

TAKING THE HIGH ROAD: CIVILITY, JUDICIAL INDEPENDENCE, AND THE RULE OF LAW

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Restoring civility to political discourse and changing the tone in Washington was a theme of George W. Bush's throughout the 2000 presidential election campaign and has been ever since.¹ While one can argue whether the noticeable drop in Washington's civility level was primarily the fault of the Congress, the Executive Branch, the media or others, no one can doubt that real damage has been done to the notion of civil debate and discourse in recent years. So, whatever its causes, President Bush's rhetoric about a return to civility has been welcome—particularly because a decline in civility in political discourse has been accompanied by or reflected in an increasing lack of civility among litigating lawyers in our courts.²

The presidential election and the litigation surrounding it also have resonance, however, for another unfortunate phenomenon: attacks on the courts and potential threats to the independence of the judiciary. In fact, one of the most fascinating aspects of the election was the litigation. From a television viewer's perspective at least, one had to be impressed with the state court judges in Florida who organized and supervised the recounts, scheduled prompt hearings on various challenges and presided over them with intelli-

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1. See Mike Allen, *Cheney Tells Conservatives Civility, Honesty Will Prevail*, WASH. POST, Feb. 16, 2001, at A4; Andrew E. Busch, *The Race for the Presidency*, WORLD & I, Nov. 2000, at 23, available at 2000 WL 9051123; 'Good Public Policy Makes for Good Politics,' WASH. POST, Mar. 10, 2001, at A6; Sean Scully, *Bush Sees Greater Tolerance of Religion: Discusses Plan at Prayer Breakfast*, WASH. TIMES, Feb. 2, 2001, at A1, available at 2001 WL 4145844.

2. See Marvin E. Aspen, *From the Bench: Doing Something About Civility in Litigation*, LITIG., Winter 1992, at 61 [hereinafter Aspen, *From the Bench*]; Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513, 513-14 (1994) [hereinafter Aspen, *Renewed Civility*]; Judge 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. INTELL. PROP. NEWSL. (Am. Bar Ass'n Section of Intellectual Prop. Law, Chicago, Ill.), Summer 1996, at 3.

gence and dignity, asked hard questions of the lawyers for both sides, and who, for the most part, rendered seemingly well-reasoned, judicious decisions, whether one agreed or disagreed with the outcomes. Of the many players in this drama, the lawyers and the judges came across very well indeed.

So I was distressed, as well as surprised, when after the decision of the Florida Supreme Court, former Secretary of State James Baker III not only expressed a lawyer's typical disappointment and disagreement with the outcome on behalf of his client, George W. Bush, but seemed also to question the legitimacy of the court's decision and its processes.³ If the first response of a lawyer and statesman of Mr. Baker's stature was to suggest that the court and the judicial process might have acted in a partisan or political way, even more pointed attacks on the court by lesser figures were sure to come⁴ and to be accepted as valid by the public. After the 5-4 decision of the United States Supreme Court on December 12, 2000, there followed equally vocal, personalized criticism of that institution from those in the Gore camp.⁵

Even before this litigation, some members of Congress were calling for the impeachment of federal judges with whose decisions they disagreed.⁶ In addition, various groups in states where judges

3. See Dan Balz, *Fla. Supreme Court Orders Partial Recount Across State: Bush Appeals to U.S. High Court as Ruling Cuts Lead to 154 Votes*, WASH. POST, Dec. 9, 2000, at A1; Dan Balz & Peter Slevin, *Florida Justices Say Vote Totals Must Include Hand Recounts: Court Sets Deadline, Overrules Harris*, WASH. POST, Nov. 22, 2000, at A1; David S. Broder & Matthew Vita, *Analysis: Politics; Bitter Struggle Is Certain to Escalate*, WASH. POST, Nov. 22, 2000, at A1; James A. Baker III, Remarks, in *Text of Remarks by James A. Baker III of the Bush Campaign*, WASH. POST, Nov. 22, 2000, at A17.

4. See, e.g., Balz & Slevin, *supra* note 3; Broder & Vita, *supra* note 3; Richard E. Cohen, *Lone Star Allies*, 32 NAT'L J. 3748 (2000), available at 2000 WL 25041873; Ralph Z. Hallow, *Democrats, Republicans Press for Harmony*, WASH. TIMES, Dec. 11, 2000, at A1; Toby Harnden, *See-saw Day That Put Both Camps in a Spin: Bush: His Envoy Has Declared War on the Judges over Their Ruling*, DAILY TELEGRAPH (LONDON), Nov. 23, 2000, at 16, LEXIS, Nexis Library, The Daily/Sunday Telegraph (London) File; Bob Herbert, Editorial, *A Plan to Intimidate Judges*, N.Y. TIMES, Dec. 4, 2000, at A29.

5. See Lizette Alvarez, *On Capitol Hill, Feelings of Finality and Disappointment and Sighs of Relief*, N.Y. TIMES, Dec. 13, 2000, at A27; Linda Greenhouse, *Another Kind of Bitter Split: When Jurisprudence Is Pulled into Politics*, N.Y. TIMES, Dec. 14, 2000, at A1; John F. Harris & Ceci Connolly, *Gore Greets Ruling with Silence: Behind Scenes, Advisers Debate Campaign's Fate*, WASH. POST, Dec. 13, 2000, at A1; Michael Powell, *In Florida, It's All Over But the Shouting*, WASH. POST, Dec. 14, 2000, at C1; Robin Toner, *Day-to-Day Duels on Political Issues Have Grown Increasingly Personal*, N.Y. TIMES, Dec. 13, 2000, at A26.

6. See Christopher P. Banks, *The Politics of Court Reform in the U.S. Courts of Appeals*, JUDICATURE, July-Aug. 2000, at 37; Richard Carelli, *ABA President Shestack*

are elected were raising massive amounts of money to unseat judges whom they thought were either too liberal or too conservative.⁷ Thus, this recent, even more intense criticism of courts as partisan political institutions can only serve to encourage 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 the case and the relevant statutes and legal precedents. The judiciary's integrity and motives are now being seriously questioned in ways that I fear may ultimately undermine the rule of law.

The clearest encapsulation of the attack on both state *and* federal judges is found in the last full paragraph of Justice Stevens's dissent in *Bush v. Gore*. While a portion of it has been widely quoted, the entire paragraph deserves attention.

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decisions. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.⁸

Justice Stevens's concerns bring to mind an important recent speech by his fellow Justice—one on the opposite side of *Bush v. Gore*, incidentally—Justice Anthony Kennedy. In that speech to the American Bar Association, Justice Kennedy reminded us that both civility *and* judicial independence are essential and connected values necessary to preserving the rule of law, and that the rule of law

Addresses Attempts at Judicial Intimidation, LEGAL INTELLIGENCER, Feb. 3, 1998, at 4, LEXIS, News library; Herbert, *supra* note 4; Herman Schwartz, *One Man's Activist . . . : What Republicans Really Mean When They Condemn Judicial Activism*, WASH. MONTHLY, Nov. 1997, at 10.

7. See Kyle Cheek & Anthony Champagne, *Money in Texas Supreme Court Elections: 1980–1998*, 84 JUDICATURE 20, 25 (July–Aug. 2000); Dexter Filkins, *Republican Group Seeks to Unseat Three Justices*, N.Y. TIMES, Dec. 20, 2000, at A31.

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

is the bedrock of both our federal and state systems.⁹ For the rule of law to thrive, he suggested, we must insist on three fundamental principles: the responsibility of the individual, rationality in the legal profession and in the courts, and civility.¹⁰ “The whole idea of rationality,” he said, is the ability to “examine a problem with adequate information and come to a reasoned . . . conclusion.”¹¹ For judges, as for the profession as a whole, it embodies “essential values such as neutrality and detachment,” or independence.¹² As for civility, Justice Kennedy said, it “has deep roots in the idea of respect for the individual.”¹³ “We are civil to each other”—or we should be—“because we respect one another’s aspirations and equal standing in a democratic society.”¹⁴ Civility is “the mark of an accomplished and superb professional,” he said, “but it is more even than this. [It] is an end in itself.”¹⁵ As Chief Judge Marvin Aspen said at the National Judicial College in a lecture entitled “The Erosion of Civility in Litigation”:

Judges, lawyers, and the very foundation of our democratic society—an independent justice system enjoying the confidence of the citizenry—are under unprecedented attack. Ethnic and blonde jokes have been replaced by equally tasteless lawyer jokes. Movie audiences cheer at the mandatory anti-lawyer rhetoric in today’s hit films. Talk show hosts continue to stoke this feeding frenzy. And politicians attack individual judges and 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 as dispute resolution institutions are mortally damaged.¹⁶

Because public rhetoric has reached the state where it is now commonplace in our society to impugn others’ motives rather than simply to express disagreement with their conclusions, even judges

9. Anthony M. Kennedy, *Law and Belief*, TRIAL, July 1998, at 24.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 25.

14. *Id.*

15. *Id.*

16. Marvin E. Aspen, *The Erosion of Civility in Litigation*, Address at the National Judicial College 2–3 (May 10, 1996) (transcript available in the National Judicial College Law Library).

and the courts have become fair game. As Senator Robert Byrd noted on the Senate floor some years ago:

Mr. President, can't we rein in our tongues and lower our voices and speak to each other and about each other in a more civil fashion? I can disagree with another Senator. I have done so many times in this Chamber. I can state that he is mistaken in his facts; I can state that he is in error. I can do all these things without assaulting his character by calling him a liar, by saying that he lies. . . . Can we no longer engage in reasoned, even intense, partisan exchanges in the Senate without imputing evil motives to other Senators, without castigating the personal integrity of our colleagues?¹⁷

Professor Stephen Carter framed the idea slightly differently in his excellent book *Civility: Manners, Morals, and the Etiquette of Democracy*: "Civility assumes that we will disagree; it requires us not to mask our differences but to resolve them respectfully Civility requires that we express ourselves in ways that demonstrate our respect for others" ¹⁸

Some may argue that it is just too late to change the direction in which we seem to be headed. Whether we like it or not, "hardball" tactics, "scorched earth" strategies, and so-called "take no prisoners" litigation are not only in vogue these days, but often are required of lawyers in the aggressive pursuit of their clients' interests. We routinely see these approaches in our courtrooms—where I believe judges have an obligation to step in and say how far is too far, how much is too much. We see it even more frequently in depositions, a forum in which there usually is no judicial referee, no umpire, and no judge to call a halt to ad hominem attacks, harassment, and abuse.

To focus just on depositions, the following are two examples of how bad the situation has become. In the first, after a lawyer had requested that his adversary provide a copy of a document he wanted to use in questioning a witness, his adversary called him a "child," and then said "[y]ou look like a slob the way you're dressed, but you don't have to act like a slob."¹⁹ After literally throwing the document at the requesting lawyer, he continued: "Oh, Mr. V, you're about as childish as you can get. You look like a slob, you act like a slob."²⁰ An even more infamous example, widely

17. 141 CONG. REC. 37,732 (1995) (statement of Sen. Byrd).

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

19. Aspen, *Renewed Civility*, *supra* note 2, at 513.

20. *Id.* at 514.

quoted in the press, was a deposition taken in Texas in connection with a Delaware securities case in which one lawyer called his adversary an "asshole" and said to him: "You could gag a maggot off a meat wagon."²¹

While these two depositions may be extreme examples, similar abusive conduct in discovery has, unfortunately, become commonplace. A study of litigation practices conducted by a committee of lawyers and judges in the Seventh Circuit found too much of this kind of abusive and unethical deposition conduct, as well as many examples of bad faith arguments, misrepresentations of fact and law, lack of candor and even some cases of outright lying by lawyers both in and out of court.²² The District of Columbia Bar Task Force on Civility in the Profession conducted a similar study and made similar findings.²³ It also sent a survey to the judges of the United States District Court for the District of Columbia. Approximately three-quarters of them said they believe that there is a significant problem of incivility in the legal profession, and most of them think that the problem reflects a trend in society at large. The majority feel that incivility occurs most frequently in the discovery setting, where no judicial officer is present, and many believe that incivility is affirmatively used as a litigation tactic, a "win at any cost" mentality, that is often client-driven. Such a tactic may be in use because too many lawyers today are unwilling to tell a client "no."²⁴

This civility issue is not just about etiquette and manners. Unfortunately, incivility is a trend that is becoming culturally institutionalized and accepted in some quarters, and it threatens the pursuit of justice in very real ways. The rise in incivility has resulted from a number of recent developments. First, society has changed. There is less civility in public discourse generally, in politics and government, on television, certainly in the sports world, and in the media. Many lawyers have grown up in this environment, and they do and will practice what they see all around them unless they are told by the more experienced among us that it is unacceptable. This only works, however, if senior lawyers have not themselves abandoned traditional notions of civility and professionalism and if

21. *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 54 (Del. 1994).

22. See COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, FINAL REPORT (1992), *reprinted in* 143 F.R.D. 441 [hereinafter SEVENTH CIRCUIT REPORT].

23. See D.C. BAR TASK FORCE ON CIVILITY IN THE PROFESSION, FINAL REPORT (1996).

24. *Id.*

judges also accept responsibility for changing the tone. Lawyers need to remind themselves and teach their juniors new to the profession—and judges need to and should remind both—that personal attacks, name-calling, and invective will not be tolerated as the means to an end. The late Sidney Sachs, one of the great trial lawyers and great personalities of the District of Columbia Bar, once told me: “Always remember, the lawyer on the other side of the case is not your enemy. His client and your client may view themselves as enemies. But you and he are not enemies. You are friends, or, in time, you may become friends.” Such good advice is too infrequently given to young lawyers today.

Second, many current lawyers see the legal profession as a money-making venture at least as much as it is a calling dedicated to high standards of professionalism and service. Lawyers feel pressure to get and keep clients in an environment where clients now follow a “shopping around” for lawyers mentality. In this economically-driven, result-focused marketplace, clients are especially demanding and many expect hired guns to do their bidding—or else they will find others who will.

Similar competition exists within law firms—particularly large ones. There is more pressure on everyone to bill hours, bring in business, and get results. Because solo and small firm practitioners are busy pursuing clients, and partners and associates in big firms are billing as many hours as possible, there is little time for the kind of formal or informal mentoring that many of us benefited from as young lawyers. The struggle to survive and to succeed has begun seriously to undermine many of the substantive elements of professionalism and civility that once characterized the legal profession. Since there are fewer chances than before to make partner, and associates must impress their seniors in some way, being tenacious at depositions and in dealing with opposing counsel has taken on extreme proportions. It is difficult for new or less experienced lawyers to think of themselves as servants of the law, officers of the court, or members of a noble profession when all they hear about is billing their time and winning at any cost.

In terms of the tone of our profession, lawyers must be reminded that they can be advocates for their clients without assuming their clients’ personalities, antipathies and tactics. Lawyers provide their skills, their seasoned judgment, and their advice. They provide their ability to reason, to engage in rational discourse, and to present analytically sound arguments. Perhaps most importantly, they offer to clients their own professional reputations and the integrity and credibility with the courts that they have estab-

lished over time. If these commodities are squandered through the Faustian “selling of their soul” to clients, lawyers lose their value to future clients, not to mention their dignity. In fact, as Justice Sandra Day O’Connor remarked to the American Bar Association: “It is *not* always the case that the least contentious lawyer loses. It is enough for the ideas and positions of the parties to clash; the lawyers don’t have to.”²⁵

Admittedly, changing these trends takes time, effort, and perseverance. But it is not too late. While bar associations, law firms, government agencies, and law schools all have roles to play in getting our profession back on track, judges have a special responsibility—one on which we need to focus urgently and more seriously than ever before. We need to do so for the sake of the legal profession, the independence of the judiciary, and ultimately the rule of law.

To begin with, judges should make clear that incivility and lack of professionalism are not acceptable in our courtrooms, in depositions in cases over which we preside, or in briefs filed in our courts. While judges cannot be substitute mentors, they can lay out the rules of the road, for young and more experienced lawyers alike, as to what is expected in court and what simply will not be tolerated. They can maintain control of the courtroom and demand compliance with the fundamentals.²⁶ Judges can address these issues aggressively and should not be reluctant to use the tools at their disposal when appropriate; e.g., monetary sanctions imposed on counsel, contempt of court, or referral to the disciplinary authorities, among others.

By way of example, in one case I appointed a special master to preside over a deposition that had become so contentious that the lawyers actually needed a “babysitter” if there was any hope of discovery moving forward. I ordered the parties to pay the special master at his normal hourly rate, with the special master determining on the basis of the lawyers’ conduct how to apportion the costs.²⁷ In another case, I imposed a \$2,000 sanction on one of the

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

26. See, e.g., John L. Bonee III, *Civility at Bench and Bar*, 67 CONN. B.J. 415, 419–20 (1993); Bruce S. Mencher, *A Casualty of Modern Litigation? An Alert to the Bench and Bar*, WASH. LAW., Sept./Oct. 1993, at 19; Jacob A. Stein, *Civility as an Art Form in Diplomacy and the Law*, 9 COSMOS 79, 81–82 (1999).

27. *Teferra v. Marriott Int’l, Inc.*, No. 96-1626, slip op. at 2 (D.D.C. Apr. 25, 1997).

lawyers—not on the lawyer’s client—for “abuse of the discovery process in an effort to delay resolution of [certain discovery] matters” in direct violation of the court’s orders.²⁸ In yet another, I noted in a written order that “counsel would benefit from a reminder of their professional obligations to their clients, opposing counsel and this Court.”²⁹ I then directed every lawyer involved in the case to read the D.C. Bar Civility Standards and to file a certificate with the court that he or she had done so.³⁰ My colleague, Judge James Robertson, took a more subtle approach in dealing with the “heated exchange” between counsel on peripheral and unimportant matters. He accused counsel of having “a startling lack of sense of humor, or sense of proportion, or both,” and ultimately ordered the parties to “lighten up.”³¹

Some may consider these measures extreme, and others may question whether they can truly change the climate. In all three of my cases, however, the conduct of the lawyers did change for the better—in one, so dramatically that as I presided over a five-week trial I completely forgot that these were the same lawyers I had found it necessary to admonish. Judge Robertson’s order was e-mailed to and from lawyers throughout the legal community and is now regularly cited in briefs and correspondence when opposing counsel seem to be getting out of hand. These few examples from just one court suggest that judges can indeed make a difference. And if judges *fail* to act in such cases, they send the wrong signal to lawyers everywhere, putting “the ethical advocate in a posture where he or she may, unfortunately, conclude that the only recourse left to an opponent’s ‘Rambo’ tactics is to ‘fight fire with fire.’”³²

Judges must also lead by example. They must set the proper tone of civility in the courtroom and in written opinions.³³ Where there is a formal, serious, and firm but courteous tone set by the judge, the lawyers are more likely to respond in kind. 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

28. *Harris v. Georgetown Univ.*, No. 95-0032, slip op. at 2 (D.D.C. Dec. 24, 1996).

29. *BOCA Investorings P’ship v. United States*, No. 97-0602, slip op. at 3 (D.D.C. Nov. 16, 1999).

30. *Id.*

31. *Citizens Coal Council v. Babbitt*, No. 00-0274, slip op. at 1–2 (D.D.C. May 22, 2001).

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

33. *Id.*

judge—to try.³⁴ Nothing is to be gained by adopting an authoritarian persona. Judges must remember that lawyers, jurors, and witnesses all take their cues from the judge. If judges send the right signals, they are more likely to get a respectful response. As Chief Justice Burger once said:

[C]ivility is relevant to judges, and especially trial judges because they are under greater stress than other judges, and subject to the temptation to respond in kind to the insolence and mad manners of lawyers. 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.³⁵

Despite the incivility exhibited by some politicians and lawyers, and the often unfair attacks that members of the press, other branches of government and some academics recently have been making on the courts,³⁶ I still believe that when citizens choose judges—whether indirectly through the appointing authorities or directly at voting booths—they expect, fundamentally, that their judges will be knowledgeable, unbiased, courteous and civil, and that they will follow the law. So it did not come as a surprise during my confirmation hearing that Senator DeConcini asked me and the other nominees about judicial temperament and what it meant to each of us,³⁷ or that Senator Simpson expressed concern about some judges who—like some professors—“confuse tenure with di-

34. See Aspen, *From the Bench*, *supra* note 2, at 61; see also 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, 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 or short-tempered”); 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.

35. 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).

36. See, e.g., Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 252–53, 263, 267 (1997); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 73, 97 (2001); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717 (1997); Richard J. Pierce, Jr., The Special Contributions of the District of Columbia Circuit to Administrative Law, Address at the D.C. Circuit Bicentennial Celebration Symposium (Mar. 9, 2001), in 204 F.R.D. 499, 581–84.

37. *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 103d Cong. 945, 953 (1994) (statement of Sen. Dennis DeConcini and Sen. Alan K. Simpson).

vinity.”³⁸ I responded that I thought the marks of a proper judicial temperament were “courtesy, patience, listening to all sides, treating people fairly and decently, [and] *appearing* to treat people fairly as well as actually doing so.”³⁹ And, in different words, my fellow nominees expressed the same beliefs.⁴⁰

Regrettably, however, the civility problem is not confined to the practicing bar. All practitioners and judges know judges who are irascible, arbitrary, rude, and demeaning towards lawyers.⁴¹ One of the very first jury trials I ever had as a young prosecutor was before such a judge. He 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 to lawyers, witnesses, jurors, or other participants in the process. “A judge’s abusive treatment of attorneys can prevent them from effectively defending their clients’ interests . . . [and] can undermine the judiciary’s reputation, threatening its integrity in the eyes of the public.”⁴² As Judge Aspen has written: “Like it or not, judges are role models in our profession. Judges cannot ask lawyers to accept a standard of professional conduct to which they do not abide.”⁴³

Many courts and bar associations have now adopted or recommended Standards of Civility in Professional Conduct.⁴⁴ While these standards focus primarily on lawyers’ duties to other lawyers, to parties, and to the courts, and include principles particularly applicable to litigation, most also have standards for judges to follow in their dealings with lawyers.⁴⁵ The American Bar Association, the District of Columbia Bar, the Federal Bar Association, and the Sev-

38. *Id.* at 953 (statement of Sen. Allen K. Simpson).

39. *Id.* at 947 (statement of Paul L. Friedman) (emphasis added).

40. *See id.* at 946–47 (statements of Judge Ricardo M. Urbina, Judge Richard A. Paez, Judge Denise Page Hood, and Mr. William F. Downes).

41. *See, e.g.,* Aspen, *From the Bench*, *supra* note 2, at 61.

42. *McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conference*, 264 F.3d 52, 78–79 (D.C. Cir. 2001) (Tatel, J., concurring in part and dissenting in part).

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

44. *See, e.g.,* D.C. BAR, D.C. BAR VOLUNTARY STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT (1997), available at http://www.dcbar.org/attorney_resources/task.html [hereinafter D.C. BAR STANDARDS]; FED. BAR ASS’N PROF’L ETHICS COMM., STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT (1997), <http://www.fedbar.org/civility.html> [hereinafter FED. BAR ASS’N STANDARDS]; Seventh CIRCUIT REPORT, *supra* note 22, at 452; A.B.A. GUIDELINES FOR CONDUCT (1998), http://patriot_net/~crouch/flnc/lit.html [hereinafter A.B.A. GUIDELINES].

45. *See* sources cited *supra* note 44.

enth Circuit, for example, all provide standards for judges, including ones that provide that judges will be “courteous, respectful, and civil to lawyers, parties, and witnesses” and that they “will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to ensure that judicial proceedings are conducted with dignity, decorum, and courtesy.”⁴⁶ The Standards go on to say that judges “will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.”⁴⁷ Judges should “recognize that a lawyer has a right and duty to present a case fully and properly,” and “to present proper arguments, to make a complete and accurate record, and to present a case free from unreasonable or unnecessary judicial interruption.”⁴⁸ Finally, judges should “not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.”⁴⁹

Intemperate comments and intemperate conduct by judges are among those things that breed a lack of respect for the decisions judges ultimately render and for the judicial system itself. Respect for our courts depends on each judge earning the respect of the citizenry *one decision or one trial at a time*—not by pulling our punches and responding to the popular will, but by acting rationally, neutrally, and civilly. Judges must also make sure that the process *appears* to be fair, not just by the force of their reasoning and analysis (though surely this is important), but also by the way in which judges treat people in the process. Not only will we enhance respect for the courts, but we will also go a long way towards addressing other goals important to the rule of law, prime among them—as Justice Kennedy suggested—judicial independence.

Judicial independence is an elusive and multi-layered concept that is difficult to define. It is, however, “a legal ideal that is universally recognized,” an ideal closely related to the concept of judicial objectivity.⁵⁰ One writer has defined it as “the ability of judges to be free from outside pressures, other than legal constraints and prece-

46. D.C. BAR STANDARDS, *supra* note 44, at 9; FED. BAR ASS’N STANDARDS, *supra* note 44, at 1; *see* SEVENTH CIRCUIT REPORT, *supra* note 22; A.B.A. GUIDELINES, *supra* note 44, at 1.

47. D.C. BAR STANDARDS, *supra* note 44, at 10; FED. BAR ASS’N STANDARDS, *supra* note 44, at 4; *see* A.B.A. GUIDELINES, *supra* note 44, at 1.

48. D.C. BAR STANDARDS, *supra* note 44, at 10; FED. BAR ASS’N STANDARDS, *supra* note 44, at 4; *see* A.B.A. GUIDELINES, *supra* note 43, at 1.

49. D.C. BAR STANDARDS, *supra* note 44, at 10; FED. BAR ASS’N STANDARDS, *supra* note 44, at 4.

50. Geoffrey C. Hazard, Jr., *Judicial Independence: A Structure for Analysis 1* (Dec. 21, 2000) (unpublished manuscript, on file with author). For a particularly

dents, so that they can decide cases in an impartial manner.”⁵¹ Chief Justice Rehnquist calls it “one of the crown jewels of our system of government today,”⁵² and Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court has said that threats to judicial independence are “ultimately threats to the rule of law.”⁵³

In the current climate, maintaining and preserving that independence has become increasingly difficult even for federal judges who have been appointed for life. One can imagine just how difficult it must be for those serving on state courts who must face popular elections against well-financed opponents or groups opposing retention—people who sometimes distort a judge’s record or level charges that the judge is “soft on crime,” a “coddler of criminals,” or other such emotional, tactic-driven charges. “The nature of judicial elections in some of our biggest states has turned more expensive and downright nasty than at any time in history.”⁵⁴ Courage and rectitude are required to remain unintimidated in such circumstances. In the end, however, the credibility and independence of the courts can be preserved *only* if judges stand tall and give no one reason to perceive them as succumbing to partisan pressures, re-

thoughtful discussion of the various aspects of judicial independence, see James Zagel & Adam Winkler, *The Independence of Judges*, 46 MERCER L. REV. 795 (1995).

51. Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 Ky. L.J. 679, 787 (1999).

52. Chief Justice 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, 274 (1996); see also *id.* at 271 (“[T]here are a very few essentials that are vital to the functioning of the federal court system as we know it. Surely one of these essentials is the independence of the judges who sit on these courts.”).

53. A.B.A. *Public Hearing of the Comm’n on the Separation of Powers and Judicial Independence* 89 (1996) (statement of Chief Justice Shirley Abrahamson, Wisconsin Supreme Court), available at <http://www.abanet.org/govaffairs/judiciary/home.html>; see also Lewis A. Kornhauser, Notes on Judicial Independence 2 (Feb. 14, 2001) (unpublished manuscript, on file with author) (“Whatever judicial independence is, it is instrumental to some other goal or goals, among them the rule of law.”).

54. 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 3 (May 21, 2001) (transcript on file with author); see also John H. Pickering, Remarks at the Ceremony of Admissions to the Bar of the United States District Court for the District of Columbia 5 (June 7, 1999) (transcript on file with author) (“Politics has always played a part in choosing judges, but we need to speak out against what has become the excessive politicalization of the judicial selection process, against the use of litmus tests for picking judges, and against political campaigns that promise to appoint judges on the basis of their ideology or their promise to be tough on crime.”).

sponding to political or press criticism, acting “out of control,” or forgetting just whom and what it is they are meant to serve.

The well-known attacks on judges culminated on the federal level in a call by several members of the Senate and the House of Representatives for both the impeachment of Judge Harold Baer, Jr. and for the use of impeachment generally to “intimidate” federal judges.⁵⁵ President Clinton and Senator Dole also spoke critically of Judge Baer’s and other judges’ decisions in their campaigns during the 1996 presidential election.⁵⁶ On the state level, perhaps the most prominent, recent example of the threat of partisan pressure was the 1996 election retention defeat of Justice Penny White of the Tennessee Supreme Court. Many attribute the defeat to her concurrence in a decision to overturn a death penalty sentence.⁵⁷

The American Bar Association Commission on Separation of Powers and Judicial Independence has noted that the tenor of the debate has become “shrill,” and that it is 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.”⁵⁸ As a result, there is 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. This may reflect a decline in the respect for governmental institutions generally, or a cynicism about the law and lawyers, or, in the thirty-eight states that elect judges, disillusionment with an electoral process that depends on huge sums of campaign money.

Whatever the cause, this is a dangerous trend. Fair criticism of judicial decisions is to be expected, of course. The work of the judi-

55. 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, 1997 WL 17886968; Carelli, *supra* note 6; Carlton, *supra* note 54, at 20–21; Herbert, *supra* note 4.

56. See Stephen B. Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165, 166–67 (Jan.–Feb. 1997); see also Mark Hamblett, *Baer’s Controversial Ruling Leads to Appeal on Recusal*, N.Y. L.J., June 28, 1999, at 1; Kline, *supra* note 51, at 705–11; 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).

57. See Bright, *supra* note 56, at 167–69; Zemans, *supra* note 56, at 627.

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

ciary should not go unexamined. But the criticism should be based on fact and on an understanding of the proper role of the institution of the courts. “[D]istorted attacks for political gain endanger judicial independence and public confidence in the courts.”⁵⁹ They are “a dangerous threat to the independence of our judiciary.”⁶⁰ Unfortunately, those prominent people who recently attacked the Florida Supreme Court and the U.S. Supreme Court, as Justice Stevens said, “only lend credence to [this] cynical appraisal of the work of judges throughout the land.”⁶¹

Federal judges must remind themselves—and sometimes the lawyers who appear before them—that they are not Clinton-appointed or Reagan-appointed or Bush-appointed judges, as the newspapers increasingly describe judges when they report on judicial decisions. State judges must remember that they are not beholden to a political party or to a campaign contributor; rather, their responsibility is to resolve disputes impartially and to preserve the rule of law. All federal and state judges have taken an oath of office that they are bound to uphold, an oath to follow the law and the legal precedents regardless of where they may lead. The public must be given no reason to doubt that judges are doing the best that they can to decide cases on the basis of the facts and the law, conscientiously working to discharge their responsibilities fairly, impartially, and civilly. 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.”⁶²

Today, both judicial independence and civility are values at risk. The problems posed by their erosion are very real—for the courts and for society at large. The special challenge for judges is to work to restore civility in the profession and on the bench, to safeguard the essential independence of the courts, and thereby to

59. Bright, *supra* note 56, at 165.

60. Pickering, *supra* note 54, at 7.

61. Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting).

62. 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).

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help sustain the rule of law, a bedrock of our constitutional and democratic system.⁶³

63. See Kennedy, *supra* note 9, at 24; Kornhauser, *supra* note 53; Zemans, *supra* note 56, at 632.