

JUDICIAL INDEPENDENCE:

Promoting Justice and Maintaining Democracy

August 2019



Boston Bar
ASSOCIATION

BOSTON BAR ASSOCIATION
JUDICIAL INDEPENDENCE WORKING GROUP

Renée Landers (Co-Chair) is a Professor of Law and Faculty Director of the Health and Biomedical Law Concentration at Suffolk University Law School. She is a former BBA President and served as Vice Chair of the Commission on Judicial Conduct. She also sat on the task force that drafted the revised Massachusetts Code of Judicial Conduct and currently is a member of the Committee on Judicial Ethics which advises judges on compliance with the Code.

Lisa Goodheart (Co-Chair) is a partner at Sugarman, Rogers, Barshak & Cohen, P.C., where her litigation practice includes environmental, energy, land use, real estate, insurance, and business matters. In addition to being a former President of both the BBA and the BBF, Lisa has served as Chair of both the Judicial Nominating Commission and the Court Management Advisory Board.

Jon Albano (Boston Bar Association President) is a partner at Morgan Lewis, where he focuses his practice on trial and appellate work in commercial, media, and First Amendment matters. Before becoming BBA President, Jon co-chaired the Civil Rights and Civil Liberties Steering Committee.

Hon. Robert Cordy (Ret.) was appointed to the Supreme Judicial Court in 2001 and served for 16 years as associate justice. Currently, as partner at McDermott, Will & Emery, he focuses his practice on white-collar defense, internal investigations, and appellate work. For the last 18 years he has worked with judiciaries from around the world on furthering rule of law principles, adversarial justice and judicial independence.

Prof. Lawrence Friedman teaches State and Federal Constitutional Law, Information Privacy Law, and National Security Law at New England Law. He is a former member of the BBA Council and has written extensively on a range of constitutional law matters.

Hon. E. Susan Garsh (Ret.) was appointed Associate Justice of the Massachusetts Superior Court in 1993, where she presided over a number of high-profile cases. She now sits on the Supreme Judicial Court's Judiciary-Media Committee. Prior to joining the bench, her practice focused on civil litigation matters.

Giselle Joffre is a partner in Foley Hoag's Litigation Department and a former federal prosecutor currently handling white-collar defense and corporate investigations. She co-chairs the BBA White-Collar Crime Steering Committee.

Paul Lannon is a partner at Holland & Knight, where he practices in the firm's Labor, Employment, and Benefits Group, and co-chairs the firm's national Education Team. He is a member of the BBA Council and former co-chair of the BBA Ethics Committee.

Hon. James McHugh, III (Ret.) was appointed to the Superior Court in 1985 and to the Appeals Court in 2001. During his time as a judge, he received the BBA's Haskell Cohn Award (1995) as well as the William H. Rehnquist Award for Judicial Excellence (2011) from the National Center for State Courts. He also served two terms on the Board of Editors for the BBJ.

Patrick Moore is a partner at Hemenway & Barnes. Pat previously worked in both Governor Deval Patrick's and President Obama's Counsel's Offices. He is a member of the BBA's Civil Rights and Civil Liberties Section and co-chairs the BBA's Government Lawyers Forum.

Ian Roffman is chair of the Securities Enforcement and Litigation practice at Nutter McClennen & Fish and serves on Nutter's executive committee. He is currently a member of the BBA Council.

The BBA would also like to extend its appreciation to those groups and individuals that shared their time, experience, and expertise over the course of the Working Group's efforts, including representatives from the Commission on Judicial Conduct, the Supreme Judicial Court (SJC) Public Information Office, the First Circuit's Office of the Circuit Executive, the SJC Committee on Judicial Ethics, and current and former members of the press.

August 5, 2019

Table of Contents

1. Introduction & Statement of Principles.....	4
2. What Do We Mean When We Talk About “Judicial Independence”?.....	5
3. The History and Importance of Judicial Independence.....	6
4. Current & Frequent Threats to Judicial Independence.....	9
5. Consequences of Attacks on Judicial Independence.....	11
6. Structural Support for Judicial Independence.....	12
7. Mechanisms Promoting Judicial Accountability.....	20
Recommendations for Protecting Judicial Independence.....	27
Appendix A.....	30
Appendix B.....	34

1. Introduction & Statement of Principles

The Boston Bar Association (BBA) is a professional association with 13,000 members drawn from private practice, corporations, government agencies, legal services organizations, the courts, and law schools. Our mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, foster a diverse and inclusive professional community, and serve the community at large. Over the years, we have been a constant supporter of a well-functioning, adequately-funded, and independent judiciary, and as an association of attorneys, we believe we have a particular responsibility to ensure that the role of the judicial branch is understood and that its independence is defended. (See Appendix A for more information on the BBA's efforts to support judicial independence.)

This responsibility compelled us, four times in the last two-and-a-half years, to speak out in response to statements and actions by local and national figures that seemed to threaten the independence of the judiciary. Of course, as long as there have been judges, there has been criticism of judicial decisions. Indeed, a healthy democracy welcomes responsible and thoughtful criticism of government, including the judicial branch. Reckless and irresponsible criticism, however, which unreasonably calls into question a judge's integrity, motives, or good faith, operates to undermine the strength of our democracy.

Recently, the tenor and frequency of malign attacks on judges—and, indeed the judiciary as an institution, as well as the process for judicial selection and appointment—have risen to a point that the climate around judicial rulings and other decisions may be undermining public faith in the judiciary. For that reason, the BBA Council authorized the creation of a working group to reflect upon the values of judicial independence and advise the BBA on how we can best support the judicial branch as these situations inevitably continue to arise.

Over the course of five months, the Working Group met to discuss, debate, and analyze the key aspects of judicial independence. At the end of this effort, the Working Group landed on five key principles to serve as a framework on which the BBA, and the wider bar and general public, can rely when considering new developments that may serve to bolster, or weaken, judicial independence:

- **Principle 1:** In our system of government, judicial independence is a concept that is fundamental to the rule of law and to the checks and balances the rule of law supports.
- **Principle 2:** “Rule of law” is a shorthand expression for a legal system in which disputes are predictably decided on the basis of established legal principles applied in a systematic and orderly way that is free from bias and under which the resulting decisions typically are followed voluntarily by those whom they affect.
- **Principle 3:** The vitality of the rule of law ultimately depends on public understanding of the value and importance of the concept coupled with public support for judicial independence.
- **Principle 4:** The BBA has an obligation to promote, support, and defend judicial independence and should use its education, public policy, and advocacy resources to enhance public understanding of the judiciary, demystify the judicial process, and explain to the public and elected officials the ways in which judicial independence is essential to protecting the rights and liberties of us all.

- **Principle 5:** The BBA should serve as a resource to the public and the press by responding to assaults on judicial independence in a timely and measured manner that distinguishes between, on the one hand, vigorous public debate and dissent and, on the other hand, misinformation and personal attacks that undermine the public's respect for and confidence in the courts.

With these principles as a guide, the Working Group produced the following report, which outlines the history of judicial independence and why it is important; current threats to judicial independence and the consequences of these threats; and structural supports for the judicial system and mechanisms of accountability.

After this analysis, the Working Group offers several recommendations for consideration by bar associations, lawyers, judges, and courts. In brief:

- **Bar Associations:** Bar associations should use their institutional voices to defend, explain, and promote the value of judicial independence and respond to unfounded and uninformed attacks on the judiciary. In this vein, bar associations should work to serve as resources to the press and public to explain key legal processes and to counter misinformation. Bar associations would also benefit from developing a set of criteria that can be used to determine when and how to respond to developments that may threaten the independence of the judiciary.
- **Lawyers:** Lawyers in all practice areas can and should be more proactive in taking actions to promote and defend judicial independence, including by participating in public education opportunities, helping the public to discern between healthy criticism of the judiciary and potentially dangerous attacks, and speaking out against those instances that rise to the level of an unfair attack.
- **Judges and Courts:** The Massachusetts Trial Court should continue to expand and improve its data collection and transparency practices, which will aid in maintaining public trust in the judiciary and identifying patterns and practices that merit further study and improvement. Judges, though not always required by law, should endeavor to explain their reasoning in written decisions when appropriate and, when permitted by the Code of Judicial Conduct, to support judicial independence by educating the public on key issues, whether in person, by writing articles, or through the press.
- **Diversity and Inclusion:** A diverse and inclusive bench will help to promote equity, fairness, and public trust in judicial decision-making. Achieving this goal will take collective action from the legal community, including making diverse judicial nominations and appointments a priority, improving court culture to ensure that professional experiences are inclusive and equitable, and creating an effective pipeline for talent that supports the legal education, employment, and professional development of lawyers from diverse backgrounds.

Taken together, these recommendations function as a call to the bar and the bench to focus attention on efforts to ensure that the judiciary remains independent, supported, understood, and accountable. No less than the health of our democracy may be at stake.

2. What Do We Mean When We Talk About “Judicial Independence”?

Day in and day out throughout the Commonwealth and beyond, disputes are presented to state and federal courts for resolution. Some are civil and some are criminal. But all of them essentially present three broad questions: What are the facts that produced the dispute? What is the law applicable to those facts? And what result is produced by application of that law to those facts? Sometimes, a judge answers

all three questions. Other times, a judge decides what law applies but a jury overseen by a judge and composed of people drawn from the community determines both the facts and the result required when the law is applied to those facts.

Whether the answers to those questions are supplied by a judge or by a judge and jury, judicial independence means that the process of answering the questions is unaffected by the identity of those the dispute involves, unaffected by public opinion regarding how the dispute should be resolved, and unaffected by thoughts or opinions held by other branches of government about the dispute's proper outcome.

Judicial independence thus underlies a system in which disputes are predictably resolved in a systematic and orderly way that produces transparent results free from bias toward or against either side and based upon the objective application of established principle to fact.¹ We call such a system “the rule of law” and it is essential for the reliable planning and ordering of personal and organizational transactions; for creating reliable boundaries for individual, organizational, and governmental conduct; and for the maintenance of a legal environment capable of supporting the economic and social planning essential for a vibrant and dynamic society. As we discuss more fully in Section 4 of this report, judicial independence is a concept at the very heart of the rule of law.

3. The History and Importance of Judicial Independence

Judicial independence is a cornerstone of constitutional democracy. In language as clear today as when it was ratified by the citizens of the Commonwealth, the Massachusetts Constitution of 1780 states that “[i]t is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws and administration of justice.”² Accordingly, the judiciary must be “as free, impartial and independent as the lot of humanity will admit.”³

These very same principles, of course, informed the framers of the federal Constitution and numerous other state constitutions. As Alexander Hamilton argued in the *Federalist* No. 78, the judiciary must stand apart from the political branches of government, because “there is no liberty if the power of judging be not separated from the legislative and executive powers.”⁴ And the judiciary must stand apart from temporal public passions, which “sometimes disseminate among the people themselves, and which, though they [may] speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the [disfavored] in the community.”⁵

All people benefit from this independence—which Hamilton termed the “integrity and moderation of the judiciary”—because no person “can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today.”⁶ This understanding of the judiciary's role traces its origins back to the Magna Carta: “To no one will we sell, to no one will we refuse or delay, right or justice.”⁷ Though these core beliefs and principles have ancient roots, they are as vital today as they were in our nation's formative years. Indeed, just recently, the Massachusetts Supreme Judicial Court

¹ See Section 6e., *infra*.

² Mass. Const. Pt. I, art. XXIX.

³ *Id.*

⁴ The *Federalist* No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁵ *Id.* at 469.

⁶ *Id.* at 470.

⁷ Magna Carta, cl. 40 (1215).

observed that “[t]he judiciary’s independence from the other branches of government and from outside influences and extraneous concerns has been one of the cornerstones of our constitutional democracy, intended to ensure that judges will be free to decide cases on the law and the facts as their best judgment dictates, without fear or favor.”⁸

Both the state and federal judiciaries are guided by the principle of independence. Upon assuming office, judges pledge to “administer justice without respect to persons, and do equal right to the poor and to the rich,” by “faithfully and impartially” applying the law.⁹ Canons of judicial ethics require strict adherence to that pledge.¹⁰ Put more colloquially by the Honorable Joseph L. Tauro, when he was Chief Justice of the Massachusetts Supreme Judicial Court:

No judge [may] ever be concerned with whether his decision will be popular or unpopular. He does his job always with complete awareness that political considerations of the day, contemporary public emotions (no matter what their motivation), and personal philosophies are completely foreign and irrelevant to the exercise of his judicial power. This is the very essence of judicial duty—no less should be given and no more should be required.¹¹

No matter how well-established, these concepts require constant tending. Our governmental system, our economy, and our relationships with our fellow citizens are built on a foundation of which judicial independence is an integral part. The bar has a particular responsibility to continue to highlight this foundation and the importance of judicial independence in principle and in practice. As law professor and constitutional scholar Alexander Bickel put it, “enduring values . . . do not present themselves ready-made. They have a past always, to be sure, but they must be continually derived, enunciated, and seen in relevant application.”¹² These words are especially true where the judiciary is concerned. Its power rests on public understanding—not just of its particular actions, but of its overall task.¹³

So, in that spirit, we catalogue several of the most prominent ways in which judicial independence is essential to our society.

First, judicial independence is essential to the protection of civil rights and liberties. Judges who are not beholden to popular opinion or a political patron are more likely to recognize that constitutional commitments to such values as free expression, due process, and equal protection of the laws require enforcement, particularly in respect to those members of the community who are not in the political majority. Thus William Cushing, Chief Justice of the Massachusetts Supreme Judicial Court in 1783, when charging the jury in *Commonwealth v. Jennison*,¹⁴ could challenge the view that slavery was compatible with the promise in Part I, Article I of the state constitution that “[a]ll men are born free and

⁸ *In re Shelley M. Joseph*, SJC No. OE-140, slip op. at 12 (Supreme Judicial Court August 13, 2019) (quoting *In re Enforcement of a Subpoena*, 463 Mass. 162, 169, 972 N.E.2d 1022, 1029 (2012)).

⁹ E.g., 28 U.S.C. § 453; see *Williams-Yulee v. Fla. Bar*, 135 S.Ct. 1656, 1666 (2015), quoting 10 Encyclopaedia of the Laws of England 105 (2d ed. 1908) (“[T]he common law judicial oath . . . binds a judge ‘to do right to all manner of people . . . without fear or favour, affection or ill-will’”).

¹⁰ See, e.g., Rule 2.2, Mass. Code of Judicial Conduct, SJC Rule 3:09 (effective January 1, 2016).

¹¹ *Commonwealth v. O’Neal*, 369 Mass. 242, 273, 339 N.E.2d 676, 693 (1975) (Tauro, C.J., concurring).

¹² Alexander Bickel, *The Least Dangerous Branch* 24 (1962).

¹³ See *Williams-Yulee*, 135 S.Ct. at 1667 (quoting *Federalist* No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed. 1961)) (“Unlike the executive or the legislature, the judiciary ‘has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.’ The judiciary’s authority therefore depends in large measure on the public’s willingness to respect and follow its decisions”).

¹⁴ Helen Tunnicliff and James Hayden, “Judicial Cases concerning American Slavery and the Negro,” *Commonwealth v. Jennison* (1926-1937), at 465.

equal.” And the Supreme Judicial Court, in cases decided as early as 1799, could exercise, without comment or criticism, what we today call judicial review, without which the textual protections of rights and liberties would amount to little more than examples of James Madison’s “parchment” promises. Indeed, absent the independence that fuels robust judicial review in cases involving rights and liberties, the U.S. Supreme Court might not have ended the doctrine of “separate but equal” in *Brown v. Board of Education* in 1954,¹⁵ and, more recently, the Supreme Judicial Court might have hesitated to enforce the protection of privacy guaranteed by Part I, article 14 of the Massachusetts Constitution in numerous cases in which that right was in tension with the interests of law enforcement.¹⁶

Of course, judicial independence does not guarantee, or even presuppose, judicial infallibility when it comes to protecting rights and liberties. There have been decisions throughout our history that today are universally viewed not only as wrong, but as wrong in fundamental ways. Those decisions have been enormously painful, but these prominent outliers can be corrected. Errors regarding interpretation or application of statutes, regulations or the other handiwork of legislatures and administrative bodies can be corrected by the legislature or the administrative agency that created them. For errors of constitutional dimension, the essential corrective forces, applied over time and often requiring enormous effort, are tied to the careful appointment of thoughtful judges who are willing to look at the impact the decisions have had, at decisions of similar issues by other judges, and at discussions of those issues by thoughtful scholars, commentators, and elected officials. As former Massachusetts Supreme Judicial Court Justice Robert Cordy has noted, “America has acted imperfectly on [matters of fundamental constitutional importance], but what is redeeming about our imperfection, and to our credit, [is that] we take those imperfections very seriously. As a civil society, we expend a great deal of energy exposing and understanding them, and then attempting to correct them.”¹⁷ And in the end, the very independence that allowed the errors is the same independence that permits their correction.

A second way in which judicial independence is essential for our society is the role it plays in producing a stable economic order. Undergirding commercial transactions is the understanding that, if necessary, our courts will fairly impose damages for a breach of an agreement’s terms. Consumer and business confidence rests, in part, on recourse to a remedy in the courts for unfair or deceptive business practices—or for laws that transcend the authority of the state legislature, to regulate economic concerns. In construing the laws and resolving commercial disputes, independent judges have no reason to favor large companies over small, the politically-connected over the iconoclast, or the local over the outsider. This independence supports the reliability and common trust required to promote an open and stable economy. It is no small thing that an individual or small business taking on a large corporation, or

¹⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁶ See, e.g., *Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985) (concluding that confidential informants must possess a basis of knowledge and veracity before their statements can support a search). There are many other illustrations of the principle both at the state and federal level. Consider, for example, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that though the law was race-neutral on its face, its discriminatory application violated the equal protection clause of the Constitution); *Buchanan v. Warley*, 245 U.S. 60 (1917) (holding that an ordinance prohibiting black individuals from living on a block where the majority of residents were white was unconstitutional); *Loving v. Va.*, 388 U.S. 1 (1967) (holding that a Virginia law which forbade interracial marriages was unconstitutional); *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974) (holding that the Boston public school system was unconstitutionally segregated and prescribing a remedial plan).

¹⁷ Robert J. Cordy, Former Massachusetts Supreme Judicial Court Justice, Remarks to the Legal Community of the Gambia (Sept. 2009).

the state itself, knows that the judge before whom they will appear has no interest in the case other than its fair and just resolution.¹⁸

Third, judicial independence means that our personal affairs, when they wind up in court—in the form of a divorce, a will contest following a death in the family, or any other dispute—will be adjudicated fairly, with results driven by the facts and the law. In 1859, Rufus Choate, the Massachusetts Senator, Congressman, Attorney General, master orator and superb trial lawyer now memorialized in the only statue erected in the John Adams Courthouse, explained that a fair judge “shall know nothing about the parties, everything about the case. He shall do everything for justice; nothing for himself; nothing for his friend; nothing for his patron; and nothing for his [government].”¹⁹ The same holds true today. An independent judiciary means that no case or claim shall be deemed too small to warrant attention. While subject-matter jurisdictional boundaries are drawn by legislatures, in the Massachusetts state and federal trial courts, the litigants know when they step into the courtroom that the judge will not favor one side or the other in seeking to resolve the issues surrounding the dissolution of a marriage or the administration of an estate plan.

Finally, and not least, the widespread recognition among the citizenry that the law will be applied and administered fairly is essential to the civic confidence that enables self-governance. That confidence is compromised if the judiciary favors particular interests, ideologies, or political parties. In the words of former U.S. Supreme Court Justice Felix Frankfurter, “justice must satisfy the appearance of justice.”²⁰ John Adams and the framers of the Massachusetts Constitution knew from their own experiences that, for government to operate optimally, checks and balances must be in place to deter tyrannical impulses. And so they created a government of multiple parts: (1) an elected, bicameral legislature to make the laws; (2) an elected governor who could veto legislation and appoint, with the advice and consent of the elected Governor’s Council, principal officers, including judges; and (3) as a check against the abuse of power by any part of the government, an independent judiciary whose members would “hold their offices during good behavior.”²¹ They recognized that, in order to preserve the value of an independent judiciary, judges must be protected from the vicissitudes of public opinion and the interests of lawmakers or officials seeking to stretch their authority farther than a fair reading of the constitution would allow. Those concepts, born here in Massachusetts, also animate the United States Constitution.

4. Current & Frequent Threats to Judicial Independence

Important though judicial independence is for the health of the rule of law, it has for some time and in some quarters been under attack in various ways. Some of the attacks take the form of vocal outbursts by public officials and thought leaders singling out specific judges or unpopular decisions in a way that crosses the line between constructive and destructive criticism.

For example, President Trump announced in late 2018 a series of new regulations that would bar asylum in the United States for anyone who crossed the U.S.-Mexico border at any place other than an official port of entry. In a lawsuit challenging the regulations, the Honorable Jon Tigar of the U.S. District Court for the Northern District of California interpreted existing statutes and regulations as requiring officials to accept asylum claims regardless of where migrants entered the country, and he ordered them to do so.

¹⁸ Consider, for example, *Coffee-Rich, Inc. v. Comm’r of Pub. Health*, 348 Mass. 414, 204 N.E.2d 281 (1965), in which the Supreme Judicial Court concluded that, even in cases involving economic classifications, the legislature must act upon some rational basis.

¹⁹ The Meaning of the Statue of Rufus Choate in the Boston Court House, 2 Mass. L.Q. 220 (1917).

²⁰ *Offutt v. United States*, 348 U.S. 11, 14 (1954).

²¹ Mass. Const. Pt. II, ch. III, arts. I, XCVIII.

The President called the decision “a disgrace,” attacked Tigar as “an Obama judge,” and criticized the entire Ninth Circuit, of which Judge Tigar is a part, as “really something we have to take a look at because it’s not fair,” adding, “[t]hat’s not law... Every case that gets filed in the Ninth Circuit we get beaten.”²² In a similar vein, then-U.S. Attorney General Jeff Sessions reacted to an injunction against enforcement of another immigration regulation issued by a United States District Judge for the District of Hawaii by saying that he “really [was] amazed that a judge sitting on an island in the Pacific can issue an order that stops the President of the United States from what appears to be clearly his statutory and constitutional power.”^{23 24}

More subtle forms of attack on the integrity and independence of the judicial branch occur through the conversion of the federal judicial appointment process from an inquiry into a judicial candidate’s knowledge of the law and the candidate’s demonstrated fair, evenhanded, and thoughtful approach to decision-making into an inquiry about whether that candidate will rule on certain issues in certain ways. In and of itself, an outcome-based inquiry does not tie the hands of a judge after appointment, but it does heighten the odds that the judge will approach particular issues from a starting point that is not the product of open inquiry. More pernicious, it focuses public attention not on judges’ capacities for fair and independent decision-making, but on their willingness and ability to deliver the kinds of decisions that an appointing authority has promised when making an appointment. And the ripple effect of an outcome-oriented appointment process tends to tar the entire judiciary, including the multitude of judges—state and federal—who daily strive to render the independent judgments they deem proper, not those that conform to their appointing authorities’ political views. Such trends have the potential to jeopardize public faith in the judicial branch as a whole.

Fortunately, for the last 50 years, we in Massachusetts have enjoyed a merit-based judicial appointment process. Nevertheless, periodic fitful eruptions remind us that local support for the rule of law can be fragile. Some newspaper columnists, for example, routinely describe all judges as subservient political hacks who have sought and obtained appointment to judicial office because they were unable to make a living as practicing lawyers. Recently, a bipartisan group of legislators sought impeachment of a judge for a decision that clearly was within the bounds of his discretion but with which they vehemently disagreed.²⁵ Several years ago, a Massachusetts District Attorney sought removal of a judge because he thought that the judge’s decisions in criminal cases—which were well within recognized boundaries of judicial discretion—were too lenient.²⁶ More recently, similar complaints about a different judge led a group of legislators to seek a bill of address to force the judge’s removal.²⁷

²² Adam Liptak, *Trump Takes Aim at Appeals Court, Calling It a ‘Disgrace,’* New York Times (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html>.

²³ Charlie Savage, *Jeff Sessions Dismisses Hawaii as ‘an Island in the Pacific,’* New York Times (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html>.

²⁴ Those troubling examples notwithstanding, proper deference to the authority and independence of the Supreme Court has generally been the rule, as expressed, for example, by President George W. Bush, who said in 2008, regarding the Court’s decision in *Boumediene v. Bush*, overturning his Administration’s policy on legal challenges by Guantanamo Bay prisoners, “We’ll abide by the Court’s decision. That doesn’t mean I have to agree with it.” Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, New York Times (June 13, 2008), <https://www.nytimes.com/2008/06/13/washington/13scotus.html>.

²⁵ Christian M. Wade, *Lawmakers renew effort to impeach judge who let drug dealer off with probation*, Eagle Tribune (July 30, 2018), https://www.eagletribune.com/news/lawmakers-renew-effort-to-impeach-judge-who-let-drug-dealer/article_7c149c94-942e-11e8-8b77-179281f667b5.html.

²⁶ See Andrea Estes and Scott Allen, *He’s the jurist defendants covet — Judge ‘Let Me Go,’* Boston Globe, Apr. 17, 2011.

²⁷ See Christian M. Wade, *Lawmakers renew effort to impeach judge*, The Salem News, July 30, 2018.

It is, of course, perfectly fair to criticize judicial decisions and the judges who made them. And such criticism is not out of bounds simply because it may be caustic or unfair. Judges, after all, “are supposed to be [people] of fortitude, able to thrive in a hardy climate.”²⁸ Elected officials in both the legislative and executive branches have a right, if not a responsibility, to criticize the courts when they perceive a judicial decision to be flawed or misguided. But comments by the President of the United States that question not the reasoning behind a particular judicial decision but the very legitimacy of the decision-making process itself; or a judicial appointment process that focuses on how a judge will rule in cases about which the appointing authority has a particular interest; or efforts to remove a judge from office based on an unpopular, though legally justified, decision, warrant our resistance and response. Such attacks go far beyond caustic criticism and take dead aim at the rule of law itself.

5. Consequences of Attacks on Judicial Independence

Public and private attacks on judicial independence can have significant deleterious consequences for individual judges as well as for the integrity and operation of the judiciary generally. When attacks are *ad hominem*, judges may experience intimidation, harassment, or threats to their safety or the safety of their families. They may undergo violations of their privacy or property. Their personal and professional reputations may be injured. Such experiences can have a detrimental impact on particular individuals and their families—and more broadly on the recruitment and retention of qualified judges—and may take a toll on the healthy functioning of our judicial system.

With respect to the integrity of our justice system, the primary concern about attacks on judicial independence is that they generate pressure for judges, going forward, to consider factors beyond the merits of the cases before them, instead of focusing exclusively on the facts and legal issues presented. Attacks on judicial independence are frequently aimed at coercing judges to consider how their rulings will be perceived by different interest groups outside the courtroom, and how their rulings will affect their careers, their families, and their public reputations. If judges allow extrinsic factors to weigh on legal decision-making, or even if such attacks create the public perception that they did so, judicial independence is weakened. And when judicial independence is weakened, both the process for judicial decision-making and the substantive outcomes of that process are damaged in fundamental and dangerous ways.

As noted earlier, the ability of judges to exert a counter-majoritarian power is, and has always been, an essential aspect of the role of the judiciary in our political system of checks and balances. Courts protect the rights of vulnerable minorities by acting as a check on the power of legislative majorities and executive leaders to dictate the results of claims and conflicts. To the extent that judges are subjected to external public pressures in connection with their decision-making, these counter-majoritarian safeguards are threatened and may be eroded. The so-called Heckler’s Veto can have a similar corrosive effect. Sometimes the loudest or most hostile voices are those of a vocal minority, with a very singular or limited point of concern, or with a prominent platform from which to express that concern. Were judges to be swayed by such voices raised outside the courtroom, the interests of extremists could have a grossly disproportional impact, to the detriment of the greater good.

Attacks on judicial independence also taint public perception of the judiciary and undermine public trust in the judicial process. To operate effectively, the judiciary and the judicial system must have the respect and confidence of the citizens they serve. The public should trust that judges are impartial and unbiased in the application of the law to the particular facts of a case, and that judicial decisions deserve respect

²⁸ *Craig v. Harney*, 331 U.S. 367, 376 (1947).

because they are based only on the law and the evidence. The perception that judges follow personal, political, or other extrinsic interests undermines public trust in the process and outcomes of our justice system. In this context, appearances may be as important as underlying facts; if the public is left to wonder, based solely on inappropriate criticism leveled at its author, whether a judicial decision is on the level, then the damage has been done.

In response to perceived judicial abuses, various proposals for reactionary “corrective” measures are advanced from time to time, particularly in the wake of unpopular judicial decisions. Some of these proposals, such as those urging implementation of judicial elections or retention proceedings in Massachusetts, may generate considerable public enthusiasm.²⁹ At such times, it is especially important for lawyers to help the public appreciate that the adoption of such measures, to the extent they are designed to rein in the perceived excesses of a judiciary that is “too independent,” may ultimately distort and weaken the system of careful checks and balances on which our government is based.

Distinguishing between harmful attacks on judicial independence and helpful efforts at reform, even when they reflect sharply critical assessments, requires lawyers to remain vigilant and maintain perspective. Analytic rigor is also necessary because “tone of voice” and “volume” are unreliable indicators of this sometimes subtle but critical difference. Lawyers can provide a valuable service by helping the public to discern between healthy criticism of the judiciary and potentially dangerous attacks on judicial independence.

It is essential that lawyers perform that service because, in the end, judicial independence is one of a democracy’s critical guardrails. As we look around the world at recent events in Turkey,³⁰ Poland,³¹ Nigeria,³² Venezuela,³³ Argentina,³⁴ Hungary,³⁵ and elsewhere, it is therefore no surprise that those who seek to transform a liberal democratic system into an authoritarian regime begin by undermining their independent judiciaries. The swiftness with which some of those judicial systems have been transformed from checks on authoritarian overreach to enabling bureaucracies is in some cases stunning. In all cases, it is a testament to the fragility of judicial independence and the need for lawyers, in particular, to be vigilant and vocal in its defense.

6. Structural Support for Judicial Independence

The concept of judicial independence is perfectly compatible with the concept of judicial accountability, as noted above. Indeed, maintenance of appropriate mechanisms for ensuring judicial accountability is essential to maintaining public confidence that the judicial process is proceeding with integrity and is beholden to no person or institution. So important is the topic of accountability that Section 7 of this

²⁹ See Section 7b, *infra*.

³⁰ Carlatta Gall, *Erdogan’s Purges Leave Turkey’s Justice System Reeling*, New York Times (June 21, 2019), <https://www.nytimes.com/2019/06/21/world/asia/erdogan-turkey-courts-judiciary-justice.html>.

³¹ Marc Santora, *Poland Purges Supreme Court, and Protesters Take to Streets*, New York Times (July 3, 2018), <https://www.nytimes.com/2018/07/03/world/europe/poland-supreme-court-protest.html?module=inline>.

³² Paul Wallace, *Nigeria Leader Sparks Pre-Vote Crisis by Replacing Top Judge*, Bloomberg (Jan. 28, 2019), <https://www.bloomberg.com/news/articles/2019-01-25/buhari-suspends-nigeria-s-top-judge-ahead-of-election-aide-says-jrcau3pn>.

³³ *Venezuela must guarantee judicial impartiality - UN human rights expert*, UN News (Mar. 1, 2019), <https://news.un.org/en/story/2019/03/1033852>; Steven Levitsky and Daniel Ziblatt, *How Democracies Die* 81-87 (Crown 2018).

³⁴ *Inquiry Threatens Judicial Independence*, Human Rights Watch (Mar. 19, 2019), <https://www.hrw.org/news/2019/03/19/argentina-inquiry-threatens-judicial-independence>.

³⁵ Benjamin Novak and Patrick Kingsley, *Hungary’s Judges Warn of Threats to Judicial Independence*, New York Times (May 2, 2018), <https://www.nytimes.com/2018/05/02/world/europe/hungary-judges-independence.html>.

report focuses on that topic exclusively. The discussion immediately below, however, focuses on the several processes and forces that provide essential structural support for judicial independence.

a. Judicial Appointments

While at least some judges are elected in the majority of states, judges in Massachusetts are appointed. However, it's worth remembering that though they are not elected, judges are nominated by the Governor, who is accountable to the electorate, and must be confirmed by the eight members of the Governor's Council, who also are popularly elected.³⁶

Our Commonwealth's Constitution provided for lifetime judicial appointments when it was first adopted in 1780³⁷ and a similar provision was included in Article III of the United States Constitution when it was adopted shortly thereafter. Federal lifetime tenure remains in place today, but by virtue of a 1972 amendment to the Massachusetts Constitution, Massachusetts judges now must retire at age 70.³⁸

Over the years, questions have arisen about whether we would be better served if Massachusetts judges were elected by the people rather than appointed in the fashion just described. Indeed, some form of electoral process is in place in the vast majority of U.S. states. Those processes reflect a carefully-considered belief that judicial accountability and judicial independence are both advanced by mechanisms for public review of judicial activity at various intervals. While that approach may be satisfactory to the citizens of the states that employ it, the Massachusetts approach is based on a series of interrelated considerations that have guided and supported our efforts to protect judicial independence since the Republic was founded. It is important to remember what they are.

In the *Federalist* No. 78, Alexander Hamilton provided one of the fundamental principles that underlie an appointed rather than elected judiciary. Stressing the judiciary's role in providing "checks and balances" to an otherwise unrestrained public will, Hamilton spoke of appointed judges as people who were able to protect against "legislative encroachments" through "unjust and partial laws," and also serve a "steady, upright, and impartial" role in "administration of the laws." At the Massachusetts Constitutional Convention of 1853, Rufus Choate, the Massachusetts statesman, similarly noted the importance of impartial jurisprudence by judges who are not beholden to the public opinion of the time.³⁹

In more recent times, it has become clear that one benefit of appointing judges, rather than electing them, is avoidance of the potential negative effects of campaign contributions on judicial independence and public perception of the court. Some scholars have noted that judicial elections are often "low-salience, down-ballot races," and thus, voter information is often derived primarily from political spending.⁴⁰ It is also conceivable that a judge's gratitude for a past financial contribution could pose a serious "risk of actual bias or prejudgment," or at least risk the appearance of a lack of impartiality. In *Caperton v. A.T. Massey Coal Co., Inc.*, for example, the U.S. Supreme Court found that, where one party's financial support of a candidate was instrumental in that judge's election, the judge could "feel a

³⁶ Before judicial candidates are nominated for approval in Massachusetts, they are screened and vetted by both the Judicial Nominating Commission, which each Governor appoints, and by the Joint Bar Committee, which is a standing consortium of bar association representatives, including the BBA.

³⁷ Mass. Const., Pt. II, ch. III, art. I.

³⁸ Mass. Const., amend. XCVIII.

³⁹ The Meaning of the Statue of Rufus Choate in the Boston Court House, 2 Mass. L.Q. 220 (1917).

⁴⁰ Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 90 (2009).

debt of gratitude to [the contributor] for his extraordinary efforts to get him elected,” which might tempt the judge to benefit the contributor in the future.⁴¹

Many scholars have noted that an appearance of bias and partiality resulting from judicial elections can undermine public perception in the legitimacy of the court.⁴² One empirical study found that when judicial candidates receive campaign contributions from those with direct business interests before the court, many perceive subsequent decisions as biased or partial.⁴³ Indeed, when a party that contributed substantially to a judge’s campaign appears before that judge in court, fewer than one-half of surveyed people believed that the judge could be impartial. Empirical data also suggest that the use of negative or attack ads by judicial candidates, a common practice in both legislative and judicial elections, detracts from the appearance of impartiality and fairness. The same study, however, found that while negative or attack ads undermine perceptions of judicial legitimacy, policy debates among candidates do not.⁴⁴

Judicial elections also create a real risk that sitting judges will decide cases based on how they might impact their own re-election prospects.⁴⁵ In *Republican Party of Minnesota v. White*, the Court stated that all elected judges will feel they have a stake in the outcome of every publicized case, and therefore “[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.”⁴⁶ In his dissent, Justice Stevens noted that “[a]s a practical matter, we cannot know for sure whether an elected judge’s decisions are based on his interpretation of the law or political expediency.”⁴⁷

To be sure, the appointment process is not a complete and perfect antidote to self-interested ambition, among judges and judicial candidates.⁴⁸ No such antidote exists. Judicial service, like public and private service elsewhere, provides opportunities for promotion, and promotions require further evaluation by appointing authorities. Moreover, there are opportunities for both public and private positions after judicial service is over, and a judge’s reputation and record may be taken into account in the selection process for such opportunities. Nevertheless, insulation of the judiciary from transient popular sentiment is typically greater in an appointive system than it is in an elected system, because the relationship between present actions and downstream rewards is typically more amorphous.

b. Judicial Tenure

The nation’s founders considered it fundamental to judicial independence for judges to enjoy life tenure subject to good behavior, as opposed to temporary terms of service. In *Federalist* No. 78, Hamilton opined:

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.

⁴¹ *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 882 (2009).

⁴² George Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 William & Mary L. Rev. 1543 (2007); James Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 THE AM. POL. SCI. REV. 1, 59 (2008).

⁴³ Gibson, *supra*, at 61.

⁴⁴ *Id.* at 70.

⁴⁵ Michael Dimino, Sr., *Counter-Majoritarian Power and Judges’ Political Speech*, 58 FLA. L. REV. 53, 54 n.1 (2006).

⁴⁶ *Republican Party of Minn. v. White*, 536 U.S. 765, 788–89 (2002).

⁴⁷ *Id.* at 800 (Stevens, J., dissenting).

⁴⁸ Nor is it a complete shield against ideological influences on judicial decision-making. See Cass Sunstein, et. al., *Studying Judges with Numbers* (Brookings Institution Press 2006).

Periodical appointments, however regulated, or by whomsoever made, would in some way or other, be fatal to their necessary independence.⁴⁹

Applying these principles, if sitting judges perceive that they must curry favor with elected officials and bend to majority opinion in order to maintain their seats, this will tend to skew their incentives and give rise to a conflict between their personal interests and their duty to issue unpopular decisions when warranted under the law. This is why, in the interest of supporting judicial independence, federal judges serve life terms subject to good behavior.⁵⁰ As was noted earlier, that was the constitutional requirement in Massachusetts until 1972, when a constitutional amendment required judges to retire at age 70.

The Massachusetts legislature regularly has been called upon to debate unsuccessful proposals to limit judicial terms to six years. There have also been proposals to have the Governor's Council conduct what amounts to a periodic retention review of each judge's performance. Proponents of shorter judicial terms or that kind of review reason that judges should be held accountable for their negative performance, including patterns or trends of issuing poorly-supported decisions.⁵¹ In 2002, the Boston Bar Association adopted a resolution opposing the then-pending legislative proposal to establish six-year judicial term limits, reasoning that short judicial term limits would "induce a natural fear in judges of political reprisal for unpopular decisions" and that adequate "means already exist," based in our state constitution and laws, "to discipline or remove any judge for misconduct."⁵²

An alternate proposal to either life tenure or short judicial terms is long judicial term limits. For example, academics have proposed that Supreme Court Justices should serve staggered, non-renewable eighteen-year terms.⁵³ Longer limited terms may still foster judicial independence while (1) reducing strategic retirements by judges to benefit a particular political party, (2) reducing the incentive for the appointment of young nominees to the exclusion of older qualified nominees, and (3) reducing the random nature of appointment opportunities across administrations.⁵⁴ Those kinds of term limits, too, would require a constitutional amendment, and the current Massachusetts mandatory retirement age of 70 years achieves many of the goals sought by those who seek long but renewable term limits.

c. Transparency of Judicial Proceedings

A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. . . . People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

Richmond Newspapers v. Va., 448 U.S. 555, 571-72 (1980).

Popular support for the judiciary is inextricably tied to the openness of judicial proceedings and records. Public access is the primary means for enabling the citizenry to assure itself that the judge has, in fact,

⁴⁹ The *Federalist* No. 78, at 470-71 (Alexander Hamilton).

⁵⁰ Judges "both of the supreme and inferior Courts, shall hold their Offices during good Behaviour." U.S. Const. art. III, § 1.

⁵¹ Elise Takahama, *Bill seeks to hold judges accountable*, The Lowell Sun (Apr. 10, 2019), http://www.lowellsun.com/todayshadlines/ci_32566599/bill-seeks-hold-judges.

⁵² Resolution of the Boston Bar Association regarding House Bill 3357 (2002); Bonnie Sashin, *H-3357 Strikes at Heart of Judicial Independence so Says Boston Bar Association*, BBA Newsroom (July 12, 2002), <https://web.archive.org/web/20021013080406/http://bostonbar.org/nr/independence.htm>.

⁵³ James E. DiTullio and John B. Schochet, *Saving this Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093 (2004).

⁵⁴ *Id.*

conducted the proceedings fairly and not made decisions based on bias or partiality to an attorney or participant. Recognition of the link between public trust in the independence of the judiciary (“that justice should be ministered indifferently to rich as to poor”) and judicial transparency dates at least as far back as early fourteenth-century England.⁵⁵ Massachusetts similarly has stressed the desirability of judicial transparency so that the public can satisfy itself as to the manner in which judges carry out their duties.⁵⁶

In order to ensure transparency, a judicial proceeding generally cannot be closed unless specific, on-the-record findings are made to support the determination that “closure is essential to preserve higher values and is narrowly tailored to serve that interest.”⁵⁷ The presumption against closed, private judicial proceedings preserves the opportunity for the public to scrutinize directly, or through the media, the actions of the courts. Placing the actions of the judicial branch of government beyond public scrutiny tends to undermine public confidence in democratic institutions: “Democracies die behind closed doors.”⁵⁸ In *Detroit Free Press v. Ashcroft*, the Sixth Circuit observed that the Framers protected the people against secret government and that the people have the right “to know that their government acts fairly, lawfully, and accurately.”⁵⁹ The decision also noted that “[o]pen proceedings, with a vigorous and scrutinizing press, serve to ensure the durability of our democracy.”⁶⁰ Openness provides “confidence that standards of fairness are being observed” and “gives assurance that established procedures are being followed and that deviations will become known.”⁶¹ Transparency promotes public understanding of how the courts are operating, knowledge necessary for the public to develop informed opinions on how government is performing.⁶² This understanding is important to maintaining the legitimacy of the judicial branch.⁶³

In addition, the ready availability of court transcripts supports the public’s right of access.⁶⁴ Even plea discussions in which a judge participates must be recorded and made part of the record.⁶⁵

In state court, unlike the federal district courts, the Supreme Judicial Court’s directive that a trial judge generally “shall permit” televising courtroom proceedings that are open to the public allows the public to have an unfiltered view of high-visibility cases.⁶⁶ Similarly, the Uniform Rules on Impoundment Procedure that govern impoundment of otherwise public records filed in civil and criminal proceedings in each department of the Trial Court establish a presumption that case records are open to the public

⁵⁵ *Richmond Newspapers*, 448 U.S. at 566; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982).

⁵⁶ *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.).

⁵⁷ *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1 (1986).

⁵⁸ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (invalidating under the First Amendment an order of the Chief Immigration Judge requiring certain immigration proceedings be closed to the press and public). *But see*, *N. Jersey Media Grp. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

⁵⁹ *Detroit Free Press*, 303 F.3d at 683.

⁶⁰ *Id.* at 711.

⁶¹ *Id.* at 704 (quoting *Press-Enterprise v. Superior Court*, 464 U.S. 501, 508 (1984) (*Press-Enterprise I*)).

⁶² *Id.* at 704-05.

⁶³ *Id.* at 704.

⁶⁴ Mass. Superior Court Administrative Directive No. 18-1 provides that all proceedings in criminal cases in the Superior Court shall be recorded by either an electronic recoding system or a per diem court reporter. District Court Special Rule 211 provides that in all divisions of the District Court Department and in the Boston Municipal Court Department, all courtroom proceedings shall be recorded electronically subject to the availability of functioning recording devices except for the call of the list and similar administrative matters, proceedings recorded by an official court reporter, and proceedings conducted by a magistrate other than a judge.

⁶⁵ Mass. Rule of Crim. Procedure 12(b)(2).

⁶⁶ Mass. SJC Rule 1:19: Electronic access to the courts.

unless a statute, court rule, standing order or case law requires them to be withheld from public inspection.⁶⁷

The training of new judges and continuing legal education programs for judges on the statutes, court policies, and rules and regulations governing public access to judicial proceedings and records aid in the promotion of transparency. Similar training of court clerks helps to facilitate the public's right of access. Mentors for new judges should be cognizant of the need to stress with their mentees the existence and importance of the various rules governing access to judicial records and proceedings.

A judicial explanation of the logic behind a particular ruling is not always required by law or rule. The omission of an articulated reason for action undercuts transparency, however. Obviously, it is difficult to know whether a judge has relied upon impermissible grounds if the reasoning for a decision remains hidden. Transparency is particularly important in the criminal sentencing realm, where the public has a keen interest in understanding what may appear, in the absence of explanation, to be a lenient (or harsh) sentence. Indeed, outrage over a controversial sentence tends to be magnified when the judge has not articulated the basis for the sentence. Drafted for the specific purpose of promoting public understanding, the Best Practices for Criminal Sentencing in the Superior Court provide that a judge should, as a general matter, state orally or in writing the reasons for imposing a particular sentence. Boston Municipal Court and District Court Sentencing Best Practice Principles permit, but do not encourage, a statement of reasons for imposition of a particular sentence.⁶⁸

d. The Role of Elected Officials

Judges ought not to bear alone the responsibility of safeguarding their independence through their policies, procedures and court culture. Members of the executive and legislative branches of our government also can—and should—provide structural support for judicial independence. To begin with, elected officials should support judicial independence by respecting judicial decisions and appealing unfavorable decisions through the court process as opposed to in the court of public opinion. Elected officials' irresponsible criticism of judicial decision-making undermines the public's confidence in and respect for the judiciary.⁶⁹ For example, the legal community has expressed concern that President Trump's recent negative comments on social media about certain judicial decisions and judges not only undermine judicial independence but diminish the legitimacy and authority of the judiciary as a check on the executive.⁷⁰ Because of the affirmative powers that the executive branch possesses, in addition to the high-profile status of certain elected officials, when elected officials criticize judicial opinions, judges may be intimidated.⁷¹ Lawmakers, too, should recognize the power and impact of their voices and strive to express criticism in ways that do not undermine the independence of the judiciary.

e. A Diverse Bench and Inclusive Courtroom Culture

⁶⁷ Mass. Trial Court Rule VIII: Uniform Rules on Impoundment Procedure.

⁶⁸ "In circumstances deemed appropriate by the judge and consistent with applicable legal authority, the judge may state in open court, or in writing, the reasons for imposing a particular sentence." Boston Municipal Court and District Court Sentencing Best Practice Principle 2 (Mass. Court System 2017).

⁶⁹ Stephen B. Bright, *5 Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997). (Defining irresponsible criticism as attacks on judges without regard to the legal principles that govern judicial decision-making, for the purposing of removing a judge from political office to open a space for a judge from a different political party or to bully the bench at large into a particular course of action).

⁷⁰ Kevin Judd and Keith Watters, *Trump's Attacks on Courts Undermine Judicial Independence*, ABA Journal (June 28, 2018), www.abajournal.com/news/article/trumps_attacks_on_courts_undermines_judicial_independence.

⁷¹ *Id.* ("Derogatory tweets and criticisms from the executive branch must not be allowed to intimidate the judiciary.")

We have above identified and addressed some external threats to judicial independence, but it is likewise essential to speak about how diversity within the court system strengthens judicial independence.⁷² Having a diverse bench that is representative of the community the judges serve builds the public's confidence in the ability of the judiciary as a whole to be impartial and unbiased. In this report, we posit that judicial independence requires a "process of answering the questions [that] is unaffected by the identity of those the dispute involves."⁷³ Because each judge has biases—conscious and/or unconscious—the ideal of an unbiased judiciary that provides impartial ruling regardless of the identities of those involved in a dispute remains aspirational. Nevertheless, a diverse bench, including, but not limited to, one that is diverse in terms of race, ethnicity, gender, sexual orientation, gender identity, ability, religion, socioeconomic background and political view, will bring us closer to that ideal. As the Honorable Carlton W. Reeves, U.S. District Judge for the Southern District of Mississippi, explained:

With no Muslims on the bench, will our judiciary understand the many facets of religious freedom? How can it defend economic opportunity with so few judges who know the taste of a free lunch program or the weight of poverty? . . . Filled only with the experiences of prosecutors and state court judges, of Big Law partners and corporate counsel, of a single religion or sexual orientation, our courts will fail to find the many truths justice may see. We need a judiciary as diverse as our country – as diverse as “We the People.”⁷⁴

This unfinished work remains the responsibility of those officials who appoint or elect judges, all who are in a position to support and promote potential candidates for the bench, and educators and mentors who can help create the pipeline that delivers a steady stream of talented, diverse lawyers qualified to serve as judges.

f. Active Support from Lawyers and Legal Organizations

Lawyers have an intense interest, indeed self-interest, in the existence of strong popular support for judicial independence. As noted earlier, lawyers are uniquely positioned to foster and help maintain that support. Support from lawyers and legal organizations has historically taken many forms, including advocating for adequate funding for the judicial branch, supporting legislation that would ensure meaningful civics education for Massachusetts students, and speaking out against developments and proposals that would threaten the independence of the judiciary.

Individual lawyers can and should be much more active in speaking out against unfair, uninformed, and inflammatory attacks on judges. A press report on a judicial decision that omits mention of applicable legal standards and constraints—such as the purpose of bail, the standards that control in a dangerousness hearing, relevant sentencing considerations, and fundamental rights governing motions to suppress—should not be left uncorrected. The media coverage and concomitant outrage about such matters as bail decisions and bail reductions often rest on a fundamental misunderstanding of what bail

⁷² Mass. Trial Court Annual Diversity Report Fiscal Year 2018, at 7 (2019) (stating that 11 percent of justices are racial/ethnic minorities and 43 percent are female); Tracey E. George and Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment in State Courts?*, Am. Const. Soc’y for Law and Policy 21-23 (2016) (stating 37% of Massachusetts state judges are women while women comprise 51% of the population, and 14% of judges are racial/ethnic minorities while racial/ethnic minorities comprise 25% of the population).

⁷³ *Supra* at p. 6.

⁷⁴ Carlton W. Reeves, *Defending the Judiciary: A Call for Justice, Truth, and Diversity on the Bench. Prepared Remarks upon Receiving the Thomas Jefferson Foundation Medal in Law*, (April 11, 2019), <https://www.documentcloud.org/documents/5836481-Thomas-Jefferson-Award-Speech-April-2019.html>.

is and what a judge may and may not do in making bail decisions. “Unanswered, the steady drip, drip, drip of irresponsible criticism can poison the very roots of judicial independence: public trust in the courts.”⁷⁵ It is vital, therefore, that attorneys, whether they agree with the judge’s decision, promptly speak up in defense of the integrity of the process when a judge has been subjected to misleading criticism based on a significant error or omission concerning the law. A lawyer can explain the judge’s role; whether the decision was mandated by state law; the general principles governing bail, the issuance of restraining orders, and other proceedings; and why the attack on the judge is unjust. The greater the frequency and strength of such responses, the greater the likelihood that follow-up stories will provide fuller context.

g. Judicial Actions to Promote Judicial Independence

Judges, when unfairly attacked, are not without recourse. Indeed, judges have a responsibility, as well as a right, to speak and act appropriately in ways that promote judicial independence. Although the Massachusetts Code of Judicial Conduct prohibits a judge from making any statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in a Massachusetts court, the Code does not render a judge unable to promote public understanding by explaining a decision in suitable ways.

First and foremost, the judiciary promotes respect for itself when its members are competent, perform their judicial roles with integrity, follow the law—including statutes, court rules and standing orders and generally act in a fashion that inspires public confidence in their independence and impartiality. As the Preamble to the Massachusetts Code of Judicial Conduct states:

[1] An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of persons of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and must strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times and avoid both impropriety⁷⁶ and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

Judges who follow the encouragement in the Code’s commentary to explain on the record, at the time that decisions are made, the basis for those decisions or rulings, including decisions concerning bail and sentencing, advance judicial independence by promoting public understanding of judicial proceedings. Public confusion and misunderstanding about why or how judges have exercised their wide discretion easily turns into public mistrust, especially when encouraged by vocal critics. Whenever practicable, therefore, judges should clearly and concisely articulate the basis for their rulings.

⁷⁵ Robert J. Cordy, *The Interdependent Relationship of a Free Press and an Independent Judiciary in a Constitutional Democracy*, 60 B.C.L. REV. E. SUPP. I.-1 (2019), <https://lawdigitalcommons.bc.edu/bclr/vol60/iss9/4>.

⁷⁶ “Impropriety” is defined, in part, as meaning conduct that violates the law, namely the Code itself, court rules and standing orders, statutes, constitutional provisions, and decisional law, as well as conduct that undermines a judge’s independence, integrity or impartiality. Terminology, Mass. Code of Judicial Conduct, SJC Rules 1.2, 2.10, and 3.13.

Subject to the restrictions on statements that might affect the outcome or impair the fairness of a pending matter, a judge is free to make statements that explain the procedures of the court, general legal principles, or what information is available in the public record in a case. General comments, about topics such as the role of precedent or a decision-making process mandated by statute or court rule, can be enormously helpful to members of the press and public who are often unfamiliar with both. The comments to the Code of Judicial Conduct make clear that a judge is permitted to respond to questions from a reporter about a judicial action and correct an incorrect media report by referring to matters that may be learned from pleadings, documentary evidence, and proceedings held in open court. This permission to speak is too often underutilized by judges, with the result that the public is left with more unanswered questions than may be necessary. Judges who receive media inquiries and who are reluctant to engage directly with members of the media should be encouraged to promptly contact the Supreme Judicial Court's Public Information Office so that public, relevant information can be rapidly disseminated.

Judges are also allowed to participate in activities that promote public understanding of and confidence in an independent judiciary, such as speaking about the administration of justice to not-for-profit groups and bar associations. Indeed, commentary to the Code encourages judges "to initiate and participate in appropriate community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice," and many judges do so. An increase in such public outreach efforts by the judiciary might serve to counteract some of the misinformation and disinformation that undercuts public support for judicial independence.

7. Mechanisms Promoting Judicial Accountability

What we in the courts do, and how we do it, is seen not only by the litigants before us, but by the entire community. The stakes are high. Our performance will help to determine whether constitutional principles are nourished and whether human rights are advanced.

Edward F. Hennessey, former Chief Justice, Supreme Judicial Court of Massachusetts.⁷⁷

Judicial independence without accountability lacks legitimacy. The *American Heritage Dictionary* defines the word "accountable" to mean "[e]xpected or required to account for one's actions; answerable" and "[c]apable of being explained."⁷⁸ In the context of examining the legitimacy of the judicial branch of government, "accountability" takes on both aspects of the definition. The judiciary, like other institutions of government, must be accountable to the public it serves. Supreme Court Justice Thurgood Marshall observed, during the turbulent years of the 1960s, that "the only real source of power we as judges can rely on is the respect of the people." In other words, an independent, effective and courageous judiciary is sustained not just by the written words of the Constitution, but by earning the trust of its citizens. Earning the trust and respect of the people requires measures of judicial accountability that can assure the public that those who serve as judges are living up to their professional obligations—first, by explaining the reasoning underlying their decisions, and second, through their behavior, their competence, and their impartiality.

The public is accustomed to holding public officials accountable, directly or indirectly, through the mechanism of elections. Other mechanisms of accountability—such as media scrutiny and enforcement

⁷⁷ Edward F. Hennessey, *The Courts and the Media*, published in THE HENNESSEY PAPERS 25–26 (remarks delivered on April 14, 1989, at a conference of all Massachusetts judges.)

⁷⁸ *Accountability*, AMERICAN HERITAGE DICTIONARY (5th ed. 2019).

of conflict of interest and other laws—constrain the conduct of, and enforce legal norms for, elected officials. Some of these same mechanisms provide judicial accountability for the federal and state judges in Massachusetts, none of whom is elected, yet a judge’s foremost accountability is to what Chief Justice Hennessey termed “the work of justice.” How a system strengthens judicial independence with mechanisms of judicial accountability is vital to gaining the trust and confidence of the public that is essential to the judiciary’s mission. Those mechanisms should be sufficiently comprehensive and robust to earn the public’s trust that misconduct is effectively identified, remedied, and deterred.

The discussion below describes seven current mechanisms that promote and enforce the necessary accountability for the federal and state judiciary in Massachusetts.

a. Appeals

An effective, timely, and efficient appeals process is essential to ensure that judges act according only to the law and that the law is consistently and equitably applied. Different trial court judges, for example, may decide similar cases differently, by interpreting or applying the law at issue, as they understand it, in different ways, to similar sets of particular facts. It is the role of an appeals process to smooth out those differences by clarifying the law and making its application more consistent and predictable, both for the judges and for future parties. Trial court judges may also make decisions that reflect inaccurate views of law, and it is the role of an appeals process to correct those errors. Finally, trial court judges may apply the law correctly according to existing precedent established by appellate courts, but the highest appellate court in the system may decide to change the law when reviewing a case on appeal. So even though a lower court judge may not have acted in error, the decision may be reversed. The appeals process, then, serves both to correct misinterpretation of the law and to assess whether a change in the law is necessary.

b. *Stare Decisis* and the Role of Precedent

Accountability is supported by our long-ago established system of precedent. As U.S. Supreme Court Justice Elena Kagan recently wrote, in a dissenting opinion, “Adherence to precedent is a foundation stone of the rule of law. . . . [I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”⁷⁹ Adherence to precedent, often described by the Latin phrase “stare decisis” which roughly means “standing by things decided,” does not mean that the outcome of any particular dispute will necessarily be predictable. Rather, it means that a principle, once established, will be faithfully applied in future cases. Precedent provides direction for judges so that their decisions are not freewheeling determinations of individualized outcomes but remain tethered to a rule of law applicable to all disputes presenting similar facts. Courts do not abandon or overrule precedent lightly. In *Planned Parenthood v. Casey*, a joint opinion by Justices O’Connor, Kennedy, and Souter set forth factors the Court should consider in determining whether to overturn a precedent. The justices wrote that overturning precedents is warranted if the earlier decision establishing the precedent had become unworkable, if overruling the precedent would not disrupt substantial and important reliance interests around which members of the public have organized their activities, if legal principle had evolved in a manner undermining the doctrinal basis for the precedent, and if time has overtaken the factual

⁷⁹ *Knick v. Township of Scott, Pa.*, 139 S.Ct. 2162, 2189 (2019) (Kagan, J., dissenting) (internal citations omitted).

assumptions on which the precedent was based.⁸⁰ These factors tend to operate as a brake on overturning precedents and help courts distinguish between precedent that has outlived its utility and others which remain useful and consistent with contemporary norms. The Court has relied on this analysis in subsequent cases raising the possibility of overturning a precedent.⁸¹ The Code of Judicial Conduct requires judges to “uphold and apply the law.”⁸²

c. Amending the Federal and State Constitutions

Both the United States and Massachusetts Constitutions specify processes for amendment. Amendments can replace outdated provisions and can be used to correct and replace interpretations of the documents by the United States Supreme Court or the Supreme Judicial Court of Massachusetts. Article V of the United States Constitution allows for amendments when approved by votes of two-thirds of the House and Senate or on application of two-thirds of the states followed by ratification by three quarters of the states. Four decisions of the United States Supreme Court have been reversed by constitutional amendment. One such amendment is the Fourteenth Amendment, which grants citizenship to all people born or naturalized in the United States. This amendment reversed the case of *Dred Scott v. Sandford*,⁸³ the pre-Civil War case which held that African-Americans were not citizens.

Article XLVIII of the Amendments to the Massachusetts Constitution governs the amendment process. The Constitution can be amended upon petitions initiated by citizens as well as by votes of the state legislature in constitutional convention subject to ratification by voters. The Constitution restricts some subjects from the initiative petition process, barring petitions that relate to the “appointment, qualification, tenure, removal, recall or compensation of judges,” petitions that would reverse judicial decisions, and petitions relating to the “powers, creation or abolition of courts.” These limitations serve to preserve and enable judicial independence.

d. Procedures for Investigating and Resolving Complaints Against Judges

Experience has shown that relying solely on the integrity, compassion, and work ethic of people with decision-making power is insufficient to ensure accountability. For that reason, codes of judicial conduct have been adopted to circumscribe the activities of both state and federal judges. For Massachusetts state court judges, the Commission on Judicial Conduct is the body designated by state law⁸⁴ to investigate complaints of judicial misconduct—from litigants, lawyers, the public, and arising in the media—and to impose appropriate disciplinary measures in cases where the Commission determines that misconduct has occurred. The Office of the Circuit Executive for the United States Court of Appeals for the First

⁸⁰ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.) (upholding and affirming the “essential holding” of *Roe v. Wade*).

⁸¹ See, e.g., *Lawrence v. Tex.*, 539 U.S. 558, 577 (2003) (overturning *Bowers v. Hardwick* and invalidating state laws prohibiting certain sexual acts among persons of the same sex, while acknowledging the “essential role” of the doctrine of stare decisis in engendering the “respect accorded to the judgments of the Court and to the stability of the law.”).

⁸² Rule 2.2, Mass. Code of Judicial Conduct, SJC Rule 3:09 (effective January 1, 2016).

⁸³ 60 U.S. (19 How.) 393 (1857). The Fourteenth Amendment ratified in 1868 reversed the *Dred Scott* decision and granted citizenship to former slaves. Other constitutional amendments reversing Supreme Court rulings are the Eleventh Amendment ratified in 1798 providing states with immunity from certain suits in federal court, the Sixteenth Amendment adopted in 1913 allowing for the federal income tax, and the Twenty-Sixth Amendment adopted in 1971 requiring states to grant voting privileges to citizens at age 18. Kathleen M. Sullivan and Noah Feldman, *CONSTITUTIONAL LAW* 33 (19th ed. 2018).

⁸⁴ Mass. G.L. c. 211C, § 1.

Circuit administers the process for investigating complaints regarding federal judges.⁸⁵ In both systems, a judge may seek review of an initial determination that misconduct has occurred.⁸⁶

The state and federal officials responsible for administering the process for resolving complaints against judges use different thresholds for docketing complaints. For complaints against state court judges, the Commission on Judicial Conduct reviews incoming complaints and docket complaints for investigation only after it decides that if the facts alleged in the complaint are true, the conduct of the judge would constitute either misconduct or disability. Of the 300-400 complaints received in a year, only a small number meet this stringent docketing standard. In the system administered in the First Circuit, all complaints are docketed. Many complaints received in both systems present a substantive disagreement with the judge's decision, for which the appeal process, rather than a complaint of judicial misconduct or disability, is the appropriate mechanism for corrective action.

The two systems for addressing complaints against judges differ in another important respect as well. Under the statute enforced by the Commission on Judicial Conduct, all complaints against judges and the resolution of those complaints are confidential, except as to the complainant, unless one of three exceptions applies. The exceptions apply when (a) the Commission and the judge agree on issuance of a press release regarding the outcome of the complaint, (b) the Commission and the judge agree on the underlying facts or evidence, agree to make a binding submission for resolution to the Supreme Judicial Court, and the Supreme Judicial Court decides to make the outcome public, or (c) the Commission files formal charges against the judge with the Supreme Judicial Court (unless the Commission, the subject judge, and the person who filed the complaint all agree that the proceedings on a complaint should remain confidential).

By contrast, in the federal system, determinations by the Chief Judge of the Circuit and the Judicial Council on complaints of judicial misconduct are not presumptively confidential; to the contrary, they are routinely posted on-line. While the judge's name is not made public in most cases where a complaint is dismissed, the rules do allow for identification of the judge to assure the public of the integrity of the process – as may be the case in high profile matters. In the First Circuit, complaints, allegations, scope, findings, reasoning, and disposition are made public, including any suggestions for improvement made to a judge. The identity of the complainant, however, is not made public.

Finally, a state judge must also comply with the Massachusetts conflict of interest law except in those few instances where provisions of the Code of Judicial Conduct supersede provisions of G.L. c. 268A and G.L. c. 268B.⁸⁷ Where the Code is more restrictive than the state conflict of interest law, *see, e.g.* Rules 3.7 and 4.1, a judge must comply with the Code. Federal judges must also comply with 28 U.S.C. § 455 setting forth the circumstances requiring disqualification and must file annual financial disclosure statements as required by the Ethics in Government Act of 1978, as amended.

⁸⁵ Citation to statute and informational materials from the First Circuit. *See also* The Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364.

⁸⁶ On the extremely rare occasions when a judge's alleged misconduct would, if proven, amount to a violation of the criminal law, the judge is of course subject to the same criminal processes and penalties upon conviction that apply to any other person. This section focuses on administrative processing of non-criminal complaints and sanctioning of non-criminal conduct.

⁸⁷ *See, e.g.*, Rules 3.1(e) and 3.13 (D) – (E).

e. Resources for Judges Seeking Advice on Compliance with Relevant Codes of Conduct

Useful guidance is available to both state and federal judges who seek advice about how to conform their conduct to the relevant standards. In implementing the revised Code of Judicial Conduct which became effective January 1, 2016, the Supreme Judicial Court reconstituted its Committee on Judicial Ethics.⁸⁸ The Committee is authorized to provide informal advice and letter opinions to judges and certain others on conduct contemplated by judges.⁸⁹ In addition, the Committee regularly updates a collection of frequently asked questions to provide a compilation of advice it has given, for the benefit of all judges facing similar or identical situations. (While the letter opinions are made public, the name of the requesting judge and other identifying information is almost always redacted from the opinion.) Rule 3:11.2.D.ii provides that a judge may not be disciplined for conduct in reasonable reliance on a letter opinion from the Committee.

The First Circuit staff who investigate complaints against judges in the federal system also are available to provide informal guidance to judges who seek advice on complying with the Code of Judicial Conduct. Formal advisory opinions, which are made public, are provided by an office in the Federal Judicial Conference in Washington, D.C. A different process governs complaints in relation to the financial disclosure statements which federal judges must file annually.

f. Procedures for Judicial Evaluations

Judicial evaluations provide another accountability mechanism for judges. A meaningful judicial evaluation ensures a shared understanding of what is expected of a judge and enables detection of weaknesses in the performance of individual judges that can be promptly addressed and corrected. Evaluation processes are not designed to discipline judges, but rather to educate them and improve the quality of justice and its delivery by every judge in the system. In addition, the collective results of a judicial evaluation process can inform areas for additional or improved training for all judges or judges in particular courts.

The judicial evaluation program for Massachusetts state judges was instituted in 2001 as part of the Supreme Judicial Court's judicial performance enhancement programs. It is the primary method for members of the bar, court employees, and jurors to provide feedback about the judges before whom they have appeared and with whom they work.⁹⁰ The judiciary uses these evaluations to inform individual and court-wide professional development programs and to help judges achieve and maintain a high degree of professional performance.

The Supreme Judicial Court makes questionnaires available to attorneys via a confidential and secure website, to court employees through paper questionnaires sent to their home addresses, and to jurors at a trial's conclusion. All responses are anonymous and cannot be traced back to the respondent. Each trial court judge is evaluated approximately every three years. The topics covered in the evaluations include: a judge's knowledge of the law; temperament on the bench; courtroom control; treatment of courtroom participants; and issuing clear rulings. Each Departmental Chief Justice reviews the evaluation reports and comments to remove information that could identify the responding lawyer or the judge. After this review, a judge receives his or her evaluation report with the aggregate data and the redacted open-

⁸⁸ SJC Rule 3:11.

⁸⁹ The Committee on Judicial Ethics will advise judges regarding the obligations of the Code of Judicial Conduct, including the exemptions the Code permits to particular restrictions otherwise imposed by G.L. c. 268A §§ 3 and 23(b)(2). Otherwise, a judge with questions about chapters 268A or 268B must seek advice from the State Ethics Commission.

⁹⁰ See Mass. G.L. c. 211, § 26 and SJC Rule 1:16.

ended comments from the respondents and meets with the relevant Departmental Chief Justice to discuss the findings of the report along with other measures of the judge's performance. Professional development, not discipline, is the objective of the meeting. The Chief Justice of the Trial Court and the Chief Justice of the Supreme Judicial Court also receive copies of all evaluation reports.

Low participation rates on individual judicial evaluations are a problem in the Massachusetts court system.⁹¹ According to court rules, the results of evaluations are not made public, even in the aggregate, and some of the value in demonstrating accountability to the public is lost because of this lack of transparency. But a hesitation to release even aggregated data about a judge is understandable when response rates are relatively low, since publishing evaluations could magnify outlier critiques, and because, despite laudable efforts by the Trial Court to rid judicial evaluations of gender and racial biases, such insidious problems persist. Additional proactive efforts on the part of the court system to explain in detail the mechanisms in place to protect the confidentiality of all evaluation responses might help in producing more robust public participation in the evaluation process, insofar as recipients of the evaluation questionnaire may be hesitating to respond based on doubts about confidentiality.

g. Transparency and the Role of News Media in Promoting Accountability

A commitment to the principle of transparency in court processes, judicial decision-making, and judicial reasoning is essential for judicial accountability to the public. Historically, state courts have tried — though not always successfully — to ensure public access to court proceedings and court records. This goal of openness reflects a judgment made more than 200 years ago that balances the public's interest in judicial accountability against the privacy interests of litigants. The reason for striking the balance in favor of public access has perhaps best been articulated by Oliver Wendell Holmes in a judicial decision he wrote 135 years ago, as a Justice of the Massachusetts Supreme Judicial Court:

It is desirable that the trial of causes should take place under the public eye . . . because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which this public duty is performed.⁹²

Because the ordinary citizen is not typically in a position to monitor the activities in courthouses and the performance of courts on a regular basis, members of the news media — in addition to lawyers and scholars — play an essential role in making judicial proceedings accessible to the public and exposing to scrutiny practices that seem problematic or that are not well explained.

As former Chief Justice Hennessey wrote in 1989, “Do we all understand the mischief that can arise from the ego or foolishness of the robe, or from the arrogance of the typewriter? We hope that media reports on the courts will be fair and accurate, but, fair or not, no limitation on freedom of the press is tolerable beyond . . . limited restrictions,” such as those permitted under the law of libel, the balancing of access against privacy interests and the constitutional rights of defendants, and the requirement that courtrooms remain open unless a compelling and superior governmental interest justifies closing

⁹¹ According to the Supreme Judicial Court's Committee on Judicial Performance Evaluation, thus far in 2019, 23% of attorneys who were invited to submit an evaluation about judges in Middlesex and Suffolk Counties Probate and Family, Housing, and Juvenile Courts have done so, representing the high water mark for responses in the last four years. Only 15% of the attorneys in Middlesex and Suffolk Counties did so in 2015. In 2017, 14% of those in Berkshire, Franklin, Hampshire and Hampden did so, and in 2018, the number in Bristol, Barnstable, Dukes and Nantucket Counties dropped to 11%. A far greater response rate would be beneficial to practicing lawyers, to the public and to the judicial system as a whole.

⁹² *Cowley*, 137 Mass. at 394.

access.⁹³ More recently, a federal judge has written that “[o]pen proceedings, with a vigorous and scrutinizing press, serve to ensure the durability of our democracy.”⁹⁴ Judicial accountability through transparency plays a key role in supporting the legitimacy of democratic institutions.

Access to judicial proceedings is not generally an issue in either the federal or state systems in Massachusetts, although members of the press often find the prohibitions on cameras and other recording devices in federal courtrooms unduly restrictive in efforts to cover proceedings. According to the Office of the Circuit Executive, recordings of oral arguments in appellate cases can be available the same day. These recordings are also released to the public on a weekly basis. The Trial Court should be encouraged to explore whether audio feeds of court proceedings could be provided live, or recordings of oral arguments and other proceedings could at least be released on the same day, to enhance public access. A number of efforts to enact legislation permitting camera access to federal courts have not been successful. Unless a case is sealed, court filings, opinions, and orders are available as soon as they are docketed—usually the same day as filed or the next day. Even though it is the policy of the Office of the Circuit Executive to respond immediately to press inquiries for publicly available information, reporters have indicated that they have encountered difficulty from time to time in gaining access to opinions, orders and court filings because of the lack of a dedicated public affairs office in the Massachusetts federal courts.

These same restrictions do not encumber press coverage of Massachusetts state court proceedings. Additionally, the Supreme Judicial Court employs a staff of four in the Public Information Office who attempt to respond to media requests and who attempt to coordinate media access in high profile cases so that the coverage is not disruptive to the proceedings. Nevertheless, and despite notable improvements, many users continue to find MassCourts,⁹⁵ the Court’s online case-information database, very difficult to use, and believe that further improvements are necessary to make case information more accessible.⁹⁶ Finally, as noted in the discussion of the Judicial Conduct Commission, the lack of transparency in the state process for investigating and resolving complaints against judges diminishes the ability of the media and the public to scrutinize the fairness and efficacy of the process, and the state practice of not making judicial evaluations public is a departure from a general policy of transparency, which fosters the accountability that must go hand in hand with judicial independence. The composition of the Massachusetts Commission on Judicial Conduct — including three judges, three lawyers, and three non-lawyer citizens — does ensure that perspectives outside the legal system are considered in the disciplinary process.

⁹³ Hennessey, *The Courts and the Media*, at 26.

⁹⁴ *Detroit Free Press*, 303 F.3d at 711 (holding that directive to close certain immigration deportation hearings without special showing by the government violates the First Amendment). *But see N. Jersey Media Grp*, 308 F.3d 198.

⁹⁵ The function and use of MassCourts is described at Instructions for using MassCourts, mass.gov, <https://www.mass.gov/lists/instructions-for-using-masscourts> (last visited Aug. 6, 2019).

⁹⁶ Pat Murphy, *Frustrations boil over for users of MassCourts website*, Mass. Lawyers Weekly (Sept. 27, 2018), <https://masslawyersweekly.com/2018/09/27/frustrations-boil-over-for-users-of-masscourts-website>.

Recommendations for Protecting Judicial Independence

1. Bar Associations

Bar associations, including the BBA, should use their institutional voices to defend, explain, and promote the value of judicial independence and respond to unfounded and uninformed attacks on the judiciary. This may include:

- a. Serving as a resource to the press and public by providing timely, accurate and authoritative information to counter misinformation. This likely will include explaining the process of screening, nominating, appointing, and confirming judges; clarifying and demystifying judicial and legal processes; and describing oversight and disciplinary bodies and procedures that ensure judicial accountability.
- b. Studying and weighing in on legislative or other proposals that aim to rein in perceived judicial excesses in ways that would threaten judicial independence, to help the public appreciate that adoption of proposed changes may ultimately distort and weaken the system of careful checks and balances on which our government is based.
- c. Responding to assaults on judicial independence in a timely and measured manner that distinguishes between, on the one hand, vigorous public debate and dissent and, on the other hand, destructive, ill-informed and personal diatribes. To ensure a consistent and effective approach, bar associations would benefit from developing a set of criteria to be utilized when considering whether and when to respond to any given critique of an individual judge, a judicial ruling, or the judicial system. Factors to consider might include:
 - i. Whether the stridency, intensity and reach of the criticism indicates that it is likely to have a serious and more than passing negative effect in the community;
 - ii. Whether the criticism contains material inaccuracies concerning a judicial decision or proceeding;
 - iii. Whether the criticism displays a fundamental lack of understanding of the legal system or the role of the judge;
 - iv. Whether the response can be made in a sufficiently timely manner to effectively counter the attack (i.e., in sufficient time to be part of the same “news cycle”);
 - v. Whether the response is likely to reach and effectively influence the same audience or constituency to whom the criticism was disseminated;
 - vi. Whether the criticism likely will be addressed adequately and effectively by a response from some other credible source;
 - vii. Whether bar association can contribute something new; and
 - viii. Whether responding risks prolonging the controversy, elevating its prominence in news reports, or exacerbating the harm to the judiciary caused by the initial attack.

2. Lawyers

Lawyers can and should be more proactive in taking actions to promote and defend judicial independence, including by:

- a. Participating in programming and public education opportunities to explain the value of the judiciary and its role as the third branch of government.

- b. Speaking out against unfair, uninformed and inflammatory attacks on judges and helping the public discern between healthy criticism of the judiciary and potentially dangerous attacks on judicial independence.
- c. Responding to errors and omissions contained in news reports of judicial rulings that threaten to undermine public trust in a judge or the judiciary; and
- d. Participating in the judicial evaluation process, both to ensure that the process is effective and to prevent skewed results that do not accurately reflect a cross-section of the bar.

3. Judges and Courts

- a. The Massachusetts Trial Court should expand and improve data collection, the use of data, and the sharing of data and give ongoing consideration to whether, when, and how various kinds of court data should be made available to the public, including through an improved website. Public understanding of the impact of judicial actions would likely be enhanced by increased data collection and data sharing on certain key legal processes, including matters such as bail and sentencing decisions, and defaults.
 - i. The data should be used to identify patterns and practices that merit further study, with the goal of promoting public trust and moving the discourse beyond reactions to individual decision and toward systemic solutions.
 - ii. The data should be made available to the public and the press (in anonymized form if necessary) to promote public confidence in the judiciary.
- b. Massachusetts courts should consider ways to improve transparency about the mechanisms for promoting judicial accountability, including:
 - i. Increasing public access to information regarding complaints filed against judges. It is essential that complaints against judges are resolved in a manner that is transparent and effective to preserve the public's trust that misconduct is properly addressed. The federal model provides more information to the public regarding the nature of complaints, their disposition, and the reasoning underlying the decision. Massachusetts courts should consider adopting similar transparency practices to promote public acceptance of the process and its results.
 - ii. Offering continuing training for new judges and continuing legal education for experienced judges on the statutes, court policies, and rules and regulations governing public access to judicial proceedings and records.
 - iii. Continuing to invest in the judicial evaluation process. Although hampered by low participation rates on the part of lawyers, and resulting small sample errors, the evaluation process offers the judiciary a means to inform and improve educational programs and performance, particularly in public-facing judicial functions. When the responses are plentiful enough to allow for overall statistical reliability and also to ensure that individual identities will not be effectively exposed, the courts should consider making the aggregated responses public, assuming persistent gender and racial bias can be corrected.
- c. The courts should also develop informational materials on routine court processes and actions that the media can rely on in reporting judicial actions on specific cases and as general background.
- d. Judges should endeavor to explain the reasoning for their rulings in written decisions when appropriate, particularly in bail and sentencing decisions. Rulings that lack an

- articulated rationale undercut judicial transparency and create opportunities for unfair (and uninformed) attacks on the judicial process and individual judges.
- e. When permitted by the Code of Judicial Conduct, judges should address the public in person, by writing articles, or through the press, to educate the public and promote the legitimacy of the judicial process. Judges who receive media inquiries but are reluctant to engage directly with members of the media should promptly contact the Supreme Judicial Court's Public Information Office so that relevant public information can be rapidly disseminated.

4. Diversity and Inclusion

Building a more diverse and inclusive bench will help to promote equity, fairness, and public trust in judicial decision-making and reduce the effects of the conscious or unconscious bias present in all human beings, which will, in turn, promote public trust and confidence in an independent judiciary. This goal will require collective action from the executive branch, the judicial branch, law schools, law firms, other legal employers, and bar associations, including:

- a. Prioritizing diverse judicial nominations and appointments;
- b. Intentional, determined, and critical work aimed at improving court culture to ensure that professional experiences within the court system are inclusive, equitable, and supportive of judges of color, women judges, LGBTQ+ judges, judges with disabilities, and judges who belong to other traditionally underrepresented groups, as well as supportive of a diverse court staff and all people who come before the courts; and
- c. Creating and sustaining a talent pipeline (including through law schools, bar associations, law firms and legal employers) that encourages and effectively supports the legal education, employment, and development of lawyers from diverse backgrounds, as well as the development of a robust and diverse pool of lawyers who are interested in pursuing judicial service.

APPENDIX A

Summary of The Boston Bar Association's History of Supporting Judicial Independence

The BBA has a long history of supporting an effective, well-understood, and independent judiciary, from advocating for adequate funding for the judicial branch to endorsing legislation that would ensure Massachusetts students will have meaningful civics education, to speaking out when certain developments and proposals threaten the independence of the judiciary. A sampling of these efforts over the past two decades are listed below.

1. BBA Statement on the Federal Indictment of Judge Shelley Joseph

In April 2019, the BBA released a statement in response to the indictment of Massachusetts Judge Shelley Joseph on obstruction of justice charges. That statement noted the concerning interference with justice that results from arrests by Immigration and Customs Enforcement (ICE) officials in courthouses. It further provides that “[i]n the absence of allegations of corruption or graft, a federal indictment of a state court judge based on her judicial actions is an unprecedented overreach into state authority, and poses a serious threat to the judicial independence that we all depend upon to protect our rights under the law.” You can read the full statement [here](#).

2. Statement of Principles Concerning Immigration and Related Issues and Adoption of Position on Immigration Court Restructure (2018)

In the summer of 2018, a working group was formed to produce a framework to guide the BBA’s responses to immigration-related matters. The report, adopted by the BBA Council in August 2018, included “Access to a Fair Immigration Process with Independent Judges” as a key tenet and expressed deep concern that “immigration judges...lack many of the protections associated with judicial independence.” You can read the full set of principles [here](#).

Also in August 2018, the Council endorsed a proposal to reform immigration courts as independent Article I Courts in order to ensure the judicial independence necessary to achieve justice. You can find more information about immigration court restructuring [here](#).

3. President Mark Smith’s Statement on Judicial Independence and Statement in Response to Proposed “Independent Judicial Review” (2018)

In May 2018, Superior Court Judge Timothy Feeley’s decision to sentence a drug dealer to probation, apparently partly based on his immigration status, came under harsh criticism, leading to calls to have Judge Feeley removed. Later, Judge Feeley’s decision to release individuals on low bail amounts also came under fire. These calls led President Mark Smith to release two statements.

The first, released in May 2018, expressed concern about the actions taken against Judge Feeley, noting that “[t]hreats to remove judges because of disagreements on individual rulings, based on their use of discretion within the bounds of the law, undermine the very notions of judicial independence, fairness, and impartiality on which our judiciary is based.” Read the full statement [here](#).

The second, released in June 2018 in response to a proposed “Independent Judicial Review” provided that “[i]n a free society, no judge should be shielded from legitimate criticism by those who disagree with decisions that fall within the judge's discretion. At the same time, if the principle of judicial independence is to mean anything, no judge should be subject to calls for removal from the bench—even temporarily—for the exercise of that discretion.” Read the full statement [here](#).

4. Massachusetts Civics Education Requirement (2018)

In May 2018, the BBA Council endorsed proposed legislation that would ensure that all public schools provide instruction in civics. In a letter urging for its passage, then-President Mark Smith noted that it was vital to have a population that understands our government and how it functions, providing that “the judiciary’s unique role in our state and federal governments may be especially vulnerable when the public lacks knowledge of key concepts like the role of checks and balances, separation of powers, and judicial review.” Read more about this endorsement [here](#).

In November 2018, the BBA released a statement praising the Governor and the legislature for passing this legislation. President Jonathan Albano said “This law is especially significant to the BBA because of its provision for students to learn about the composition and role of all three branches of government. Key institutions of a constitutional democracy – including the courts, the jury, and other critical aspects of our justice system – require the public’s understanding and trust to function properly.” Read the full statement [here](#).

5. President Carol Starkey’s Statement on Judicial Independence and Rule of Law (2017)

In February 2017, a U.S. District Court Judge in Washington State issued a decision temporarily staying enforcement of the Trump Administration’s initial executive order, commonly referred to as the “Travel Ban.” Trump thereafter made a series of tweets attacking the decision and the judge and questioning the authority of the Court. In response, BBA President Carol Starkey issued a statement expressing concern about these attacks and noting that “[o]ur constitutional democracy relies on an independent judiciary as one of three equal branches of government, as well as on our country’s unwavering commitment to the rule of law, especially as it relates to respect for the separation of powers among the three branches.” Read the full statement [here](#).

6. President Paul Dacier: “Dacier’s Take on ... a Defense of Our State Judges” (2014)

The Law Blog “Above the Law” (ATL) published an article criticizing a Suffolk Law School advertising campaign that highlighted the fact that more sitting Massachusetts state judges graduated from Suffolk Law than from several other law schools with more traditionally prestigious reputations. In criticizing Suffolk’s ad, the ATL post suggested that becoming a state court judge is a small achievement and not a high honor, prompting a response from President Paul Dacier in defense of Massachusetts judges and courts. He stated: “Any attack on the judiciary is an attack on our society and the foundational structure of our government. Whether they are serving on the highest court in the country or in a local Trial Court, judges are there to follow one rule: adjudicate fairly and efficiently for all based on the facts of the case and the guidance of the Constitution. The Constitution is not selective – it applies to all citizens, and anybody involved with the law must give it the proper weight.” Read the full post [here](#).

7. President Anthony Doniger Interview (2007)

In a 2007 interview with Metropolitan Corporate Counsel, President Anthony Doniger discussed the importance of judicial independence, adequate judicial compensation, and the organized bar's role in responding to attacks on the judiciary. At the time of the interview, a defendant released on bail by a Massachusetts judge had committed murder, prompting loud and public criticisms of the judge by local and national politicians. Doniger used the interview to explain that "in light of the information provided that judge by the prosecutor, the probation authorities and the Department of Corrections, she had no choice but to release this man," also stating that "one of the most important things the organized bar can do in the face of these attacks is to speak out in defense of the judiciary." Read the full interview [here](#).

8. President Anthony Doniger's President's Page (2007)

President Anthony Doniger further responded to the above-mentioned attacks on the Massachusetts judge and spoke out about court underfunding in the President's Page of the November/December 2007 *Boston Bar Journal*. He took a look back at the BBA's history of defending judicial independence, [referencing the Associations' response to Judge Garrity's busing decrees](#), and issued a call to the bar to "do more to remind the public that the court system is a crucial part of the fabric of our society, central to the smooth and efficient functioning of our economy and vital to the protection of rights and liberties." Read the full article [here](#).

9. President Edward Leibensperger, *Boston Globe* Op-Ed (2006)

President Edward Leibensperger drafted an op-ed in response to Governor Romney's reforms to the Judicial Nominating Commission and a proposal by the Lieutenant Governor to limit judicial tenure to seven years, unless a judicial review panel elected to vote for reappointment. The op-ed urged restoration of the scope of authority previously possessed by the Commission and called on the Lieutenant Governor to reconsider the reselection proposal in order to assure an independent judiciary. Read the full op-ed [here](#).

10. President Renée Landers, Letter to Legislators (2004)

In February 2004, under the leadership of President Renée Landers, the BBA submitted a letter to legislators in opposition to a proposed bill that would limit judicial terms to six years and thereafter require election to the bench. The letter states that the proposal "strikes at the heart of judicial independence, which is absolutely critical to our system of checks and balances under a constitutional democracy." It then explains the multiple ways such a proposal would threaten judicial independence, as judges would be subjected to political reprisal for unpopular decisions and would have incentives to decide cases and administer the courts with an eye toward reelection. Read the letter [here](#).

11. President Renée Landers' President's Page: *An Independent and Accountable Judiciary* (2004)

A few months after sending the above letter, President Landers focused her President's Page on judicial independence, tracing the historical debates about the appropriate role of the judiciary, and noting that those same debates were mirrored in current events, including a new statute that

required the collection of statistics on individual judges regarding downward departures from the sentencing guidelines. Read the article [here](#).

12. Judicial Response Task Force Report (2003)

In August 2003, a BBA “Judicial Response Task Force,” released a report related to how the BBA should respond to criticism of the judiciary and judges, in line with the canons of judicial ethics. The task force recommended, among other things, that the BBA should recognize its role in responding to unfair or unwarranted criticism “with the goals of providing fair and accurate information and to explain the limitations on the courts to respond on their own behalf.” Read the report [here](#).

13. Judicial Tenure Resolution (2002)

In 2002, the BBA adopted a resolution related to judicial tenure in response to calls to limit judicial terms to six years and to thereafter require reappointment by the Governor. The resolution provides that such an approach “would threaten judicial independence by inducing a fear in judges of political reprisal for unpopular decisions...” and by “inciting political commentary by political and news media figures upon the application for reappointment by any judges.” Read the full resolution [here](#).

APPENDIX B

Further Reading

Law Review and Scholarly Sources

- Robert J. Cordy, *The Interdependent Relationship of a Free Press and an Independent Judiciary in a Constitutional Democracy*, Vol. 60, Boston College L. Rev. (2019), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3744&context=bclr>.

In this Boston College Law Review piece, Robert J. Cordy discusses the importance of recognizing and understanding the interdependence between an independent judiciary and the free press. He argues that the degree to which we can rely on the Judiciary to protect our constitutional rights is dependent on the respect and support of the people it serves, which is why the role of the press in shaping public attitudes is so essential.

- Alexander Bickel, *The Least Dangerous Branch* (1962).

This famous book traces the history of the U.S. Supreme Court and its role in American democracy, discussing the establishment and justification of judicial review by examining recent decisions and how they were or were not influenced by judicial independence. He conceives of the role of the court to be three-fold: to check, to make legitimate, or to do neither. In this book, Bickel coins the term “counter-majoritarian difficulty” to describe his view that judicial review stands in tension with democratic theory.

- George Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, William & Mary L. Rev. 1543 (2007), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1212&context=lsfp>.

George Brown explores *Republican Party of Minnesota v. White*, a U.S. Supreme Court case that ruled that the Minnesota law barring candidates for judicial office from sharing their opinions on disputed legal and political issues was unconstitutional, to argue that conservatives around the country are causing campaigns for judicial office to look more and more like campaigns for other “political” offices. He pushes for a more nuanced conservative view that protects the institution of the elected judiciary from the pressures of campaigning in order to preserve the health and vitality of state courts.

- Michael Dimino, *Counter-Majoritarian Power and Judges’ Political Speech*, 58 FLA. L. REV. 53 (2006), <http://www.floridalawreview.com/wp-content/uploads/2010/01/Dimino-BOOKwithCharts.pdf>.

Dimino also discusses *Republican Party of Minnesota v. White* to make the argument that the 5-4 divide that held that Minnesota violated the First Amendment by forbidding judicial candidates from publicly speaking their views on legal or political issues was not simply a reflection of differing positions on the value of free speech, but rather a reflection of vastly different approaches to the canons of judicial ethics and the counter-majoritarian difficulty. He claims that the future of judicial free speech depends on how members of the Court tackle challenging restrictions on judicial involvement in non-judicial politics.

- James Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 THE AM. POL. SCI. REV. 1 (2008), https://www.jstor.org/stable/27644498?seq=1#page_scan_tab_contents.

James Gibson seeks to investigate the claim that institutional legitimacy is being threatened by the rise of politicized judicial election campaigns in three ways: campaign contributions, attack ads, and policy pronouncements by candidates for judicial office. He collects survey data that determines that campaign contributions and attack ads do indeed lead to a diminution of legitimacy, whereas policy pronouncements are found to have no impact on the legitimacy of courts and judges.

- Cass Sunstein, et al., *Studying Judges with Numbers* (Brookings Institution Press 2006).

In this book, Cass Sunstein, et al., conduct a large-scale empirical study of judicial behavior on the federal appellate courts and have three principal findings: (1) the political party of the president who appointed the judge matters (judges appointed by Republican presidents will vote differently than those appointed by Democratic presidents); (2) the law constrains judicial behavior, and this is something that both parties can agree on, and (3) group dynamics matter – the division between Democratic and Republican appointees, collegial concurrence, group polarization, etc., affect the way judges vote.

External Organization Resources

- **Brennan Center for Justice Fair Courts Initiative**

- Daniel I. Weiner and Alicia Bannon, *How to Criticize a Judge*, Brennan Center for Justice (2018), <https://www.brennancenter.org/blog/how-criticize-judge> (last visited Aug. 6, 2019).

This article interrogates the extent to which criticism of the courts is appropriate in reference to President Trump’s attacks on a federal court decision that approved a warrant to surveil Carter Page, one of his former campaign aides. Daniel Weiner argues that although criticizing judicial rulings is natural, given the irrevocable ties between judicial rulings and political issues, our system also demands that judges’ authority be upheld and that judges not be treated as politicians.

- Alicia Bannon, *Rethinking Judicial Selection in State Courts*, Brennan Center for Justice (2016), https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf.

Bannon emphasizes the essential role of state courts on the country’s legal and policy landscape and makes the argument that the problems with judicial selection at the state level are extremely consequential for the whole country and must be addressed. She claims that judicial selection has become increasingly politicized, polarized, and dominated by special interests, especially in the 39 states that use elections to choose at least some of their judges. The paper then goes on to propose the basic values that judicial selection should promote and outlines a set of recommendations to achieve those.

- John F. Kowal, *Judicial Selection for the 21st Century*, Brennan Center for Justice (2016), https://www.brennancenter.org/sites/default/files/publications/Judicial_Selection_21st_Century.pdf.

Kowal discusses the arguments for merit-based appointment of judges versus the election of judges and why it is that the over-politicization of judicial selection is most prominent in states that elect judges. He explains that although merit-based judge selection system is more widely supported across America, the system that is based on the Missouri Plan—using an independent commission as part of a merit-selection process, but then requiring judges to stand in retention elections—needs to be updated and reformed to adjust to 21st Century challenges to the legal and public policy arenas. He does so by reviewing the history of judicial selection and providing examples of different selection systems and their failures and successes.

- Douglas Keith, *Impeachment and Removal of Judges: An Explainer*, Brennan Center for Justice (Mar. 23, 2018), <https://www.brennancenter.org/blog/impeachment-and-removal-judges-explainer> (last visited Aug. 6, 2019).

In this article, Keith explains the workings of the judge impeachment process. He points out that although the threat of impeachment is used often, as a leverage tool for partisan objectives, judges are impeached quite infrequently, and he argues that the threat of impeachment should not continue to be used as a political maneuver.

- **National Center for State Courts**

- National Center for State Courts, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Aug. 6, 2019).

This page provides a summary of judicial selection processes by state, including number of judgeships, method of selection, length of term, method of retention, and more.

- National Center for State Courts, *Judicial Selection in the States*, <http://www.judicialselection.us/> (last visited Aug. 6, 2019).

This page provides a summary of judicial selection processes by state, including methods of selecting, retaining, and removing judges, successful and unsuccessful reform efforts, the roles of parties, and more.

- The Constitution Project, *The Newsroom Guide to Judicial Independence*, The Constitution Project (June 13, 2006), <https://constitutionproject.org/wp-content/uploads/2012/10/37.pdf>.

This “Newsroom Guide” to Judicial Independence is intended for journalists who are reporting on issues of judicial independence and need background information on the issue. It provides historical information on judicial independence, related court cases, quotes from lawmakers, a glossary of terms, and more.

- **American Bar Association**

- *Standing Committee on the American Judicial System*, American Bar Association, https://www.americanbar.org/groups/committees/american_judicial_system/ (last visited Aug. 6, 2019).

The purpose of the Standing Committee on the American Judicial System (SCAJS) is to protect judicial independence, preserve fair and impartial courts, respond to unjust criticism of the judiciary and the media, and improve access to justice. Their website is home to a series of publications that are intended to “increase public understanding about the role of the judiciary and the importance of fair courts within American democracy.”

- *Defending Justice*, American Bar Association, https://www.americanbar.org/groups/committees/american_judicial_system/projects1/defending-justice/ (last visited Aug. 6, 2019).

This essay series is a joint production of SCAJS and the *ABA Journal* that compiles “thoughtful and thought-provoking essays about topics related to judicial independence written by prominent judges, lawyers, ABA members, and advocates for fair, impartial, effective courts”. It includes a variety of pieces that explore issues such as bench diversity, access to justice, the politicization of the judiciary, and more.

- Hilarie Bass, *The ABA’s role in protecting judicial independence*, ABA Journal (May 1, 2018), http://www.abajournal.com/news/article/the_abas_role_in_protecting_judicial_independence.

In this article, Hilarie Bass, then President of the American Bar Association (ABA), highlights the value of a judiciary free from interference and outlines how lawyers can contribute to upholding that standard. She describes the role of the ABA in fulfilling this duty, by speaking out about threats to judicial independence and alerting the public to these issues.

- Bob Carlson, *Statement of Bob Carlson, ABA president Re: Undermining judicial independence*, American Bar Association (Feb. 25, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/02/statement-of-bob-carlson--aba-president-re--undermining-judicial/>.

This statement by Bob Carlson, ABA President, from February 2019, demands that judicial decisions and the process by which judges are selected be entirely separated from political partisanship. He calls on state legislatures “to respect the independence of the judicial branch and end efforts to politicize the judicial process”.

- Brian Hoffstadt, *The High-Profile Case: Where the Court & The Media Meet*, American Bar Association (2018), https://www.americanbar.org/digital-asset-abstract.html/content/dam/aba/publications/judicial_division/2018courtsandmedia.pdf.

This guide, put together by the JD Courts and Community Relations Committee, is designed to prepare courts, media, prosecutors, defense attorneys, and the community for high-profile cases. It includes two sets of materials: (1) A presentation for members of the public, the legal community, and the media regarding the unique challenges that judges face in high-profile cases; and (2) A checklist of issues for judges to consider when assigned a high-profile case.

- Robert J. Derocher, *State and local bars lead the charge in protecting the separation of powers*, American Bar Association Bar Leader (June 15, 2017),

https://www.americanbar.org/groups/bar_services/publications/bar_leader/2008_09/3303/separation/.

Robert J. Derocher outlines the issues with the lack of public knowledge on the judicial process, particularly how it contributes to negative perceptions of influence in states with judicial elections. He describes the ABA's efforts to combat this ignorance, particularly through ABA President H. Thomas Wells, Jr.'s efforts in asking retired U.S. Supreme Court Justice Sandra Day O'Connor to serve as honorary chair for the new ABA Presidential Commission on Fair and Impartial State Courts. She was the keynote speaker at the commission's summit that was scheduled for earlier this year.

- **Federal Judicial Center**

- Bruce Ragsdale, *Judicial Independence and the Federal Courts*, Federal Judicial Center (2006), <https://www.fjc.gov/sites/default/files/pdf/JudicialIndependence.pdf>.

This teaching module was developed by the Federal Judicial Center to support judges and court staff who want to speak to various groups about the history of an independent federal judiciary. It examines the history of judicial independence, its importance, and the present-day concerns with its maintenance. For each topic, it provides a PowerPoint presentation, talking points, and suggested discussion topics.

- *Judicial Independence: Talking Points*, Federal Judicial Center, <https://www.fjc.gov/history/talking/judicial-independence-talking-points> (last visited Aug. 6, 2019).

This FJC page provides talking points for a series of items relating to judicial independence, including its constitutional protections, its politicization, and the importance of upholding it.

- **Sandra Day O'Connor's Project on The State of the Judiciary at Georgetown University Law Center**

- Sandra Day O'Connor, *Background Papers for 2007 Conference: The Debate Over Judicial Elections and State Court Judicial Selection*, (Meryl Chertoff, Roy A. Schotland, and Abigail B. Taylor eds., Georgetown Law, 2007).
<http://www.bostonbar.org/docs/default-document-library/sandra-day-o'connor-project-on-the-state-of-the-judiciary.pdf?Status=Temp&sfvrsn=4>.

These documents, put together for a 2007 Conference on the Debate Over Judicial Elections and State Court Judicial Selection, discuss the potential issues that may arise with judicial elections and how to address them. They provide a comprehensive review of the relationship between judicial selection systems and judicial independence and encourage discussion on the pros and cons of appointment versus election.

- *Call to Action: Statement of the National Summit On Improving Judicial Selection*, National Center for State Courts (2002), <http://www.bostonbar.org/docs/default-document-library/call-to-action-statement-of-the-national-summit-on-improving-judicial-selection.pdf?Status=Temp&sfvrsn=4>.

The *Call to Action* was issued by the participants of the National Summit on Improving Judicial Selection on December 8-9, 2000. It recommends 20 concrete steps for consideration by states that elect some or all of their judges. The purpose of these recommendations is to ensure that the judicial electoral

process is not being co-opted by campaign money and corporations, with the intention that it can remain as depoliticized as possible.

Historical Documents

- Alexander Hamilton, *The Federalist* No. 78, https://avalon.law.yale.edu/18th_century/fed78.asp (last visited Aug. 6, 2019).

This historical document is titled “The Judiciary Department” and was published on May 28, 1788. It is the most cited by justices of all *The Federalist Papers* and argues that the federal courts have the duty to determine whether acts of Congress are constitutional. Hamilton viewed this as a protection against abuse of power by Congress.

- Speech of Rufus Choate on Judicial Tenure (July 14, 1853), http://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Works-of-Rufus-Choate_Vol-II.pdf, at 290.

This speech was delivered to the Massachusetts State Convention on July 14, 1853, and in it Choate describes the qualities that a good judge must hold and asserts that the existing system of judicial appointment and tenure is the best one. He does so by outlining the pros and cons of judicial appointment versus election and providing examples for instances when judicial tenure has been longer or shorter and the benefits that came with that.

Court Resources

- Paula M. Carey and Jonathan S. Williams, *Massachusetts Trial Court – Annual Diversity Report Fiscal Year 2018*, mass.gov (Feb. 11, 2019), https://www.mass.gov/files/documents/2019/02/11/jud-FY18-Diversity-Report-20190211_0.pdf.

The Diversity Report reflects the Trial Court’s efforts to strengthen its commitment to making its workforce more representative of the diversity in the communities it represents. It shows that the number of racial/ethnic minority employees and the number of women employees at the Trial Court have increased. It also acknowledges that more work must be done in the realm of diversity and inclusion and establishes a plan to better recruit minority employees.

- *Massachusetts Code of Judicial Conduct*, mass.gov, <https://www.mass.gov/service-details/massachusetts-code-of-judicial-conduct> (last visited Aug. 6, 2019).

The code of conduct establishes standards for the ethical conduct of judges. It consists of four Canons, a set of Rules under each Canon, and a series of Comments that explain each Rule.

- *Supreme Judicial Court Rule 3:11: Committee on Judicial Ethics*, mass.gov, <https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-rule-311-committee-on-judicial-ethics> (last visited Aug. 6, 2019).

The Committee on Judicial Ethics serves the purpose of rendering opinions concerning the Code of Judicial Conduct. In this page, they provide a set of standards and regulations to systematically address matters relating to judicial ethics.

- *Ethics Policies: Code of Conduct for United States Judges*, United States Courts, <https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies> (last visited Aug. 6, 2019).

This page provides a link to the Code of Conduct for United States Judges, which “provides guidance for judges on issues of judicial integrity and independence, judicial diligence and impartiality, permissible extra-judicial activities, and the avoidance of impropriety or even its appearance”. This page also includes links to the Code of Conduct for Judicial Employees, Judicial Conference Regulations, and more.

- *Rules for Judicial-Conduct and Judicial-Disability Proceedings*, United States Court of Appeals for the First Circuit, <https://www.ca1.uscourts.gov/rules-judicial-conduct-and-judicial-disability-proceedings> (last visited Aug. 6, 2019).

This page provides a link to the Rules for Judicial-Conduct and Judicial-Disability Proceedings, a document that establishes the standards of conduct that judges must uphold and provides resources for filing complaints against judges who have not followed the standards of conduct.

