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Judicial Independence: Remarks by Ohio Chief Justice Thomas J. Moyer*

Carol, thank you for the warm introduction and for the opportunity to speak to the members and guests of the Columbus Metropolitan Club. This is my third appearance in eight years and I always feel at home here because you represent the bright side of community and civility, the way civic discussion should be conducted.

Some of you might remember a book from a few years ago, Bowling Alone.1 The author presented the idea that people no longer join organizations with broad perspectives; they now tend to join ones that reinforce the beliefs they already hold. The Columbus Metropolitan Club, you might say, is the antithesis of that notion. You touch on a broad range of issues and hold these critical discussions without the caustic rhetoric that infects much of our daily discourse. Thank you for being a safe harbor for civil conversation.

I will spend the next few minutes talking about an area of concern that is in great need of informed, rational discussion: the importance of an impartial judiciary. The judiciary is viewed by most people as a venue for the fair and efficient resolution of disputes; a venue where both the so-called winners and losers in a case are able to say they were given a fair hearing in a forum that values truth and the application of principles to dispute resolution. The courts, for example, are viewed not only as an adversary process but increasingly as a setting for disputing parties to sit down with a mediator trained in the art of reaching consensus and long lasting agreements.

Today, court-connected mediation is successful in addressing issues as far reaching as child custody matters, home foreclosures, and business disputes. Today, judges are working with partners in the fields of mental health and substance abuse to address some of the core reasons that some people find themselves stand-

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ing before a judge on a repeated basis. These specialized dockets use the carrot and stick approach: the carrot of treatment and education, and the stick that if they drop out of the program or fail a drug test that they will be incarcerated. The courts are working with child welfare agencies in new and collaborative ways to dramatically reduce the number of days a child spends in foster care, placing children in safe and nurturing homes years earlier than the practice just a few years ago. I could talk for hours about the work of judges, court administrators, and clerks, who work to ensure that the courts of Ohio are fair and efficient. It is very encouraging to see what is being done.

Despite these innovative and efficient efforts, the public's trust and confidence in the judiciary has been threatened in recent years by expensive and often times misleading campaigns for judicial office. Some contested judicial campaigns are indistinguishable from the highly political campaigns for the other branches of government. Spending for campaign advertisements in contested supreme court races is increasing at an ever-expanding rate. From 1999 to 2007, $165 million was raised by candidates for state supreme courts—more than two and a half times the amount raised in a similar period between 1991 and 1998. In that time period, candidates for the Ohio Supreme Court raised $18.7 million, placing Ohio third in the nation in the amount raised by Supreme Court candidates. In one race for a seat on the Illinois Supreme Court candidates raised more than $9.3 million—a record amount. Nationally, in the most recent election cycle in 2008, $17 million was spent on Supreme Court races with $5 million spent on television advertising in the last week of the campaigns.

Before I continue, I wish to point out that I serve as a board member of the Justice at Stake Campaign, an independent Wash-

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2. For updated statistics, see Press Release, Brennan Center for Justice at New York University School of Law, State High Court Reviews Rules in Wake of Conflicts Involving Campaign Cash (July 31, 2009), available at http://www.brennancenter.org/content/resource/brennan_center_justice_at_stake_urge_recusal_reform_in_michigan/ (reporting that over $200 million was raised by candidates for state supreme courts between 1999 and 2008).


ashington-based organization that monitors judicial campaigns, and is the primary source for information regarding judicial selection in the United States. Many of the statistics I will use are the product of research by Justice at Stake.

The increased spending is used to fund television ads that often are overly personal and political, obviously causing citizens to question whether either candidate will be able to fulfill their constitutional responsibility to be fair and impartial. In Michigan, Chief Justice Clifford Taylor was defeated after the Democrat[ic] Party aired ads accusing him of falling asleep during oral arguments and of being a “good soldier” for big business. He also was accused of voting to prevent women from suing employers for sexual harassment and sexual assaults. His challenger was the target of ads accusing her of being soft on crime, sexual predators, and terrorists. One attack ad used the image of what appeared to be an Arab holding an assault rifle and accused her of giving probation to a terrorist. Michigan and Ohio are not alone. Similar campaigns have been waged in Wisconsin, Alabama, and West Virginia, where the owner of a coal company spent $3 million to support a candidate for Chief Justice of that state.6

As Justice Sandra Day O'Connor recently warned, “In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the constitution.”7 When did this phenomenon begin? Most observers say the tipping point came in the 2000 elections when supreme court candidates in several states raised a record $45.6 million, a 61 percent increase over the previous election cycle.8 New fundraising records have been established by campaign committees in 15 of the 20 states that hold contested supreme court elections. And these totals do not include ads sponsored by third parties or what I call unauthorized campaigns that inflict their own message on voters.

Spending by outside groups is difficult to tabulate because for most of this period unauthorized campaigns were not required to report donors or expenditures. But according to Justice at Stake, outside groups spent $27.3 million on television advertisements in just four states, Ohio, Illinois, Michigan, and Wisconsin, between 1999 and 2006.9 Ohio holds the record, airing more judicial campaign ads since 1999 than any other state.10 With a population of 11 million, we have nine TV markets. In the 2000 elections, five candidates for the Ohio Supreme Court raised $3.3 million.11 But it was the unauthorized campaigns that set the tone that year, spending an estimated $2.7 million.12 Since 2004 Ohio has required third party campaigns to report donor names.13 We have had no negative unauthorized TV advertising since 2004.

A new tactic by special interest groups is the use of aggressive questionnaires that seek to force judges to announce their position on controversial issues such as abortion and same sex marriage. This activity has increased since the Supreme Court decision in Minnesota v. White.14 Would-be judges know that their answers could trigger significant money, political ads, and grass-roots campaigns for or against their candidacy.

By in large, voters reject negative campaigns. I believe voters understand the importance of an impartial judiciary. They instinctively know that many of the issues raised in negative campaigns have little, if nothing, to do with a judge’s ability to preside over cases. I have worked with various organizations to develop proposals to ensure the independence and impartiality of the judiciary, including proposals to lengthen the terms of judges and increase the minimum qualifications required for judicial candidates. I continue to work with legislative leaders on these matters. Soon I will announce a new effort to address these issues. I continue to push for change because I remain hopeful, hopeful because people appreciate the importance of an impartial judiciary.

10. Id. at 1.
12. Id.
14. 536 U.S. 765 (2002) (holding as unconstitutional so-called “announce clauses” found in many judicial ethics codes, which prevent judicial candidates from announcing their views on how cases should be decided).
The public understands the inherent conflict created when a judicial campaign needs to raise large numbers of campaign contributions. To use the popular vernacular, "they get it."

Nearly every survey concludes three out of four people believe the need to raise campaign contributions affects the decision of judges. According to one survey, one in four judges share that concern. That concern is shared by former Justice Sandra Day O'Connor. Since her retirement, Justice O'Connor has sponsored a series of national conferences at Georgetown Law School to draw attention to the need for ensuring the independence and impartiality of the judiciary. The number one recommendation of conference participants? Education. Educating primary and secondary school students, but just as importantly, educating American citizens, that the purpose of a court in a constitutional democracy is to serve as a place for the fair resolution of disputes. It is not to serve the particular interest of any person or organized group of citizens or the government.

The more knowledgeable people are about the role of the courts, according to research by the Justice at Stake Campaign, the more likely they are to reject efforts to limit the authority of the judiciary and support the historic mission of the courts. So long as our citizens expect, indeed demand, that courts be impartial—free from inappropriate influence—it is likely that courts will be impartial. Our system of laws and constitutions is only as strong as the trust extended to it by those who are governed. But that trust is fragile—made ever more so each time a misleading campaign ad is aired—with each effort to influence judicial decisions through contributions and with each new record amount spent in judicial campaigns.

We should reduce the role of fund raising in judicial campaigns. We should make clear to all that judges are accountable to the laws and constitutions of our country. We must ensure the integrity of the judicial selection process. What we must do—what we

15. See e.g., a 2001 survey conducted by Greenberg Quinlan Rosner Research and American Viewpoint on behalf of Justice at Stake, where 76% of voters believe that campaign contributions made to judges have at least some influence on their decisions. JUSTICE AT STAKE, FREQUENCY QUESTIONNAIRE, available at http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf.

16. This nationals survey of 2428 judges was conducted by mail from November 2001 to January 2002 and included 188 state supreme court justices, 527 appellate court judges, and 1713 lower court judges. JUSTICE AT STAKE, STATE JUDGES FREQUENCY QUESTIONNAIRE, available at http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf.

must do above all else—is strive to protect and defend the rule of law. We must nurture it in our hearts; we must preserve it in our public debates. The rule of law is not to be taken for granted. It must be polished and burnished. Each successive generation must breathe new meaning, new life into our legal institutions, our faith, and confidence in the rule of law. I believe that citizens continue to have faith and confidence in the courts because the law brings order from chaos. It reminds us that law follows in the footsteps of the masters, the greats such as Locke, Montesquieu, and Jefferson. If you look beyond the moment we find there is beauty in the law. Like brush strokes on canvas, law brings form to cloudy images of the mind.

Former president of the Ohio State Bar Association, Rob Ware, wrote about the beauty of law. He observed: “There are certain qualities that are common to most judgments of beauty. Among these are order, harmony, proportion and purity. Thus it has been said that beauty is the perfect reconciliation of the sensual and rational parts of human nature.” He concluded: “We see the elements of beauty reflected in law. There is harmony and symmetry: Law is both consistent and evolving; coldly logical, yet alive. Underneath it all is a pursuit of justice and truth.” The beauty of law is found in the text of our long-held beliefs in liberty and freedom and fairness. It is found in the contract that brings shape to the hope and promise of a new beginning. The beauty of law, in my humble opinion, is that it is the product of the ages, wrapped in the opinion of the moment.

The law takes from Aristotle, Coke, and Aquinas and is applied to the disorder and unruliness of mankind, just as an artist borrows from Michelangelo, Botticelli, and Van Gogh. Law is our seamless connection with the past. The rabbi and the minister guide us to Psalm 19, “the law of the Lord is perfect, reviving the soul.” This Psalm tells us that the Lord’s law, the historical inspiration of natural law, is sure, right, and clear, desired more than gold. The most visible symbols of the beauty of the law are the centerpieces of our communities, our courthouses, sometimes ornate like a Rembrandt painting, others strong as a Wagner opera. Some with lights on top, used as navigation aides to Sandusky Bay. The broad marble halls of many of our historic court-

19. Id.
houses are typical of the architectural symbols of our civil aesthetics, symbols that remind us that the rule of law anchors a civilized society.

In many Ohio counties, stone columns and miles of marble flooring are a message that citizens respect the rule of law and the mission of the judiciary. One of Ohio’s finest examples of the blend of art and law is now the home of the Supreme Court of Ohio, the Ohio Judicial Center. It was not designed as a courthouse, but the governor and leaders of the Ohio General Assembly, when it was constructed in the early 1930s, directed that it should be a monument to the greatness of the people of Ohio. Sixty-one original murals reflect Ohio’s industry and commerce that built a nation, one of them Perry’s victory in Lake Erie.

Thomas Aquinas determined that beauty has three elements; “conditions” as he called them: integrity or perfection; proportion or harmony; brightness or clarity. Think of how those elements touch upon the beauty of the law: the integrity of the law, the proportion, the brightness, and clarity of the law. Imagine if you sat in the courtroom as Clarence Darrow and William Jennings Bryan eloquently, artistically argued the Scopes trial in a brutally hot Tennessee courtroom. Darrow’s skillful pleadings and Bryan’s flare are an equal match for an F. Scott Fitzgerald or a Norman Mailer. The enduring qualities of the Scopes case were captured in the elegant reporting of noted journalist H.L. Mencken and again in the book and play, Inherit The Wind.21 Any good writer will tell you that a well-crafted story requires a compelling subject.

I present my case to you that the beauty of the law also may be found in the written decisions of a court. Marbury v. Madison22 is a clear, concise essay—one with a beginning, a middle, and an end—that makes clear the authority of the judiciary. Judge William Bootle, a federal judge in Georgia certainly knew the law. He lived to be 104 and could remember opinions that he had not seen in more than 70 years. He combined a sharp legal mind with a keen appreciation for the aesthetics of the legal profession. He once told an audience:

Pity the person, if such there be, who can go through life reading, studying, teaching and practicing law, and adjudicating cases without ever beholding the beauty of the work material or the

22. 5 U.S. (1 Cranch) 137 (1803).
grandeur of the work product. Such a person would be like the man who thinks he is just pushing a wheelbarrow, when in fact, he is building a cathedral.  

Great theater has both conflict and compassion, a strong crescendo that gracefully gives way to a satisfying resolution, not so different than the real-life plot uncovered by foreclosure mediators across the state. It is a work of beauty when a homeowner and a lender sit across from each other, guided by somebody trained to promote resolution, not conflict. It's a double-feature matinee with Places in the Heart and It's a Wonderful Life.

To see beauty in the law all one needs to do is witness a drug court graduation ceremony. A graduation ceremony may include a simple poem, even a song written by a graduate of the drug court program, in which they have received counseling, suppressed their addiction, and regained control of their lives. This is real-life art and literature. It is beautiful courtroom drama. It's American storytelling, wrapped in an opportunity at redemption that would rival any Jimmy Stewart movie. The law is beautiful when it reveals the human side, when the justice system demonstrates compassion and a concern for the greater good of society.

I will offer one last observation on the beauty of the law. Law is beautiful because it works. The law expresses the will of a nation's citizens to live in an abundance of freedom. It protects and defends those values that, we as Americans, have held dear since our founding: freedom of expression, freedom of assembly, [and] the freedom to seek happiness and to worship God as we will. The law works because it allows us to correct our mistakes. When it became clear that no man or woman should be de-valued as three-fifths of a person, the courts corrected a mistake. When separate but equal no longer could be disguised as lawful, the courts corrected a mistake. The law helps the needy, it makes commerce possible, it protects us when we say something unpopular, and in its own gentle way it may encourage you to drive the speed limit on your way home. Law. Law is beauty in motion. Citizens seek solace, even comfort in the law. Clarity, order, coldly logical. Law's beauty, indeed.