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2009

### 2009-02-19 H. Thomas Wells, Jr. ABA Presidential Speech

H. Thomas Wells Jr.

University of Alabama School of Law

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Judicial Independence Debate  
Birmingham Federalist Society  
February 19, 2009

Travelling as President Elect around US. First thought I was hearing discordant issues; upon later reflection, realized they were all in the category of threats to judicial independence. Allow me enumerate a few, and then focus on what I see as the main threat:

**Unjust criticism**

**Ballot initiatives:** SD Jail 4 Judges; Colorado term limits

**Funding issues** (and that was last year!)

FIC Summit – cosponsored by NCSC; 35 state chief justices

Lack of even a COLA pay increase for federal judges. CJ Roberts says this is a threat to the judiciary

**Rankings threats** (if you don't rule the "right way" you will no longer be considered a business friendly court)

Some of these affect the decisional independence of the courts; others affect the institutional independence of the courts.

In speech to HOD on Monday, CJ Margaret Marshall of SJC of Mass, and the Pres of the Conf of Chief Justices, identified three threats to state courts:

1. Funding - threat to institutional independence
2. Lack of access to courts by many
3. Politicization of judicial elections – threat to decisional independence

On the last point she quoted SDO, who had spoken to the CCJ at its meeting in Arizona last month:

"While our judiciary has always faced significant attacks, some appropriate and others not, the single greatest threat to judicial independence is fairly modern and uniquely American. And that is the flood of money coming into our courtrooms by way of increasingly expensive and volatile judicial elections."

Examples:

Alabama: Recent race for open seat. \$3.8 million + over \$1 M in out of state \$ for push polls. So bad that ASB wrote AG Troy King to investigate b/c of falsity of push polls

Wisconsin: *In Re Disciplinary Proceedings of Hon. Michael Gableman*  
Defense is *Republican Party of Minnesota v. White*

Wisconsin: in a reversal of Gableman, a convicted killer endorsed the sitting SC Justice, who, as a public defender, represented the killer.

Caperton v. Massey

Do polls bear out assumption that these nasty contested and highly expensive races undermine judicial independence?

USAToday/Gallup poll this month: 89% believe the influence of political contributions is a problem, and 52% believe it is a major problem

Same poll: 90% believe a judge who received a campaign contribution from either the lawyer or the party should be removed from hearing the case.

Earlier polls: 78% think courts should be free from political pressure in deciding  
72% concerned that contributions compromise impartiality  
76% believe campaign contributions influence decisions  
>50% believe elected courts are controlled by special interests

Selection process is where there is the greatest tension between judicial independence on the one hand, and judicial accountability on the other.

Cannot take politics out of the process, it is inherent. It doesn't have to be the free for all that it seems to have become in contested races for judgeships.

Sand Wedge

Boiling pot, lid blown off.