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2009-02-03 H. Thomas Wells, Jr. ABA Presidential Speech

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Thank you, everyone, for being here today. I especially want to thank Shep Tate for inviting me to Memphis and carrying the torch for this fine tradition of bringing ABA presidents to speak before you year after year. It's important for the public to understand what lawyers care about, and it's important for lawyers to understand what the public cares about.

We're only at February 3, yet it marks my 24th day on the road this year. And I spent 215 days on the road last calendar year. At least I get to drive home this

afternoon, which is something I can't do for most of my trips. It's getting to the point where my wife asks to see my ID before she lets me in the house.

So much for the glamour of representing the American legal profession. Actually, it's an honor and privilege to lead the world's largest voluntary professional membership organization, an association that is the voice of the American lawyer and an advocate for justice.

A number of folks in the ABA and bar leadership are from Memphis—and

they've been filling me in quite a bit about the great things our profession is doing locally and throughout the state to promote justice and improve how we serve the public.

I'm the third president of the American Bar Association from Alabama. The first was a man by the name of Henry Upson Sims, who was also from Birmingham. I think about him a lot these days. You see, as the old Chinese curse puts it, he led in interesting times. He was president of the Alabama State Bar from 1917 to 1918—America's years

in World War I. And he served as president of the ABA from 1929 to 1930.

Following in his footsteps, I want to assure you of one thing: Any connection between Henry Upson Sims and the stock market crash of 1929 has been greatly exaggerated.

Six months ago, that line got a bigger chuckle than it does today. Now, I'm afraid, it gives us pause.

We're living in some interesting times of our own. Americans are hurting from the economy—and the legal profession's

considerable efforts to promote access to justice are more needed than ever.

State and local bar activities, such as programs here in Tennessee and Memphis, help provide free legal services for people whose homes are being foreclosed, for folks who are facing bankruptcy from credit card debt, for people who need legal help securing unemployment benefits.

More than ever, the most vulnerable in our communities need trusted advocates to help them navigate their legal problems. I was especially interested

to learn about the Tennessee Bar Association's 4 ALL campaign, which is mobilizing the state's lawyers to provide access to justice for Tennessee's citizens of limited means.

A University of Tennessee study done for the Tennessee Alliance for Legal Services showed that 70 percent of the state's citizens who are eligible for free legal services had experienced one civil legal problem in the past year. That's about 700,000 legal problems each year.

About two-thirds of these legal problems involve creditors or problems

with medical bills. A high percentage of issues involve women and their care for their children. Many are victims of domestic violence who need a legal advocate on their side.

And there are ripple effects. Folks who don't have access to a lawyer to help them resolve their basic legal problems often end up requiring more resources from other state and federal agencies.

That's why the legal profession fundraises for local legal services programs. Why we promote free legal services to the poor through pro bono

activities. Why we advocate before Congress to fund basic legal services to the poor through the federal Legal Services Corporation.

This is all the more important these days, as the economic crisis is sharply reducing the investment returns of endowments and other programs that fund legal services for the poor.

Along with access to justice, another core value of our profession is the need to promote excellence in our courts—to assure the public that our judges and our

courts are fair and impartial, and why that's important in our system of laws.

We need courts that are fair and impartial in order to have equal treatment under the law, and to protect our personal freedoms that our laws guarantee. Judges should be accountable only to the law and the Constitution, not to the whims of the day or to popular public opinion.

This is a problem relevant to our state courts as well as our federal courts. I'll talk about the federal courts a little later, but first let me offer a few observations

about my home state of Alabama and the lessons it may offer for you in Tennessee.

In Alabama, we elect most of our state court judges in partisan elections. These highly politicized judicial elections undermine public confidence in a fair and impartial judiciary.

In the election we just had, candidates for the open Alabama Supreme Court seat and outside interest groups spent almost $5 million on the race. It was the most expensive supreme court election in the country this year. I told a reporter

that the amount we spent on this race was obscene—and I meant it.

Earlier I mentioned access to justice. Well, guess what? That $5 million far exceeded the amount of money Alabama spends on legal services for the poor.

This situation is shameful, and we need to do something about it.

Why? Because judicial campaign contributions often come from special interests that expect their influence to shape how judges rule on cases—and that's a threat to America's rule of law, which is respected throughout the world.

The Republican candidate received money largely from business interests, while the Democrat got money from trial lawyers.

Maintaining fair and impartial courts is important for public confidence in the courts—yet the current situation doesn't help. National polls show that three in four Americans believe campaign contributions affect judges' decisions.

The issue hit home for me last fall, when my colleagues in the ABA leadership from across the country attended a meeting in Birmingham the

weekend before the elections. They told me they were shocked by the sensational TV ads for state supreme court candidates to which most Alabamans sadly have become accustomed. They were justifiably appalled at the negative content and endless repetition.

It is inappropriate to put judges and judicial candidates in positions where they must campaign on issues that will appear before them on the bench. It is wrong to set them up so the must rely on financial contributions from interests that argue before the courts. No matter how

responsible and fair-minded judges in these circumstances are, it's difficult to shake the resulting perception that some litigants cannot get a fair shot at justice.

Let me tell you another story—not from Alabama, but from West Virginia. A while back, a candidate for the state supreme court received a $3 million contribution from the CEO of a coal mining company. The candidate won the election. Soon thereafter, the justice provided the deciding vote in overturning a $50 million verdict against the same mining company. There's a case now

before the U.S. Supreme Court—it's called Caperton v. Massey Energy—where the court will rule whether the West Virginia justice should have removed himself from considering the state court case.

Still, though, regardless of whether the justice should have ruled on that case, think about the underlying issue—a $3 million campaign contribution from a party who appears before the courts . . . for a judge who is sworn to be fair and impartial.

I encourage you to think about these things here in Tennessee as your lawmakers consider the fate of judicial merit selection. The citizens of my state, quite frankly, are envious of states like Tennessee, where judges are appointed first and foremost on the basis of their qualifications, not on who raises the most money.

Critics say that merit selection merely disguises the politics of judicial selection. No one, however, is naïve enough to believe that politics can be removed

entirely from judicial selection—but it can certainly be kept in check.

I love golf, so let me invoke an analogy. Lurking inside every sand wedge is a two iron trying to get out. The trick is keeping that two iron from escaping and ruining your game.

It is the same with the politics in judicial selection: You must keep the politics that always lurks in the process from jumping out and damaging public perception.

I believe, the organized bar believes, and just about all good-government folks

agree that merit selection is far preferable to judicial elections. We'll leave it to individual jurisdictions to iron out the details, but I urge you to contact your state legislators and *urge them* to avoid any system that even comes close to having judges—who are sworn to uphold the law and the law only—appear to be accountable to popular opinion through the electorate.

Now, let's move on to our federal judgeships. Unlike state judges, federal judges are nominated by the president and confirmed by the Senate. Federal

judges serve for life and make decisions that affect the Constitutional rights of all Americans—so it's an important issue for all of us.

Our federal judicial nominees should reflect the community's best legal talent and highest values.

But too often, the nomination and confirmation process in Washington involves lengthy, partisan conflict and delay.

In some instances, it causes nominees to languish while the parties fight over whether to confirm them, or even

whether to hold a vote on the Senate floor.

It causes overwhelming workloads for the judges and backlogs of cases in our federal courts.

The judicial confirmation process is not an example of government at its finest.

Many have offered an approach to create a less conflict-ridden method for getting excellent judges onto the federal bench.

Here's how the constitutional process for choosing federal judicial nominees

works: The president selects the nominees—usually by recommendation from the nominees' home-state senators—for an eventual confirmation vote by the Senate. Sometimes there's input from the home-state senators and citizens, and sometimes there isn't.

What we've found is that when there's no buy-in, contention and delay is often the result.

The ABA is taking a community approach to the problem. We're encouraging Senators in each state to jointly establish bipartisan advisory

commissions, similar to those already used to wide acclaim in seven states by senators of both parties. The advisory commissions evaluate the qualifications of prospective nominees to the U.S. district—or trial—courts. We're also suggesting similar commissions for the U.S. courts of appeals.

These commissions are voluntary and completely nonbinding. They recommend *possible* nominees whom the Senators of that state may suggest for the President's *consideration*. Everyone recognizes that

any nomination decision ultimately belongs to the President.

The approach is flexible. We don't outline particular steps or procedures to follow. That's best accomplished by the senators themselves.

It does encourage the commissions to involve the full range of the state's legal and non-legal communities—lawyers as well as non-lawyers—so they can benefit from the most diverse input possible.

We believe this will help avoid battles whose costs outweigh their benefits to the

President, the Senate, the nominees, and the courts on which they may serve.

The extra screening provided by bipartisan advisory commissions can help speed the process once a nominee is named.

Use of advisory commissions offers a way out of partisan contention and delay in the nomination and approval process for federal judges. Judging from the mood of the country these days, anything that reduces gridlock in Washington is an idea whose time has come.

Given the spirit of bipartisan cooperation we're seeing, I think we're going to get a lot of traction with this idea.

I've enjoyed sharing with you some ways my colleagues and I are working to make a difference to promote access to justice and boost confidence in our state and federal courts. Thank you for your time this afternoon. I'd be happy to take any questions.