an example that the every day citizen can relate to that demonstrates why we need court decisions based on law and not political pressure."[207] It is the perfect case to demonstrate the need for checks and balances and the roles of the courts and the legislature.

Promoting judicial independence, the foundation of democracy, has to be a life-long project, but it is well-worth the effort.

206. Telephone Interview with Justice White, Director of the Center for Advocacy and Associate Professor of Law, University of Tennessee College of Law (June 16, 2008).

207. *Id.*