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WELCOME REMARKS

- It is my pleasure to be with you this afternoon and to bring greetings from the American Bar Association.
- A number of folks in the ABA and bar leadership are from South Carolina —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.
- Back in the day, that line got a bigger chuckle than it does today. Now, I'm afraid, it gives us pause - because we too are living in some interesting times.
- Our country continues to grapple with a recession that has made maintaining an independent judicial branch more critical and timely than ever.

JUDICIAL INDEPENDENCE

- Hardly a week passes without news of jurisdictions severely cutting criminal, civil, or juvenile justice programs due to revenue shortfalls.
- Our ability to maintain courts as an independent branch of government is threatened if they don't have the resources they need to carry out their work.
- 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.
- In an address to the Conference of Chief Justices of the NCSC, former Justice Sandra Day O'Connor said:

"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."

- This threat was emphasized again by Chief Justice Margaret Marshall of the Mass. Supreme Court, who as President of the Conference of Chief Justices, stated:

  "When judges have to look over their shoulders before deciding a case – or worse, when they made an implied promise to look over their shoulder before deciding a case – when litigants enter the courtroom hoping their attorney has contributed enough to a judge's election coffers, we are in trouble, *deep* trouble."

ALABAMA

- 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 South Carolina.
- 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 one of our most recent elections, 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 last year.

- 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 year, 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 they 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.

West Virginia

- Let me tell you another story that many of you are probably familiar with - not from Alabama, but from West Virginia.
- A while back, a little-known candidate for the state Supreme Court received a $3 million contribution from the CEO of a coal mining company.
- That $3 million was a full 60 percent of the $5 million total campaign contributions the candidate received. That candidate won the election, unseating the incumbent.
- Soon thereafter, the new justice provided the deciding vote in overturning a $50 million dollar verdict against the same mining company. And that was after the opposing

party asked the justice to recuse himself from the case, which he elected not to do.

- *Caperton v. Massey Energy (2009)* - went before the U.S. Supreme Court who held, in a 5-4 decision, that the conflict of interest was so "extreme" that the West Virginia Justice's failure to recuse himself constituted a threat to the plaintiff's Constitutional right to due process under the Fourteenth Amendment.
- Although reasonable legal minds may disagree about the Supreme Court's decision - as lawyers who are committed to equal justice under the law - we should all advocate for a court system with judges who are not merely politicians in robes, but who are chosen for their qualifications and commitment to the rule of law.

SOUTH CAROLINA

- The situation here in South Carolina is a little different – as your judges are appointed by the legislature.
- And quite frankly, many citizens of my state are envious of states like South Carolina, where judges are appointed on the basis of their qualifications, not on who raises the most money.
- That said, it is still important not to become complacent in your obligation to ensure the independence of the judiciary in South Carolina.
- It is imperative, for example, that legislatures are not allowed to embark on smear campaigns to garner enough votes to remove judges whose court decisions don't coincide with their political ideology or agenda – or that

of the special interests or constituency that supports their elections.

- Another issue that comes to mind is the case of Judge Segars-Andrews.
- As many of you know, Judge Segars-Andrews is a popular family court judge - who has been on the bench for 16 years.
- The Judicial Merit Selection Commission, however, in a 7-3 decision found that she was unqualified to serve as a judge because she ruled in a divorce case where one of the attorneys involved shared in a lucrative case with her husband's law firm.
- And from what I understand, this is even after both the South Carolina Court of Appeals and the Judicial Conduct

Commission found no wrongdoing in her handling of the divorce case.

- This decision, although not yet final, raises some serious issues regarding judicial independence.
- As the South Carolina Commission on Judicial Independence and Impartiality stated in its press release:

> *"Judicial independence is jeopardized if the judicial screening process becomes a place where cases that have already been thoroughly reviewed and disposed of through both the appeals and judicial disciplinary process can be retried.*
>
> *Further, these actions are evidence of a dangerous influence that must not be present in a judicial system that depends upon absolute impartiality. Judges must be allowed to rule in good faith and fulfill their constitutional requirements without fear of losing their jobs at the hands of disgruntled litigants."*

- Now, I am aware that for - all intensive purposes – it is impossible to remove all politics from judicial selection, however, we can certainly work hard to keep it 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.

FEDERAL COURTS

- 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.

CONCLUSION

- I've enjoyed sharing with you some ways my colleagues and I are working to make a difference to boost confidence in our state and federal courts.
- Thank you for your time this afternoon.