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## Civility, Judicial Independence and the Role of the Bar in Promoting Both

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I want to talk tonight about the erosion of civility in our courts and in our profession, how this phenomenon threatens judicial independence—which, in our justice system, is fundamental to the preservation of the rule of law—and the obligation of the practicing Bar both to help restore civility and to defend our courts and judges when they are wrongly attacked.

There has been a lot of welcome attention in recent years to the issue of civility—or, more precisely, to the increasing *lack* of civility in litigation. Locally, Superior Court Judges Noel Kramer and Bruce Mencher, D.C. Fellows Secretary Andrew Marks, and the D.C. Bar, among others, have focused on the problem, and I have written and spoken about it as well.<sup>1</sup>

The sad fact is that whether we like it or not, “hard-ball” tactics, “scorched earth” strategies, and so-called “take no prisoners” litigation

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\* Judge Paul L. Friedman has been a judge of the United States District Court for the District of Columbia since 1994. On May 29, 2002, United States District Judge Paul L. Friedman addressed the 2002 Annual Dinner of the D.C. Fellows of the American Bar Foundation with these heartfelt remarks about civility, professionalism, and the obligation of the Bar to respond to unfair attacks on the bench. Judge Friedman reminds us that “Judges must lead by example. We must set the proper tone of civility in the courtroom and in written opinions.” They have been modified slightly and updated for purposes of publication. This article was published electronically in November 2002.

1. See Bruce S. Mencher, *Civility – A Casualty of Modern Litigation? An Alert to the Bench and Bar*, WASH. LAW., Sept./Oct. 1993, at 19; D.C. BAR, D.C. BAR VOLUNTARY STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT (1997); D.C. BAR TASK FORCE ON CIVILITY IN THE PROFESSION, FINAL REPORT 12-13 (1996); Paul L. Friedman, *Taking the High Road: Civility, Judicial Independence, and the Rule of Law*, 58 N.Y.U. ANN. SURV. AM. L. 187 (2001) [hereinafter Friedman, *Taking the High Road*]; Paul L. Friedman, *Fostering Civility: A Professional Obligation*, Address to the Advanced Intellectual Property Litigation Techniques Program (Feb. 28, 1996), in A.B.A. SEC. OF INTELL. PROP. NEWSL. (Am. Bar Assn Section of Intellectual Prop. Law, Chicago, Ill.), Summer 1996, at 3 [hereinafter Friedman, *Fostering Civility*].

are the trend these days, a means of choice by increasing numbers of litigators. Judges routinely see these tactics in our courtrooms, and we see them even more frequently in depositions, a forum in which there usually is no referee, no umpire, no judge to call a halt to ad hominem attacks, harassment, and abuse.<sup>2</sup>

The problem is that if incivility as a trend becomes culturally institutionalized and accepted, it threatens the pursuit of justice in very real ways, as well as the credibility of the justice system, judges and the courts, and ultimately the rule of law itself. I believe that leaders of the Bar, as well as judges, have an obligation to step in before it is too late and say how far is too far, how much is too much.

But how did we even reach this point? Unfortunately, what's happening in the law simply is a reflection of what's going on in society at large. "Law, like the larger society, has been coarsened. Win-at-any-cost is now the norm."<sup>3</sup> There is less civility in public discourse generally, in politics and government, on television, certainly in the sports world, and, of course, in the tabloid press. Many younger people—including young lawyers—have grown up in this environment, and they will practice what they see all around them because that's how the world they have come to know seems to function.

Unless, that is, the rewards and incentives of the system forbid it. Unless they are told, if not required, by the more experienced among us that such an approach is unacceptable and in the long run counterproductive. Unless they are persuaded, as Justice Sandra Day O'Connor has said, that "[i]t is enough for the ideas and positions of the parties to clash; the lawyers don't have to."<sup>4</sup> This only will work, however, if senior lawyers at law firms and government agencies and the leaders of the Bar have not themselves turned their backs on traditional notions of civility and professionalism. And if we judges also accept our responsibility for changing the tone and making sure that we in no way reward obnoxious or over-the-top tactics. We cannot allow the increased stake that lawyers, firms and clients have in success—and the prevalent notion that law is more a business than a profession—to

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2. See Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U.L. REV. 513, 513 (1994) [hereinafter Aspen, *Renewed Civility*]; Marvin E. Aspen, *From the Bench: Doing Something About Civility in Litigation*, LITIG., Winter 1992, at 61 [hereinafter Aspen, *From the Bench*]; Friedman, *Taking the High Road*, *supra* note 1, at 191; Friedman, *Fostering Civility*, *supra* note 1, at 4.

3. ROBERTA R. KATZ & PHILIP GOLD, *JUSTICE MATTERS: RESCUING THE LEGAL SYSTEM FOR THE TWENTY-FIRST CENTURY* 74 (1997).

4. Sandra Day O'Connor, *Civil Justice System Improvements*, Remarks Before the American Bar Association (Dec. 14, 1993) (transcript on file with author).

be an excuse for the “hired gun,” “Rambo” mentality that breeds incivility and lack of professionalism.

How do we accomplish this on a practical level? Lawyers serve their clients, of course, through providing their skills, their seasoned judgment, and their advice. Fundamental to being an effective lawyer is the ability to reason, to engage in rational discourse, to present analytically sound arguments—all of which basically are skills consistent with professionalism and civility and wholly at odds with incivility. Lawyers also must be reminded that they can be advocates for their clients without assuming their clients’ personalities, antipathies, and tactics. As Professor Stephen Carter has written: “Civility assumes that we will disagree; it requires us not to mask our differences but to resolve them respectfully.”<sup>5</sup> Most importantly, lawyers offer to clients their own professional reputations and the integrity and credibility with the courts that they have established over time. If these commodities are squandered through a Faustian “selling of their soul” to clients, lawyers lose their value to future clients, not to mention their dignity.

For our part, judges must make clear that incivility and unprofessional conduct are absolutely not acceptable in our courtrooms, in depositions in cases over which we preside, and in briefs filed in our courts. While judges cannot be substitute mentors, we can lay out clearly defined rules of the road for young and more experienced lawyers alike as to what is acceptable in litigation and what simply will not be tolerated. We can—and must—maintain control of the courtroom and demand compliance with the rules and fundamental courtroom etiquette.<sup>6</sup> We must address these issues aggressively and not be reluctant to use the tools at our disposal when appropriate: monetary sanctions imposed on counsel, contempt of court, or referral to the disciplinary authorities, among others.

Judges must also lead by example. We must set the proper tone of civility in the courtroom and in written opinions.<sup>7</sup> Admittedly, it is difficult to be even-tempered, calm and reasonable every minute of every day, but it is the job of the judge—particularly the trial judge—to try.<sup>8</sup>

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5. STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* 282 (1998).

6. See KATZ & GOLD, *supra* note 3, at 101 (Judges must “take back the courtroom” and “rein in attorneys whose tactics become too aggressive or abrasive, or clearly questionable.”).

7. See Aspen, *Renewed Civility*, *supra* note 2, at 519; Friedman, *Taking the High Road*, *supra* note 1, at 195; Friedman, *Fostering Civility*, *supra* note 1, at 5.

8. See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, Twenty-Fourth James Madison Lecture on Constitutional Law at New York University School of Law (Mar. 9,

Nothing is to be gained by our adopting an authoritarian persona. Regrettably, every practitioner has known judges who are irascible, arbitrary, rude and demeaning towards lawyers.<sup>9</sup> One of the very first jury trials I ever had as a young prosecutor was before such a judge. He had embarrassed me so thoroughly in the presence of the jury that for weeks afterward my self-confidence was diminished to the point that I thought I could never again go back into a courtroom and try a case. This is not the kind of message judges should be sending. We must remember that lawyers, jurors, and witnesses all take their cues from the judge, and if he or she sends the wrong signals, the entire process suffers.<sup>10</sup> As Judge Marvin Aspen has written: "Like it or not, judges are role models . . . . Judges cannot ask lawyers to accept a standard of professional conduct to which they do not abide."<sup>11</sup>

On the broader playing field, incivility currently is taking an even more dangerous form: the personal attack, now a routine part of public engagement not only on "reality TV," but also in politics, government, and the media as well. The "McLaughlin Group" and Jerry Springer-style shouting matches have replaced the reasoned approaches of the Walter Cronkites or Edward R. Murrows. Issues are not discussed as much as are personalities and motives. And many of our government officials—particularly in the legislative branch—have taken to these styles of "debate" as well: name-calling and invective in lieu of honest discussion about issues or policy differences. It is no longer enough to argue the merits of an issue: attacks on the character and motives of one's opponent now have become standard tools in the arsenal of aggressive advocates.

It is in this context that some politicians and cause-driven lawyers now are freely attacking the motives and integrity of courts and judges in ways that I fear ultimately will undermine the rule of law. Some members of Congress have called for the impeachment of federal

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1993), in 67 N.Y.U. L. REV. 1185, 1186, 1194, 1196 (Dec. 1992) (suggesting that judges can "encourage civility by setting a civil example themselves, which means being less abrasive and short-tempered"). See also Aspen, *From the Bench*, *supra* note 2, at 61; Philip Allen Lacovara, *Un-Courtly Manners: Quarrelsome Justices Are No Longer a Model of Civility for Lawyers*, A.B.A. J., Dec. 1994, at 53.

9. See Friedman, *Taking the High Road*, *supra* note 1, at 197; Aspen, *From the Bench*, *supra* note 2, at 61.

10. See Warren E. Burger, *The Necessity for Civility*, Remarks at the Opening Session of the American Law Institute (May 18, 1971), in 52 F.R.D. 211, 215 (1971) ("Every judge must remember that no matter what the provocation, the judicial response must be [a] judicious response and that no one more surely sets the tone and the pattern for courtroom conduct than the presider.").

11. Aspen, *Renewed Civility*, *supra* note 2, at 519.

judges with whose decisions they disagree,<sup>12</sup> and in the thirty-one states where judges are elected rather than appointed various groups have raised extraordinary amounts of money in attempts to unseat judges who they think are either too liberal or too conservative in their views.<sup>13</sup> In the short-sighted or misinformed view of many of these individuals, they apparently believe—or want the public to believe—that the courts are no different from the other two *appropriately* political branches of government.<sup>14</sup> They attack the legitimacy of the courts and their decisions by serving up the image of judges as politicians in black robes, prejudging cases, and making decisions based on their personal predilections rather than on the facts of a given case and the relevant law and precedents.<sup>15</sup>

In 1996, Judge Aspen commented on the implications of attacking and politicizing the position of judges. He said in a lecture at the National Judicial College:

Judges, lawyers, and the very foundation of our democratic society—an independent justice system enjoying the confidence of the citizenry—are under unprecedented attack. . . . [P]oliticians attack individual judges and

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12. See Christopher P. Banks, *The Politics of Court Reform in the U.S. Courts of Appeals*, 84 JUDICATURE 34, 37 (July-Aug. 2000); Richard Carelli, *ABA President Shestack Addresses Attempts at Judicial Intimidation*, LEGAL INTELLIGENCER, Feb. 3, 1998, at 4, LEXIS, News library; Bob Herbert, Editorial, *A Plan to Intimidate Judges*, N.Y. TIMES, Dec. 4, 2000, at A29; Herman Schwartz, *One Man's Activist. . . : What Republicans Really Mean When They Condemn Judicial Activism*, WASH. MONTHLY, Nov. 1997, at 10.

13. See Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 368, 383-86, 389 (2002); Kyle Cheek & Anthony Champagne, *Money in Texas Supreme Court Elections: 1980-1988*, 84 JUDICATURE 20, 25 (July-Aug. 2000); Dexter Filkins, *Republican Group Seeks to Unseat Three Justices*, N.Y. TIMES, Dec. 20, 2000, at A31.

14. The fact is, however, as Justice Stevens recently has written: There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity. Republican Party of Minn. v. White, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting). See also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959) (emphasizing “the role of reason and of principle” in judicial decision-making “as distinguished from the legislative or executive appraisal of conflicting values”).

15. See Thomas R. Phillips, Commentary, *When Money Talks, the Judiciary Must Balk*, WASH. POST, April 14, 2002, at B2 (“Judges are different from other elected officials . . . . [J]udges . . . interpret the law, not invent it. Only if the public believes that judges are the servants of the law, not legislators disguised in robes, will the courts be respected.”); De Muniz, *supra* note 13, at 386 (“Ohio Supreme Court Chief Justice Thomas J. Moyer stated: ‘Dissent is part of the American spirit, but to extract political revenge, to threaten the tenure of a judge over a decision with which some may disagree, places the judge in the same political position as a mayor or a legislator. It suggests that judges owe some members of the community something other than the impartial resolution of disputes.’”).

individual judicial systems as part of an overall attack on our court systems. Like it or not, we judges have become part of the current national political debate. When judges and the justice system are routinely demeaned as part of this political debate, the moral force of our rulings and the public's confidence in the courts . . . are mortally damaged.<sup>16</sup>

As one commentator noted recently: "It's hard to remember a time in our recent history when federal judges were subjected to so much disrespect and vitriol from virtually every corner of America. It's not a good sign."<sup>17</sup>

The American Bar Association Commission on Separation of Powers and Judicial Independence has pointed out that the tenor of these recent attacks on judges and the courts has become "shrill."<sup>18</sup> According to the ABA—and here is one of my key points—these attacks are having an impact on both the public's confidence in and respect for the courts, as well as on "the role of judges and an independent judiciary in protecting and enforcing the rights of people."<sup>19</sup> We are witnessing an increasing public distrust of the courts and a growing assumption by some members of the public that judges decide cases in accordance with their political preferences or party affiliations.<sup>20</sup> This may reflect a decline in the respect for governmental institutions generally, or a cynicism about the law and lawyers, or, in the states where judges are elected and polls show that three-fourths of voters believe campaign contributions influence judicial decisions, disillusionment with an electoral process that depends on huge sums of campaign money.<sup>21</sup> Whatever the specific reasons, the public's increasing distrust of the courts is a disturbing and dangerous trend that undermines the legitimacy of the courts and their decisions. As Justice Stevens said in his dissent in *Bush v. Gore*, the suggestion that courts are not impartial, "can only lend credence to the most cynical appraisal of the work of judges throughout the land. [And] it is confidence in the men and wo-

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16. Marvin E. Aspen, *The Erosion of Civility in Litigation*, Address at the National Judicial College (May 10, 1996) in *THE JUDGES' JOURNAL*, Fall 1996, at 32.

17. Andrew Cohen, *Commentary, The Dangers of Holding Judges in Contempt*, *WASH. POST*, July 7, 2002, at B2.

18. COMM'N ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AM. BAR ASS'N, *AN INDEPENDENT JUDICIARY* (1997), available at <http://www.abanet.org/govaffairs/judiciary/rover.html>.

19. *Id.*

20. See *Republican Party of Minn. v. White*, 536 U.S. 765, 788-89 (2002) (O'Connor, J., concurring); *Grutter v. Bollinger*, 288 F.3d 732, 752-53 (6th Cir. 2002) (Moore, J., concurring); see also Phillips, *supra* note 15, at B2; Cohen, *supra* note 17, at B2.

21. See Owen G. Abbe & Paul S. Herrnson, *How Judicial Election Campaigns Have Changed*, 85 *JUDICATURE* 286, 291 (May-June 2002); see also *Republican Party of Minn.*, 536 U.S. at 788-92 (O'Connor, J., concurring); Phillips, *supra* note 15, at B2.

men who administer the judicial system that is the true backbone of the rule of law.”<sup>22</sup>

The American system of justice was founded on the notion that the judicial branch is the one branch of government expected to be free of politics, lobbyists, and (at least on the federal level) the whims of voters, the one branch that was designed and intended to be as totally objective as possible in its decision-making and in the way it resolves disputes.<sup>23</sup> Indeed, as Justice Stevens has noted, “[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”<sup>24</sup> With pride, we call this judicial independence.<sup>25</sup>

One writer has defined judicial independence as “the ability of judges to be free from outside pressure, other than legal constraints and precedents, so they can decide cases in an impartial manner.”<sup>26</sup> Justice Paul J. De Muniz of the Oregon Supreme Court has written that judicial independence consists of “intellectual honesty and dedication to enforcement of the rule of law regardless of popular sentiment.”<sup>27</sup> Judges, said Justice Felix Frankfurter, are to have:

allegiance to nothing except . . . the effort to find their path through precedent, through policy, through history, through their own gifts of insight to the best judgment that poor fallible creatures can arrive at in that most difficult of all tasks, the adjudication between man and man, between man and state, through reason called law.<sup>28</sup>

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22. *Bush v. Gore*, 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting).

23. *See Republican Party of Minn.*, 536 U.S. at 795 (Kennedy, J., concurring) (“There is a general consensus that the design of the Federal Constitution, including lifetime tenure and appointment by nomination and confirmation, has preserved the independence of the federal judiciary.”).

24. *Id.* at 802 (Stevens, J., dissenting).

25. *See De Muniz, supra* note 13, at 374 (“Judicial independence in the United States strengthens ordered liberty, domestic tranquility, the rule of law, and democratic ideals. At least in our political culture, it has proved superior to any alternative form of discharging the judicial function that has ever been tried or conceived.”). For a particularly thoughtful discussion of the various aspects of judicial independence, see James Zagel & Adam Winkler, *The Independence of Judges*, 46 *MERCER L. REV.* 795 (1995).

26. Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 *KY. L. J.* 679, 687 (1999); *see also* J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why*, 58 *N.Y.U. ANN. SURV. AM. L.* 241, 254 (2001) (“[W]hen judges are independent of external influences, yet bound by rules and precedents, the people are maximally protected.”); Geoffrey C. Hazard, Jr., *Judicial Independence: A Structure for Analysis 1* (Dec. 21, 2000) (unpublished manuscript, on file with author) (Judicial independence is “a legal ideal that is universally recognized,” an ideal closely related to the concept of judicial objectivity.).

27. *De Muniz, supra* note 13, at 387.

28. Felix Frankfurter, Chief Justices I Have Known, Informal Talk at the University of Virginia Law School (May 12, 1953), in 39 *VA. L. REV.* 883, 905 (1953).

Chief Justice Rehnquist has suggested that “there are very few essentials that are vital to the functioning of the federal court system as we know it . . . [and] one of these essentials is the independence of the judges who sit on these courts.”<sup>29</sup> Judicial independence, he continued, is “one of the crown jewels of our system of government today.”<sup>30</sup> That independence, I fear, now is at risk.

I clerked for two judges, U.S. District Judge Aubrey Robinson, a liberal Democrat appointed by President Johnson, and U.S. Circuit Judge Roger Robb, a Goldwater conservative Republican appointed by President Nixon. While different in many respects, both of these outstanding men left their politics at the courthouse door and decided cases on the merits without regard to party or politics. Judge Robinson used to say that he often had to make decisions he may not have liked making, but, he noted, he was constrained by the laws written by Congress and by the judicial precedents set by the Supreme Court and the D.C. Circuit. Even when he strongly disagreed with it, he understood that his job was to apply the law, like it or not.<sup>31</sup> And Judge Robb did the same, as when this well-known anti-Communist wrote the decision for a three-judge court awarding Alger Hiss his government annuity, finding that the so-called Hiss Act—intended to deny pensions to former government employees who lied about their Communist party affiliations—was an unconstitutional *ex post facto* law.<sup>32</sup> Judge Robb’s colleague, Judge (now Justice) Ruth Bader Ginsburg said of Judge Robb: “He called each case as he saw it without seeking to please any particular home crowd.”<sup>33</sup>

Judge Robinson was not a Johnson judge and Judge Robb was not a Nixon judge. They were judges who took an oath of office that they were bound to uphold—and did uphold every day they served—an oath to follow the law and the legal precedents regardless of where they

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29. William H. Rehnquist, Keynote Address at the Washington College of Law’s Symposium on the Future of the Federal Courts (Apr. 9, 1996), in 46 AM. U. L. REV. 267, 271 (1996).

30. *Id.* at 274.

31. See Paul L. Friedman, Remarks at the Presentation of the Portrait of the Honorable Aubrey E. Robinson, Jr. (Mar. 20, 1992), in 817 F. Supp. lxiii, lxxii (D.D.C. 1992).

32. See *Hiss v. Hampton*, 338 F. Supp. 1141, 1148-49, 1153 (D.D.C. 1972) (three-judge court).

33. Ruth Bader Ginsburg, Remarks at Memorial Session for the Honorable Roger Robb (June 10, 1986), in 813 F.2d lxxxv, xcvi (D.C. Cir. 1986); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 806 (2002) (Ginsburg, J., dissenting) (“‘It is the business of judges to be indifferent to popularity.’ . . . They must strive to do what is legally right, all the more so when the result is not the one ‘the home crowd’ wants.”) (internal citations omitted).



may lead. That oath “means that judges are not only free to render impartial justice according to law, but that they *must* do so, letting any chips—political, personal, or otherwise—fall where they may.”<sup>34</sup> And so today, my colleagues and I are not Clinton or Reagan or Bush judges, as the newspapers unfortunately increasingly describe us when they report on our decisions. Like the judges before us, our only allegiance is to the oath we took and to the rule of law.

Some people either don’t understand that fact or choose to ignore it. On the federal level, attacks on judges came to a head several years ago in the Harold Baer controversy that led both President Clinton and Senator Dole to make Judge Baer and other judges’ decisions issues in the 1996 Presidential election campaign.<sup>35</sup> A number of Senators and Congressmen—and for a few days, even the President—publicly discussed the possible impeachment or resignation of Judge Baer, and one Congressman even proposed using the mechanism of impeachment generally to “intimidate” federal judges or teach them a lesson.<sup>36</sup> Many people were troubled by these events because, as Justice De Muniz has put it, “[n]othing can be more damaging to a society based on the rule of law than if judges fear that they will be removed from office or that their livelihood will be impacted solely for making a decision that is right legally and factually but unpopular politically.”<sup>37</sup>

Here, in the District of Columbia, a judicial complaint was filed against one of my colleagues a few years ago, alleging that she was politically motivated when she specially assigned cases to judges appointed by President Clinton when those cases might have an impact on

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34. Harlington Wood, Jr., “*Real Judges*”, 58 N.Y.U. ANN. SURV. AM. L. 259, 261 (2001) (emphasis added).

35. See Stephen B. Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165, 166-67 (Jan.-Feb. 1997); Mark Hamblett, *Baer’s Controversial Ruling Leads to Appeal on Recusal*, N.Y. L.J., June 28, 1999, at 1; Kline, *supra* note 26, at 710-11, 788; M.A. Stapleton, *ABA Comes to Defense of Judiciary*, CHI. DAILY L. BULL., Nov. 12, 1997, at 1, LEXIS, Nexis Library, Chicago Daily Law Bulletin File; Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 626-27 (1999).

36. See Joan Biskupic, *Hill Republicans Target ‘Judicial Activism’: Conservatives Block Nominees, Threaten Impeachment and Term Limits*, WASH. POST, Sept. 14, 1997, at A1; *Call to Impeach Judges Displays Lack of Historical Savvy: Political Attacks on a Ruling Can Bring About Distortions in Doctrine of Judicial Independence*, DAILY RECORD (Balt.), Sept. 18, 1997, at 17, available at 1997 WL 17886968; Richard Carelli, *Clinton Takes Up Federal Judge Issue; Republicans’ Attacks Goad President into Taking Action*, DAILY RECORD (Balt.), Sept. 29, 1997; Carelli, *supra* note 12; Herbert, *supra* note 12; Alfred P. Carlton, Jr., *Federal Judicial Independence in the 21st Century: Criticism, Competence and Compensation*, Address Before the Seventh Circuit Judicial Conference and Seventh Circuit Bar Association 20-21 (May 21, 2001) (transcript on file with author).

37. De Muniz, *supra* note 13, at 389.

friends or political supporters of the President. As one of the judges who was assigned several of those cases, I was more than passively interested in the assertion because the necessary implication, it seemed, was that those judges who received such assignments would be partisan rather than principled in their decision-making. The press reports rarely mentioned that as Chief Judge she had the authority to make such special assignments under a court rule that had existed since 1971,<sup>38</sup> that she also had specially assigned cases to judges appointed by Republican presidents, and that every chief judge of the Court had specially assigned complex or protracted criminal cases in the past—from Watergate to Iran/Contra.

A two-year investigation ensued, with constant articles and columns in the press that often distorted or misstated the facts and conveyed a great deal of misinformation to the public. Ultimately, the Judicial Council of the D.C. Circuit dismissed the complaints against the judge, concluding that she did not assign cases for political or partisan motives or violate any court rule.<sup>39</sup> On further review, a committee of the U.S. Judicial Conference went so far as to say that “no reasonable observer would perceive an improper partisan basis for the judge’s actions.”<sup>40</sup> Yet, after a two-year investigation and so much attention by political columnists and others in the press, damage inevitably was done to our Court as an institution. Fortunately, it was short-lived, and the collegiality and mutual respect among the judges of the United States District Court for the District of Columbia remains intact and may in fact be even stronger.

Still, I must ask: Where was the Bar through all of this turmoil? Why did it not come vigorously to the defense of the judges being criticized in the press—the subject judge and others. Lawyers know that judges cannot themselves respond publicly to criticism. It is considered unseemly; it is inconsistent with the Code of Judicial Conduct;<sup>41</sup> and it would draw judges into the political thicket they must scrupulously

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38. See Local Criminal Rule 57.10(c), Rules of the U.S. District Court for the District of Columbia (added May 1, 1970; effective Oct. 15, 1971; repealed Feb. 1, 2000) (originally Local Rule 77(A)(7)) (materials on file with author).

39. See JUDICIAL COUNCIL OF THE DISTRICT OF COLUMBIA CIRCUIT, In re: Charge of Judicial Misconduct or Disability, Nos. 99-11 & 00-01, Feb. 26, 2001, at 9 (on file with the Clerk of the Court of the D.C. Circuit).

40. COMM. TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS, JUDICIAL CONFERENCE OF THE UNITED STATES, In re: Complaint of Judicial Misconduct or Disability, No. 01-372-001, Oct. 10, 2001, at 4.

41. See Code of Conduct for United States Judges, Canon 2(A), 3(A)(4), & 3(A)(6), 175 F.R.D. 364-65, 367 (1998).

avoid.<sup>42</sup> Because we cannot defend ourselves, it falls to the Bar and its leaders to step up to the plate and defend the courts and its judges—and the independence so fundamental to the system—at times when unfair attacks or intimidation by politicians or the press take over.<sup>43</sup> In the situation I have just described, there was mostly silence from the lawyers of Washington, D.C. and, frankly, it was disappointing.

When lawyers become judges, we expect to sit silently by as we are criticized for our speed (or lack thereof) or our intelligence (or lack thereof) or when our decisions are called just plain wrong. That comes with the territory. Judges do make mistakes, and fair criticism of judicial decisions certainly is appropriate. The work of the judiciary and the aberrant behavior of errant judges should not go unexamined. That's specifically why we have both appellate courts and mechanisms on the federal, state, and local levels to consider judicial misconduct complaints against judges.<sup>44</sup> And, of course, except where a provision of the Constitution forms the basis for decision, Congress can always change the law if it disagrees with a judicial decision.

But criticism should be based on fact and on an understanding of the proper and limited role of the institution of the courts. Personal attacks on the integrity and motives of judges undermines the constitutional authority and independence of the courts because, in the end, the courts depend for their legitimacy on “the perception that [they] engage in principled decision-making”<sup>45</sup> and on their “reputation for impartiality and nonpartisanship.”<sup>46</sup> The attempts to intimidate judges in the hope of achieving outcomes for clients or causes, or of undermining the legitimacy of courts and their decisions, runs counter to the delicate balance that the founders of our system intended. As Professor Stephen Bright has written: “[D]istorted attacks for political gain endanger

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42. See *In re Boston Children First*, 244 F.3d 164, 168, 170-71 (1st Cir. 2001); *United States v. Microsoft Corp.*, 253 F.3d 34, 107-16 (D.C. Cir. 2001) (en banc).

43. See, e.g., De Muniz, *supra* note 13, at 379 (quoting Chief Justice Harold J. Warner, *Warner Speaks on Judicial Freedom*, 15 OT. ST. B. BULL. June 1955, at 1, 4) (“[I]ndependence requires ‘the vigilant and able support of the bar.’”).

44. See, e.g., *Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 28 U.S.C. § 372(c) (1994); *The District of Columbia Commission on Judicial Disabilities and Tenure Act*, D.C. CODE §§ 1-204.32, 11-1526-29 (2001).

45. *Grutter v. Bollinger*, 288 F.3d 732, 752 (6th Cir. 2002) (Moore, J., concurring) (paraphrasing *Planned Parenthood v. Casey*, 505 U.S. 833, 865-66 (1992)). See also Wechsler, *supra* note 14, at 15 (“the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved”).

46. *Republican Party of Minn. v. White*, 536 U.S. 765, 802 (2002) (Stevens, J., dissenting); see also Cohen, *supra* note 17, at B2.

judicial independence and public confidence in the courts” and ultimately undermine the rule of law.<sup>47</sup> ABA President Alfred P. Carlton, Jr. has said: “The din of explosive partisanship and criticism rattles [an] important foundation” of the legitimacy of the courts: public support. “The only sure antidotes . . . are to ensure that facts are clear, that they are heard, and that [the leaders of the profession] take every opportunity to educate and inform the public.”<sup>48</sup>

In my view, it is a basic responsibility of the Bar—and individual lawyers—to assure that the courts are not intimidated or subjected to political pressure, by defending the independence of the judiciary and of individual judges when those judges are wrongly attacked or when their motives, character or integrity are impugned. It is the obligation of the Bar, lawyers, and judges to ensure that our courtrooms and legal proceedings are *civil* and *civilized* engagements. The public must be given no reason to doubt—either by judges or by those who disagree with their decisions—that the system is anything less than *rational*, *civil*, and *independent*. We all have an investment in an independent judicial system. Without such an understanding, the rule of law itself is at risk.<sup>49</sup> As former Chief Judge Abner Mikva of the D.C. Circuit has said: “Judges must follow their oaths and do their duty, heedless of editorials, letters, telegrams, picketers, threats, petitions, panelists and talk shows. In this country, we do not administer justice by plebiscite.”<sup>50</sup> We judges need the lawyers and the leaders of the Bar to help us in this important endeavor so that everyone’s day in court is a fair one.

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47. Bright, *supra* note 35, at 165; *see also* Cohen, *supra* note 17, at B2 (“The judicial respect and authority [some] are so cavalierly tearing down today won’t be easy to rebuild.”).

48. *Id.*

49. *See* Zemans, *supra* note 35, at 632; Phillips, *supra* note 15, at B2.

50. Abner J. Mikva, *The Judges v. The People: Judicial Independence and Democratic Ideals*, Lecture at the House of the Association of the Bar of the City of New York in Memory of Benjamin N. Cardozo (Nov. 13, 1997), in 19 CARDOZO L. REV. 1771, 1777 (1998) (quoting *Commonwealth v. Woodward*, No. Crim. 97-0433, 1997 WL 694119, at \*1 (Mass. Super. Ct. 1997), *aff’d*, 694 N.E.2d 1277 (Mass. 1998)) (internal quotation marks omitted); *see also* *Republican Party of Minn.*, 536 U.S. at 806 (Ginsburg, J., dissenting) (“Judges, however, are not political actors. They do not act as representatives of particular persons, communities, or parties; they serve no faction or constituency.”); Wood, *supra* note 34, at 277 (“[J]udges are not to be guided by the latest opinion polls in making their constitutional rulings.”).