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Ensuring an independent and excellent judiciary

If I knew how to preserve judicial independence while holding judges accountable to a high standard of excellence, I would bottle that knowledge, sell it and become a rich woman.

With these words I opened my remarks at a conference of bar association leaders from around the world on Sept. 16, 2006. They had gathered from both common law and civil law countries at the Chicago Bar Association to discuss topics of common interest. Above all, they wanted to exchange ideas on how to improve judicial systems. This topic was as much on the minds of the conference attendees as it must have been on the minds of the drafters of the U.S. Constitution. Clearly, it is still important today.

We conference attendees all agreed that we wanted an independent and excellent judiciary. We agreed that judges' decisions on the bench should not be subject to influence by political pressure. Most of us knew of the South Asian country whose dictator regularly called judges and asked them to reverse their decisions, which the judges usually did. Such judges were nothing more than puppets when a high-profile politically sensitive case was before them.

The Americans at the conference were also aware of threats against judges, including a recent tragedy in which two members of a judge's family were murdered. Clearly, judges who make unpopular decisions should not have to fear such retaliation. Many of us commented that remarks by some members of Congress, such as those decrying an "activist judiciary," helped foster this atmosphere of violence by cultivating a culture of disrespect, even disdain, for the judiciary.

This much is clear: Political influence and physical threats are absolutely antithetical to an independent judiciary, and an independent judiciary is essential to the rule of law.

If politicians and the public perceive that judges are generally "excellent," they will be more likely to support the independence of the judiciary. So the first step is to



Law and Public Issues

By Ann Lousin

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determine the criteria for "excellent judges." Neither the discussions at that conference nor years of studying the judiciary have led me to a set of simple criteria. In fact, I think it is easier to identify what are not necessarily the best criteria:

An excellent academic record. That may seem scandalous, but I've known valedictorians of law school classes whom I wouldn't trust to judge a pet contest in a kindergarten. Grades in law school don't always translate into excellence in decision-making. In fact, judges with quick, sharp intellects are often impatient with litigants and their counsel.

Their courtroom experience. Trial lawyers learn courtroom skills, but they are often contentious and find it difficult to become objective decision-makers on the bench. Indeed, sometimes they play too great a role in a trial, rather than leaving the litigating to the lawyers.

Their public service and their views on public policies. At the trial court level, judges' views on public policy issues are relatively unimportant. However, judges' views on policy matters might play a larger role in choosing appellate court justices. That's because the concepts so important in the appellate courts, such as due

process, separation of powers and equal protection, are so hard to define that judges making decisions about them must also make policy determinations. These issues reach the greatest importance in cases of first impression involving the United States Constitution.

Diverse backgrounds and viewpoints. Since 1789 our federal courts have emphasized local representation. For almost a century the U.S. Supreme Court had one Virginian, one New Yorker and one Massachusetts resident on the bench. That was "diversity" in an era when all justices were white men, many of whom did not attend law school. Yet in 2008 nobody commented on President Obama's nomination of a third New Yorker to that court (Sonia Sotomayor, joining Antonin Scalia and Ruth Bader Ginsburg). Our federal appellate and district courts are, by their very nature, geographically diverse.

Today "diversity" seems to translate into another way of saying that women and members of minority groups should be "represented" on the bench. This idea assumes that members of these groups will have viewpoints different from those of white men — and that their backgrounds would "bring diversity" to the decision-making process. But is that true?

All six of the Jewish justices who have sat on the U.S. Supreme Court have possessed brilliant legal minds, but one would be hard put to discern a "Jewish viewpoint" in their decisions.

The same seems true of women and black judges. Justices Sandra Day O'Connor and Ginsburg are known for asserting the need for women on the Supreme Court, but they did not always vote together. As for blacks, there could hardly be two justices with more different approaches and voting records than Justices Thurgood Marshall and Clarence Thomas. Both suffered the pain of racial discrimination as youths, but their opinions revealed very different attitudes toward the legal status of laws regarding race.

Perhaps the real reason we want "diversity" on the bench is it gives the

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public confidence that all parts of our society have a “voice” in judicial decision-making. Public perception, however, doesn’t sound like a very solid basis for evaluating excellence in judges. Moreover, judges who seem to be “representing” a group or viewpoint might not exercise independence in making their judgments.

Although those attending the bar leaders’ conference could not agree on the criteria for selecting excellent judges, we were convinced that judicial independence and public confidence in the judiciary are absolute prerequisites to any democratic society. As the Americans pointed out, judicial independence has been our goal since 1776. The eighth and ninth charges against King George III in the Declaration of Independence were:

He has obstructed the administration of justice by refusing his assent to laws establishing judiciary powers.

and

He has made judges dependent upon his will alone, for the tenure of their offices, and the amount and payment of their salaries.

So who in society bears the greatest

responsibility for ensuring judicial independence? Those attending the conference were agreed. It is the lawyers, the members of the bar. I reported two statements I had heard. In 1987, the chief justice of the Supreme Court of India said to an Indian lawyer in my presence, “The key to an independent judiciary is an independent bar.” It was an offhand remark, but I thought it was absolutely spot on.

Then in 1993 I participated in a delegation of the American Bar Association that met with a member of the Argentine Supreme Court in Buenos Aires. The justice revealed that during the recent dictatorship the heads of the government had tried to interfere with the decisions of judges. He said that when he reported that to Justice Anthony Kennedy a year or two before we were there, Kennedy had said, “That could not happen in America. The American Bar Association would never allow it.”

Let’s put those two remarks together: It is the solemn responsibility of the bar to ensure that there are both an independent

bar and an independent judiciary.

As I told participants in the 2006 conference, one of the proudest moments in the history of the American bar and judiciary was in 1770. After the Boston Massacre, no lawyer in Boston would defend the soldiers accused of the murder of the colonists. Only John Adams and his cousin Josiah Quincy, both with impeccable credentials as “revolutionary patriots,” stepped forward. Bostonians hurled insults at them as they entered the courthouse. Yet, Adams, Quincy, the judge and the jury did their duty. The defendants received a fair trial according to law. As Adams said, it was important to show the world that the bar and judiciary of Massachusetts Bay knew their duty and were not afraid to perform it.

That is true for both the bar and judiciary of Illinois today.

Author’s note: The author thanks Christine Saba for her assistance in the preparation of this column. It is the author’s intent to explore ways to secure judicial independence and excellence in future columns.