Hastings Law Journal

Volume 61 | Issue 6 Article 2

1-2010

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Ming W. Chin

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JUSTICE MING W. CHIN*

Good afternoon, everyone. I am delighted to be here with you today, participating in this very important Symposium on Democracy and the Courts. An impartial and independent judiciary is an indispensible pillar in the structure of our Democracy. The issues you are examining during today's Symposium are vital to the health and viability of an impartial and independent judiciary. Many of you are law students. Just to make sure you are comfortable in this setting, let me give you some hypotheticals.

Imagine, if you will, that an initiative measure appeared on your local election ballot proposing to allow judges to be sued or criminally prosecuted for their decisions. Or, imagine an initiative proposing a retroactive term limit for judges that would remove a majority of your state's sitting supreme court justices and almost forty percent of your courts of appeal. Or, imagine a measure that would allow judges to be recalled at any time for any reason.

Sound far-fetched? Hardly. Just a few years ago, ballot measures just like these were up for a vote in South Dakota, Colorado, and Montana.[1] The measure that would have subjected judges to civil and

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* The Honorable Ming W. Chin was appointed to the California Supreme Court in March 1996. He chairs the Judicial Council of California's Court Technology Advisory Committee, as well as the California Commission for Impartial Courts Implementation Committee. He frequently lectures on DNA, genetics, and the courts before, among other organizations, the American Bar Association's Judicial Division, the State of California's Center for Judicial Education and Research, the National College of Probate Judges, and the Wisconsin Supreme Court Judicial Education Committee. He serves on the National Academies' Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence. The California Judicial Council named Justice Chin the 2009 Jurist of the Year. He is an author of *California Practice Guide: Employment Litigation* (Rutter Group 2009). These remarks were given at *Hastings Law Journal*'s spring 2010 Symposium, "Democracy and the Courts: Judicial Selection, Legal Literacy, and the Role of Public Opinion." The Symposium was held at the University of California, Hastings College of the Law, on February 19, 2010.

1. *See* Editorial, *Voting for Judicial Independence*, N.Y. TIMES, Nov. 2, 2006, at A26; Nancy McCarthy, *South Dakota Measure Puts Judges on Edge*, CAL. BAR J., Nov. 2006, http://archive.calbar.ca.gov/Archive.aspx?articleId=81746&categoryId=81741&month=11&year=2006.

criminal actions based on their rulings was called "Jail 4 Judges."[2] It would have eliminated judicial immunity and provided for a special grand jury with power to authorize civil suits and criminal prosecutions against judges based on their rulings.[3] To add insult to injury, it would have required judges to help pay for the special grand jury, by deducting almost two percent of their judicial salaries for the grand jury's operating expenses.[4]

Now, it is true that attacks on judicial independence are almost as old as the American Republic itself; they date back at least to 1805, when President Jefferson tried, but failed, to use the impeachment procedure to remove United States Supreme Court Justice Samuel Chase, in part because of the content of his decisions.[5] But most people agree that attacks are now on the rise. As retired United States Supreme Court Justice Sandra Day O'Connor wrote not long ago, judges "have become central villains on today's domestic political landscape," and "the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."[6]

Sadly, the increasing effort to politicize the judiciary is partly a self-inflicted wound. For example, in 2006, an Alabama Supreme Court justice publicly attacked his colleagues for overturning a death sentence.[7] Their crime? Following the United States Supreme Court's holding that the Eighth Amendment prohibits imposing the death penalty for offenses committed by minors.[8] The Alabama justice charged that the high court's decision was an "unconstitutional" act of "blatant judicial tyranny" by five "liberal activist" justices, and he argued that his colleagues, as judges sworn to support the Constitution, had a duty *not* to follow it.[9] Later in 2006, he made his criticism the centerpiece of his campaign to unseat Alabama's chief justice. He was joined on the ballot by three others who targeted other incumbent justices for following allegedly "unconstitutional" high court decisions and federal court orders.[10] He lost, as did the other judicial candidates who took up his cause.[11]

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2. *Voting for Judicial Independence*, *supra* note 1.

3. *Id.*

4. McCarthy, *supra* note 1.

5. Chief Justice William H. Rehnquist, Remarks at the University of Richmond T.C. Williams School of Law Symposium on Judicial Independence (Mar. 21, 2003), http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_03-21-03.html.

6. Sandra Day O'Connor, Op-Ed., *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

7. Justice Tom Parker, *Alabama Justices Surrender to Judicial Activism*, AM. VIEW, http://www.theamericanview.com/index.php?id=505&print=1&PHPSESSID=f710bbbcd5aa81df010210ob8f0f31a7 (last visited June 24, 2010).

8. *See id.*

9. *Id.*

10. *'Commandments Judge' Moore Soundly Defeated in Alabama Primary*, CHURCH & STATE,

Unfortunately, this is not an isolated incident, as advertising in judicial elections around the country has taken an increasingly negative tone. For example, the 2008 race for the top seat on the Michigan Supreme Court produced what one nonpartisan judicial watchdog group called an "orgy of negativity."[12] Backers of the incumbent accused the challenger of granting "[p]robation to a terrorist sympathizer."[13] Backers of the challenger struck back with an advertisement urging voters to call the incumbent and "thank him for protecting wealthy corporations from suits by women who are sexually harassed and raped at work."[14]

In a 2004 election for a seat on the Illinois Supreme Court, backers of the Democratic candidate ran advertisements accusing the Republican candidate of "giving probation to kidnappers who [had] tortured and nearly beat[en to death] a 92-year-old grandmother . . . and . . . to a man who [had] molested a young girl and her brothers."[15] Backers of the Republican candidate hit back with an advertisement claiming that the Democratic candidate had voted to free "a man convicted of sexually molesting a 6-year-old girl."[16] An Illinois State Bar Association Committee determined that the advertisements were "inflammatory and misleading," and asked the candidates to renounce them.[17] "Both declined, saying they believed what the ad[vertisements] said."[18]

And the 2004 race for a seat on the West Virginia Supreme Court saw what some have called "the nastiest mudslinging in the history of modern American court campaigns."[19] "Of the nearly 10,000 attack ad[vertisements] that ran nationwide in 2004 state Supreme Court races, nearly 43 percent appeared in West Virginia, including an ad[vertisement] that accused [the incumbent] of assigning a child rapist to work in a high school."[20]

These developments are just a part of a larger trend of increasing influence of politics in judicial elections. According to reports,

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July/Aug. 2006, at 16, 17, *available at* http://www.au.org/media/church-and-state/archives/2006/07/lsquocommandme.html.

11. *Id.*

12. Marcia Coyle, *An 'Orgy of Negativity' in Michigan Judicial Race*, NAT'L L.J., Nov. 4, 2008, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202425764687&hbxlogin=1.

13. John Gramlich, *Nasty Judicial Races Renew Complaints*, STATELINE.ORG, Dec. 6, 2008, http://www.stateline.org/live/details/story?contentId=360624.

14. *Id.*

15. Terry Carter, *Mud and Money*, A.B.A. J., Feb. 2005, at 40, 43, *available at* http://www.abajournal.com/magazine/article/mud_and_money/.

16. *Id.*

17. *Id.*

18. *Id.*

19. Kavan Peterson, *Cost of Judicial Races Stirs Reformers*, STATELINE.ORG, Aug. 5, 2005, http://www.stateline.org/live/printable/story?contentId=47067 (quoting executive director of Justice at Stake, Bert Brandenberg).

20. *Id.*

"[c]ampaign contributions to candidates for state supreme courts increased more than 750 percent between 1990 and 2004."[21] More generally, in 2000 and 2004, candidates for judicial elections broke fundraising records in nineteen states; in 2006, at least four more states saw similar records broken.[22] It has even been said that "[s]uccessful [state] supreme court candidates now sometimes raise more money than many gubernatorial or [United States] Senate candidates."[23] All told, from 2000 to 2009, state supreme court candidates raised over two hundred million dollars nationally, more than double the amount spent in the previous decade.[24] And that figure does not even include the tens of millions more spent on "independent" television advertisements.[25] As some have said, "Cash has become king in judicial elections."[26]

These numbers should be of grave concern to anyone who cares about an independent and impartial judiciary. When judges have to rely on campaign donors to get or keep their jobs, there is an inevitable public perception of judicial bias and favoritism. This perception threatens to diminish the courts' effectiveness because, as the United States Supreme Court has noted, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."[27] United States Supreme Court Justice Anthony Kennedy put it this way: "[T]he law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral."[28]

Two recent decisions by the United States Supreme Court both illustrate the problem and threaten to exacerbate it. In June 2009, the Court held in *Caperton v. A.T. Massey Coal Co.* that due process prohibited an elected state supreme court justice from hearing a corporation's appeal from a fifty million dollar verdict because of extraordinary campaign contributions he had received during his successful campaign to unseat one of the court's incumbents.[29] Incredibly, the state justice, who cast the deciding vote to reverse the judgment against the corporation, had refused to recuse himself, even though the corporation's chairman of the board (after the verdict but before the appeal) spent three million dollars getting him elected.[30] In the majority

21. Roger K. Warren, *Politicizing America's State Courts*, CAL. CTS. REV., Winter 2007, at 6, 9.

22. *Id.*

23. *Id.*

24. Justice at Stake Campaign, Money & Elections, http://justiceatstake.org/issues/state_court_issues/money_elections.cfm (last visited June 24, 2010).

25. *Id.*

26. *Id.*

27. Mistretta v. United States, 488 U.S. 361, 407 (1989).

28. *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999).

29. 129 S. Ct. 2256–57 (2009).

30. *Id.* at 2257–58.

opinion, Justice Kennedy reiterated the importance of judicial impartiality:

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.[31]

Six months later, in January 2010, the Court issued its blockbuster decision in *Citizens United v. FEC*.[32] Overruling two of its prior decisions, a closely divided court held that under the First Amendment, Congress may not prohibit corporations or labor unions from making independent campaign expenditures that expressly advocate the election or defeat of a particular candidate.[33] In reaching this conclusion, the five members of the majority rejected the view that the government's interest in preventing either corruption or the appearance of corruption justified the spending restrictions.[34] Among other things, the majority noted that "26 States do not restrict independent expenditures by for-profit corporations," and that "[t]he Government [had] not [even claimed] that these expenditures [had] corrupted the political process in those States."[35] Moreover, the majority concluded, "[t]he appearance of influence or access [created by corporate campaign expenditures] . . . will not cause the electorate to lose faith in our democracy."[36]

Of course, the four dissenters in *Citizens United* saw things quite differently. In their view, the restrictions were permissible because of "[t]he distinctive threat to democratic integrity posed by corporate domination of politics."[37] "[T]here are substantial reasons," the dissenters reasoned, "why a legislature might conclude that unregulated general treasury expenditures will give corporations 'unfai[r] influence' in the electoral process, and distort public debate in ways that undermine rather than advance the interests of listeners."[38] Among other things, "a substantial body of evidence" suggested that corporate sponsors of so-called "issue ads" crafted "to help or harm a particular candidate" were routinely granted special post-election access to successful candidates.[39] This access "can create both the opportunity for, and the appearance of,

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31. *Id.* at 2266–67 (quoting Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)).

32. 130 S. Ct. 876 (2010).

33. *See id.* at 913 .

34. *Id.* at 909.

35. *Id.* at 908–09.

36. *Id.* at 910.

37. *Id.* at 974 (Stevens, J., dissenting).

38. *Id.* (internal citation omitted) (quoting Austin v. Michigan, 494 U.S. 652, 660 (1990)).

39. *Id.* at 965.

quid pro quo arrangements."[40] And Congress may legitimately conclude that avoiding even the appearance of corruption is "'critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.' A democracy cannot function effectively when its constituent members believe laws are being bought and sold."[41]

The dissenters also focused on the fact that corporate wealth will enable corporations to drown out non-corporate voices. "Corporate 'domination' of electioneering," they warned,

> can generate the impression that corporations dominate our democracy. When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders "call the tune" and a reduced "willingness of voters to take part in democratic governance."[42]

Finally, and as particularly relevant to today's Symposium, the dissenters offered this warning regarding the impact of the majority's decision on judicial elections:

> 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. Perhaps "*Caperton* motions" will catch some of the worst abuses. This will be small comfort to those States that, after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.[43]

Of course, much has already been written—both positive and negative—about the high court's decision in *Citizens United*, and debate over its real world effect is ongoing. According to Justice O'Connor, whose retirement paved the way for a new majority to overrule the Court's precedents and who has spoken extensively about judicial elections and judicial independence since her retirement, the *Citizens United* decision could worsen the "funding arms races" we have already seen in judicial elections and be a "problem for maintaining an independent judiciary."[44] It "has signaled that the problem of campaign

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40. *Id.*

41. *Id.* at 964 (quoting U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973)).

42. *Id.* at 974 (internal citation omitted) (quoting McConnell v. FEC, 540 U.S. 93, 144 (2003)).

43. *Id.* at 968 (internal citation omitted).

44. Sandra Day O'Connor, Keynote Remarks at the Georgetown Law Center: Choosing (and Recusing) Our State Court Justices Wisely (Jan. 26, 2010), http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=1006.

contributions in judicial elections might get considerably worse and quite soon."[45] For example, Justice O'Connor said,

> [W]e can anticipate that labor unions and trial lawyers . . . might have the financial means to win one particular state judicial election, and maybe tobacco firms and energy companies have enough to win the next one. And if both sides unleash their campaign spending monies without restrictions, then . . . mutually assured destruction is the most likely outcome.[46]

As for whether she agrees with the *Citizens United* decision on the law, Justice O'Connor had this to say: "Since I was one of several authors [of one of the decisions the court overruled] if you want my legal opinion, you can go read it."[47] Of course, only time will tell who is right regarding the consequences of *Citizens United.*

Now, maintaining judicial impartiality and independence is no small task—it requires hard work and deliberate action. As Justice O'Connor recently observed: "Judicial independence does not just happen all by itself. It is tremendously hard to create, and easier than most people imagine to destroy."[48]

It is precisely for this reason, and in response to the increasing attacks on judges across the nation, that in 2007, California's Chief Justice Ronald George established the California Commission for Impartial Courts. The Commission's purpose is to preempt attacks from partisan and special interests seeking to influence judicial decisionmaking and to insure that judicial elections do not become more like elections for political office that are expensive, nasty, and overly politicized.[49] When Chief Justice George asked me to chair the Commission, my first reaction was, "Oh, no, not another committee." But because of the importance of the cause, I agreed to serve.

In December 2009, the Commission presented its final report and recommendations to the California Judicial Council. The report's seventy-one recommendations cover four general topics: (1) judicial candidate campaign conduct, (2) judicial campaign finance, (3) public information and education, and (4) judicial selection and retention.[50]

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45. *Id.*

46. *Id.*

47. *Id.*

48. Sandra Day O'Connor, *A Fair, Impartial and Independent Judiciary*, NAT'L VOTER, Feb. 2008, at 7, 8, *available at* http://www.lwv.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=10515.

49. News Release, Judicial Council of California, Chief Justice George Names Statewide Commission for Impartial Courts (Sept. 4, 2007), http://www.courtinfo.ca.gov/presscenter/newsreleases/NR50-07.PDF.

50. COMM'N FOR IMPARTIAL COURTS, JUDICIAL COUNCIL OF CAL., RECOMMENDATIONS FOR SAFEGUARDING JUDICIAL QUALITY, IMPARTIALITY, AND ACCOUNTABILITY IN CALIFORNIA 12, 32, 60, 77 (2009), http://www.courtinfo.ca.gov/jc/tflists/documents/cicfinalreport.pdf.

Four separate task forces were charged with evaluating how to make improvements in these areas.[51]

Fortunately, the Judicial Council accepted the report. Chief Justice George has since formed a committee to consider implementation of the Commission's recommendations. I am Chair of that committee as well. The Implementation Committee's first step was to identify those recommendations that could be implemented immediately, because they were noncontroversial and their implementation was already underway or involved little or no cost in terms of money or additional staff resources. Thirty-one of the report's seventy-one recommendations fit this criteria, including amendments to the Code of Judicial Ethics, the creation of a Public Outreach and Civics Education Advisory Group, changes to the California Courts website, and changes to California's Judicial Nominees Evaluation Process.[52]

The Committee determined that implementation of the remaining recommendations is more problematic—some because they are too controversial, and others because they are simply too costly to implement in our current economic circumstances. Although these recommendations are an integral part of the overall plan for preserving an impartial and independent judiciary in California, they will, unfortunately, have to be put on the back burner until there is enough money to move forward with them.

As Justice O'Connor has warned, "[i]n these challenging and difficult times, we must recommit ourselves to maintaining the independent judiciary that the Framers sought to establish."[53] And, as Florida Supreme Court Justice Harry Lee has said: "The rule of law is not a liberal value or a conservative value and it certainly is not a Democratic value or a Republican value . . . [r]ather it is an American value."[54] Because of the inextricable link between independent judges, the rule of law, and democracy, threats to judicial independence necessarily threaten our democratic system. Let us together insure that our judicial system continues to be fair, impartial, independent, and dedicated to the rule of law. If we do that, then our democracy will remain strong and enduring.

Thank you.

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51. News Release, Judicial Council of California, *supra* note 49.

52. *See, e.g.*, COMM'N FOR IMPARTIAL COURTS, JUDICIAL COUNCIL OF CAL., *supra* note 50, at 97, 102, 105.

53. O'Connor, *supra* note 6.

54. Gary Blankenship, *Partisan Attacks Threaten Judicial Independence*, FLA. BAR NEWS, July, 15, 2004, http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/Articles/6FDBB1BE7873FEC485256EC90057A078.