

## Introduction: The Voices and Groups That Will Preserve (What We Can Preserve of) Judicial Independence

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# ARTICLES

## INTRODUCTION: THE VOICES AND GROUPS THAT WILL PRESERVE (WHAT WE CAN PRESERVE OF) JUDICIAL INDEPENDENCE

JOHN Q. BARRETT\*

As the 1996 election year commenced, the leading issues of the day included welfare reform, late-term abortions, Bosnia, immigration, drugs, taxes, the budget deficit, and the budget impasse that had shut parts of the federal government.<sup>1</sup> The “hot” national issues did not include judicial philosophy, federal judicial appointments, individual judges or particular judicial decisions.

Within weeks, however, that changed, thanks to a single judicial opinion. On January 22, 1996, United States District Judge Harold Baer, Jr., decided a pretrial motion to suppress evidence in the then (and now) obscure New York federal drug prosecution of

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<sup>1</sup> See, e.g., Ronald Brownstein, *News Analysis: The Budget Stalemate: GOP Fails to Muscle Clinton Into a Deal*, L. A. TIMES, Jan. 4, 1996, at A12 (suggesting that GOP’s efforts to drive President Clinton into concession on budget appeared to be headed for failure).

a woman from Detroit named Carol Bayless. Judge Baer decided to suppress almost eighty pounds of cocaine and heroin that had, he determined, been seized illegally, and also to suppress Bayless' videotaped confession to being a drug courier, which was a fruit of the illegal seizure.<sup>2</sup>

In response, to put it plainly, political hell broke loose. Critics seized on two aspects of Judge Baer's decision. One aspect was the obvious negative impact of the suppression decision on law enforcement in the particular case. By suppressing the drug evidence and the confession, Judge Baer effectively had ended the government's ability to prosecute the defendant, who had confessed post-arrest that she was a regular drug courier between New York and Detroit. The other aspect was Judge Baer's assertion, in his written opinion, that public knowledge of police corruption in Manhattan's Washington Heights neighborhood made it reasonable, not suspicious, for people there to run when they see police officers looking at them.<sup>3</sup> For these reasons, Judge Baer and his decision were subjected to vociferous, sustained public criticism.<sup>4</sup> Although he soon reconsidered his decision and determined

<sup>2</sup> United States v. Bayless, 913 F. Supp. 232 (S.D.N.Y. 1996) (hereinafter "*Bayless I*").

<sup>3</sup> *Id.* at 242. The following paragraph is, in full context, Judge Baer's analysis of this "fight" factor:

Moreover, even assuming that one or more of the males ran from the corner once they were aware of the officers' presence, it is hard to characterize this as evasive conduct. Police officers, even those traveling in unmarked vehicles, are easily recognized, particularly, in this area of Manhattan. In fact, the same United States Attorney's Office which brought this prosecution enjoyed more success in their prosecution of a corrupt police officer of an anti-crime unit operating in this very neighborhood. Even before this prosecution and the public hearing and final report of the Mollen Commission, residents of this neighborhood tended to regard police officers as corrupt, abusive and violent. After the attendant publicity surrounding the above events, had the men not run when the cops began to stare at them, it would have been unusual.

*Id.* (footnotes omitted)

<sup>4</sup> Government officials led the criticism of Judge Baer. New York Governor George Pataki stated that "[t]he judge's decision is despicable." *New York Suspect May Walk Away From Drug Arrest* (CNN television broadcast, Jan. 26, 1996). New York City Mayor Rudolph Giuliani, who had been Baer's colleague when each was an Assistant United States Attorney in the United States Attorney's Office for the Southern District of New York, said the Judge's ruling was "mind-boggling in its effect," and that the decision was "very, very troubling and very, very disturbing." Clifford Krauss, *Giuliani and Bratton Assail U.S. Judge's Ruling in Drug Case*, N.Y. TIMES, Jan. 27, 1996, § 1, at 25. Senator Daniel Patrick Moynihan (D-NY) recommended that Judge Baer be sentenced to live one year in Washington Heights, to see if he would run away when he saw police, see A.M. Rosenthal, *Contempt in Court*, N.Y. TIMES, Jan. 30, 1996, at A15. New York City Police Commissioner William Bratton called Judge Baer's decision "absolutely crazy" and stated that Baer is "living in a fairyland." Paul Moses & Joseph W. Queen, *Judge: Men Not Wrong to Run From Cops*, NEWSDAY, Jan. 26, 1996, at A3. New York State Attorney General Dennis Vacco said that judges "should not be handcuffing our cops with arcane technicalities." Greg Smith & Frank Lombardi, *Rudy, Gov. Hit Judge For Axing Drug Case*, N.Y. DAILY NEWS, Jan. 26,

less than three months later that the drug evidence could be used because it had been obtained legally,<sup>5</sup> the political criticism of Judge Baer did not cease – even after the 1996 election season had come to an end.<sup>6</sup>

The “Baer episode”<sup>7</sup> is not simply an occasion to consider the facts of the *Bayless* case or Judge Baer’s opinions explaining his changing decisions.<sup>8</sup> It also is an opportunity to consider “judicial

1996, at 4. Senate Majority Leader Robert Dole (R-KS) blasted judges who “believe[] that police officers are a bigger threat to the well-being of our communities than those who peddle drugs to our kids.” 142 CONG. REC. S539 (daily ed. Jan. 26, 1996) (statement of Sen. Dole). Senator Orin Hatch (R-UT) called Baer a “bleeding-heart judge” who “lacks common sense and judgment.” GOV’T PRESS RELEASE, Feb. 9, 1996. Speaker of the House Newt Gingrich (R-GA) called Judge Baer a “pro-drug dealer, pro-crime” judge. *Lawmakers Call for Resignation of Judge*, U.P.I., March 6, 1996. Rep. Fred Upton (R-MI) stated that Judge Baer is “a Monopoly game gone bad, . . . handing out ‘get-out-of-jail’ free cards with reckless abandon.” *Id.* White House Press Secretary Michael McCurry, speaking on behalf of President Clinton, stated that Judge Baer “made a bad decision.” White House Regular Daily Briefing; *Trading Symbols*, F.D.C.H. POLITICAL TRANSCRIPTS, March 21, 1996.

Newspaper columnists and editorial writers also were scathing in their criticism of Judge Baer’s ruling. See, e.g., *The Drug Judge*, WALL ST. J., Jan. 26, 1996, at A10 (“Winning the war on drugs won’t be easy if the battles end up in courtrooms like that of Harold Baer”); *Judge Baer Mocks Justice*, N.Y. DAILY NEWS, Jan. 26, 1996, at 38 (“Federal Judge Harold Baer has become an accomplice to evil”); A.M. Rosenthal, *supra* (“some judges use their social and political inclinations, ego, antagonisms and biases to shape their decisions”).

<sup>5</sup> *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996) (hereinafter “*Bayless II*”).

<sup>6</sup> In March 1997, House Majority Whip Tom DeLay (R-TX) stated that as part of “conservative efforts against judicial activism,” congressional Republicans would be trying to impeach federal judges. Although impeachment talk is cheap, one of the judges who supposedly is under consideration for impeachment is Judge Baer. Ralph Z. Hallow, *Republicans Out to Impeach “Activist Judges”*, WASH. TIMES, Mar. 21, 1997, Pt. A, at A1; 143 CONG. REC. H 1587 (daily ed. Apr. 16, 1997) (statement of Rep. DeLay). Representative DeLay denied that he was acting for partisan reasons and explained that, “when judges exercise power not delegated to them by the Constitution, impeachment is a proper tool.” *Judicial Misconduct*, F.D.C.H. POLITICAL TRANSCRIPTS, May 15, 1997 (statement of Rep. DeLay).

Representative DeLay was not alone in his criticism of Judge Baer. Representative Bob Barr (R-GA), a former United States Attorney, spoke of the need to explore the option of impeachment for judges who go beyond the bounds of the Constitution and, as an example, spoke of the fact that “quantities of mind altering drugs will remain on the streets and wind up in the veins of our children because a judge believes the police are less trustworthy as a whole than criminals.” *Id.* (statement of Rep. Barr). Senator John D. Ashcroft (R-MO), Chairman of the Subcommittee on Constitutional, Federal and Property Rights, has held two hearings in 1997 on “judicial activism.” See *Judicial Activism*, F.D.C.H. POLITICAL TRANSCRIPTS, June 11, 1997 (opening statement of Sen. Ashcroft); *Judicial Activism*, F.D.C.H. POLITICAL TRANSCRIPTS, July 15, 1997 (opening statement of Sen. Ashcroft).

<sup>7</sup> American Bar Association Announcement, August 1996, *quoted in* Rocco Cammarere, *ABA Directs Aim at Bench-Bashing*, N. J. LAWYER, Aug. 12, 1996, at 1.

<sup>8</sup> For accounts of the *Bayless* case facts and some comments on criminal procedure issues raised by Judge Baer’s decisions, see Morgan Cloud, *Judges, “Testifying,” and the Constitution*, 69 S. CAL. L. REV. 1341, 1347-50 (1996); Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals’ Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 346-47 (1996); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2489-90 & n.123 (1996); John B. Owens, Note, *Judge Baer and the Politics of the Fourth Amendment: An Alternative to Bad Man Jurisprudence*, 8 STAN. L. & POL’Y REV. 189, 190-91 (1997).

independence" generally, and the societal forces that define and affect it at this point in our constitutional development.

As the Baer episode demonstrates, judicial independence encompasses two distinct but related concepts of independence.<sup>9</sup> One concept is *individual* judicial independence. This concept, which focuses on each particular judge, seeks to insure his or her ability to decide claims with autonomy within the constraints of law. An individual judge has this kind of independence when she can do her job without having to hear — or at least without having to take it seriously if she does hear — criticisms of her personal morality and her fitness for judicial office. The second concept is *institutional* judicial independence. It focuses on the independence of the judiciary as a branch of government. It protects judges as a class from actions by the executive and legislative branches of government and their constituent members.

Both of these concepts — the independence of the individual judge and the independence of the judicial branch — are fluid and evolving. They constantly are defined and redefined by five types of voices that speak and get heard on issues of judicial independence. These are the voices of judges, politicians, the media, the judiciary and the legal profession.

### THE JUDGE

A judge speaks, and thus defines the judicial image and the credibility of the judicial role in the eyes of the public, through the quality of his or her work and conduct on the bench. Among the many threats to judicial independence, the most serious may be the judges who fail to judge, or to explain their judging, well. Although there are many particular notions of "good judging," most lists of its components would include obeying the law and achieving justice.<sup>10</sup> In addition, at the level of craft, good judging includes maintaining an even temperament, taking hands-on responsibility for the work, communicating effectively, and gener-

<sup>9</sup> See Shirley S. Abrahamson, *Remarks of the Hon. Shirley S. Abrahamson Before the American Bar Association Commission on Separation of Powers and Judicial Independence, Washington, D.C., December 13, 1996*, 12 ST. JOHN'S J. LEGAL COMMENT. 71 (1996) (distinguishing between institutional judicial independence and individual judicial independence).

<sup>10</sup> For an extensive summary and analysis of studies and explanations of judicial decisionmaking as a process, see BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* 196-227 (1997).

ally seeking to embody propriety in all aspects of one's life on and off the bench.<sup>11</sup> These are not matters that can be decreed through the Code of Judicial Conduct. They exist in the judge who can, and who remembers to try to, summon them from within.

What is the right judicial temperament? As it relates to judicial independence, the ideal temperament is the judge who as much as humanly possible keeps her head down, ignores the world's lobbying pressures and simply does her job of making decisions that follow the law and achieve just outcomes.<sup>12</sup> For most judges, it will be a constant struggle to attain this ideal.<sup>13</sup> One reason to value judicial independence is that it enables judges to recognize this ideal and to strive to attain it, which in turn helps reinforce the public's view that this is what the job of judging demands, which in turn translates into public support for judicial independence.

The second component of good judging, taking complete responsibility for the substance of how the job is done, including the content of judicial opinions, is implicit in the concept of individual judicial independence. Judging, even as a member of a panel, is and needs to be a solo endeavor. Although judicial resources — particularly each judge's staff of law clerks and interns — have grown in recent decades, the workload of each judge has outstripped the expansion of his staff.<sup>14</sup> The resulting temptation is for a judge to manage the workload, to decide matters faster, by using staff work too casually, without giving it the true attention and review that would make this work the judge's own. There is no need or practical way for a judge to spend her career in solitary

<sup>11</sup> See generally JEFFREY M. SHAMAN ET AL., *JUDICIAL CONDUCT AND ETHICS* (2d ed. 1995); JOHN T. NOONAN, JR. & KENNETH I. WINSTON, EDs., *THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS* (1993); JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* (1974).

<sup>12</sup> See John D. Feerick, *Judicial Independence and the Impartial Administration of Justice*, 51 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 233, 239 (1996) ("the independence of the Judiciary is the right of a free people and therefore an obligation of judges rather than a privilege which they enjoy").

<sup>13</sup> See *What is Judicial Independence? Views from the Public, the Press, the Profession, and the Politicians*, 80 JUDICATURE 73, 75 (1996). Judge William M. Hoeveler of the United States District Court for the Southern District of Florida has said that "[e]ven though we [federal judges] have life tenure, we're human; don't ever think we're not subject to outside pressures. The press, public approval, polls — there are a variety of forces that invade our thinking or at least try to invade our thinking." *Id.*

<sup>14</sup> See generally RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 59, 139 (1996); Thomas Grey, *Holmes's Language of Judging — Some Philistine Remarks*, 70 ST. JOHN'S L. REV. 5, 6 (1996) ("[l]aw clerks often draft the opinions, which judges then read over to see if they say anything the judge doesn't want said at the time. There are exceptions to this practice, but this was the norm 25 years ago when I was a law clerk, and my impression is that if anything the exceptions are fewer today.") (footnote omitted).

confinement, handling everything by herself. There is a need, demanded by the ideal of judicial independence, for each judge to do her own deciding and explaining, if only to eliminate corrosive speculation that she has not done so and, even worse, that she cannot do so.<sup>15</sup>

The third component of good judging, effective communication, is one key way that a judge takes responsibility for her judgments. Judging is a private mental act, but the announcement of a judicial decision becomes a matter of public interest, at least for the litigants and often for a larger world. One factor that will determine the credibility of a judge's decision is the quality of the judge's explanation. Well-reasoned, written (or transcribed, as they are delivered from the bench) explanations may provoke attacks, but they also offer bases for higher courts and for the audience to understand why a judge did what she did.<sup>16</sup> Quality reasoning has legs to stand on. Weaker explanations, by contrast, deserve not to and usually will not withstand much scrutiny.<sup>17</sup>

<sup>15</sup> See POSNER, *supra* note 14, at 140-45, 150, 157.

<sup>16</sup> See Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 723-24 (1997) (urging judges to communicate their decisions more carefully and comprehensibly).

<sup>17</sup> For one example of the need for persuasive explanations of judicial decisions, compare Judge Baer's treatments in *Bayless* of two widely known, unfortunate characteristics of Manhattan's Washington Heights neighborhood: the prevalence of drug dealing and, closely related to it, the prevalence of police corruption. Both characteristics of the neighborhood are widely known in part because of the 1994 Mollen Commission report on New York City police corruption. See COMMISSION REPORT, THE CITY OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT (July 7, 1994) (hereinafter "Mollen Commission Report"), reprinted in 6 NEW YORK CITY POLICE CORRUPTION INVESTIGATION COMMISSIONS, 1894-1994 (Gabriel J. Chin ed., 1997). Harold Baer served, prior to becoming a federal judge, as one of the five members of the Mollen Commission. In *Bayless I*, Judge Baer referred explicitly to the Mollen Commission report to explain why it was reasonable, not suspicious, for a citizen to run from a police officer in Washington Heights. See *supra* note 3 (quoting *Bayless I*, 913 F. Supp. at 242.) But Judge Baer, in the same opinion, neither took judicial notice of the fact that Washington Heights is a high drug-trafficking area nor credited a police officer's unchallenged and more specific testimony to that effect in the suppression hearing. See *Bayless I*, 913 F. Supp. at 240 n.12 ("Interestingly, the Government offered no proof to corroborate their statement that the area surrounding 176th Street and St. Nicholas Avenue is a known hub of the drug trade."). Judge Baer's incredulity regarding the officer's testimony seems forced and implausible, given the Mollen Commission's repeated references to drug trafficking in the police precincts that comprise Washington Heights. See Mollen Commission Report, *supra*, at 4 ("drug ridden streets of Northern Brooklyn, Upper Manhattan"), 21 ("Manhattan North's 30th Precinct, where large-scale, cash-laden drug traffickers operate"), 29 ("Because the quantities of drugs transported in the 30th Precinct are often so large, skimming even part of the drugs could lead to thousands of dollars in profits."). Judicial ignorance of drug dealing in Washington Heights was, however, necessary to the logic of Judge Baer's rejection of the government's use of the "bad neighborhood" factor as one circumstance that gave rise to reasonable suspicion that Ms. Bayless was involved in criminal activity. (In *Bayless II*, after the government

The final component of good judging, an appearance of propriety, is the external perception of judicial performance that judges consciously should seek to create.<sup>18</sup> They should do this not by spin (which usually will not work in any event), but by behaving properly under the Code and by attaining the virtues discussed previously (i.e., displaying even temperament, exercising hands on responsibility for their judging, and communicating their reasoning effectively). In addition, as it relates specifically to judicial independence, a judge should be particularly conscious not to communicate anything that could contribute to an impression that his independence could be or has been affected.

### THE POLITICIANS

Elected officials who care to take judicial independence seriously while offering their comments on judicial decisions also could choose to abide by some obvious norms of good behavior. The starting point, basic as it seems, would be to become informed about the relevant law, the facts and the judge's reasoning, and to do so before speaking about any particular case or judicial ruling.<sup>19</sup> Officials also could improve the quality of public discourse on legal matters and judicial performance by eliminating meaningless adjectives, such as "activist," from their vocabularies. They also could refrain from making *ad hominem* attacks on individual judges, and from threatening judges' jobs by talking of resignation or impeachment, when they comment on the reasoning behind specific judicial decisions.

The reality of our time, however, is that today's judge-bashers probably will not change their behavior. As the Baer episode illustrates, politicians regularly become demagogues on crime-related issues and, in the search to find someone to blame for crime problems that they and we have not solved, a judge who recently, conveniently, has enforced a statute or a constitutional provision

presented further evidence of the prevalence of drug trafficking in Washington Heights, Judge Baer reversed course, criticized the government for not offering additional evidence earlier, and implied that the existence of drug dealing in Washington Heights was revelation to him. *Bayless II*, 921 F. Supp. at 215 n.4).

<sup>18</sup> See Shirley S. Abrahamson, *Foreword*, in SHAMAN, *supra* note 11, at v.

<sup>19</sup> Judge Baer apparently does not believe that many of his critics bothered to read his *Bayless* opinions. See *Bayless II*, 921 F. Supp. at 214 ("For those who may take the time to read this decision, a word about the law and how it regards the issue of credibility may be helpful.").



and thereby thwarted all-out law enforcement can become the "punching bag"<sup>20</sup> of choice. The judge becomes an attractive target not only because her decision has touched a hot button crime issue, but also because the judge's sense of propriety, given her professional role and her typical reluctance to engage in political disputes, predictably will mean that she will not respond aggressively once the bashing begins. The temptation for a politician to judge-bash becomes all the greater when a politician is seeking election or reelection, as most of Judge Baer's critics were or are, because judge-bashing is believed to be a good political tactic.

### THE MEDIA

Judge-bashing works, and thus it continues, because it fits well with two of our media's obsessions (which may accurately reflect the general public's obsessions): reporting crime-related stories, and reporting general allegations of official misconduct. This is particularly true of television news reporting, and it is all the more true when the issue is drug-related crime or the claim that a law-breaker has gone free because of a judicial decision. If a politician says that a judge has done something outrageous by dismissing a case and sending a "criminal" back into the community, that apparently is news to be reported, without any visible exercise of editorial judgment by the media. Indeed, the media often seem, through tabloid headlines, "news" stories and editorials, themselves to lead, or at least to join in, the bashing. The media also seem to lack a strong commitment to reporting and educating the public about our heritage and constitutional commitment to the principle of an independent judiciary.<sup>21</sup>

Good reporting could support judicial independence and thus give some protection to a judge who is under siege. One story to report, in general but particularly when judges are under attack,

<sup>20</sup> See *Interview: A Unique Perspective on Judicial Independence*, 25 HOFSTRA L. REV. 799, 810 (1997) (interview by Professor Roy D. Simon, Jr., and Ms. Karen E. Baldwin of Judge Harold Baer, Jr.) (hereinafter "*Judge Baer Interview*") (noting that "judges can easily become punching bags because there is little that they can say" in response to politicians who bash them).

<sup>21</sup> The irony is that, at the same time it gives such prominent platforms to judge-bashers, the media report concerns about threats to or the absence of judicial independence in countries around the world. See, e.g., *Commission Co-Chairs Express Concern About Developments in Albania*, P.R. NEWSWIRE, Mar. 3, 1997 (quoting a joint statement issued by Senator Alfonse D'Amato (R-NY) and Representative Christopher H. Smith (R-NJ)); Edward A. Gargan, *In Hong Kong, There Is Constitutional Law, But Whose?*, N. Y. TIMES, July 23, 1997, at A3.

is our history of correct, courageous and independent judicial decisions. Media also could begin to communicate the simple truth that, although constitutional rights sometimes will impede the efficiency of law enforcement, our country is based on the defining choice to make that sacrifice in the interests of personal liberty.<sup>22</sup> When the next round of bashing a judge for rendering a decision commences, the media could report that the official misconduct is the bashing, not the judging. The media also could criticize, and sometimes just ignore, the judge-bashers who seek their attention.

These prescriptions for better, more constitutionally true reporting require a level of understanding and a kind of courage, including the courage to forgo the profits that apparently come from sensationalized coverage of crime stories and official name-calling, that has not been seen much in our media recently.<sup>23</sup> Perhaps one hope is that the proliferation of new media — court system web sites that reproduce original exhibits and hearing transcripts and contain audiotapes and videotapes of court proceedings; bar association and other web sites that collect historical materials explaining the importance of judicial independence; and electronic newsletters explaining and defending judicial decisions that are automatically disseminated to government officials, traditional media and other opinion leaders — along with the related decline of traditional television news, will create venues for more responsible voices.

### THE JUDICIARY

The judiciary itself must continue to be a voice that explains and thus preserves its own independence. The highlight of the

<sup>22</sup> As Justice Brennan once noted,

what the Framers understood [in 1791] remains true today — that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy. It was for that very reason that the Framers of the Bill of Rights insisted that law enforcement efforts be permanently and unambiguously restricted in order to preserve personal freedoms. In the constitutional scheme they ordained, the sometimes unpopular task of ensuring that the government's enforcement efforts remain within the strict boundaries fixed by the Fourth Amendment was entrusted to the courts.

United States v. Leon, 468 U.S. 897, 929-30 (1984) (Brennan, J., dissenting); *accord* United States v. White, 401 U.S. 745, 789-90 (1971) (Harlan, J., dissenting).

<sup>23</sup> See generally William L. Howard, *We Pursue Different Objectives . . . They Aren't Always Compatible*, *QUILL*, Oct. 1996, at 24 (assessing judicial-media relations based on his experience as the trial judge in South Carolina's 1995 prosecution of Susan Smith).

*Bayless* case — to date, for the case is not over<sup>24</sup> — is the remarkable statement that was issued by the then Chief Judge and the former Chief Judges of the United States Court of Appeals for the Second Circuit in response to the political criticism of Judge Baer's first decision and the calls for his resignation.<sup>25</sup> Chief Judge Jon O. Newman, joined by former Chief Judges J. Edward Lumbard, Wilfred Feinberg and James L. Oakes, issued the following document on March 28, 1996:

The recent attacks on a trial judge of our Circuit have gone too far. They threaten to weaken the constitutional structure of this nation, which has well served our citizens for more than 200 years.

Last Friday, the White House press secretary announced that the President would await the judge's decision on a pending motion to reconsider a prior ruling before deciding whether to call for the judge's resignation. The plain implication is that the judge should resign if his decision is contrary to the President's preference. That attack is an extraordinary intimidation.

Last Saturday, the Senate Majority Leader escalated the attack by stating that if the judge does not resign, he should be impeached. The Constitution limits impeachment to those who have committed "high crimes and misdemeanors." A ruling in a contested case cannot remotely be considered a ground for impeachment.

These attacks do a grave disservice to the principle of an independent judiciary, and, more significantly, mislead the public as to the role of judges in a constitutional democracy.

The Framers of our Constitution gave federal judges life tenure, after nomination by the President and confirmation by the Senate. They did not provide for resignation or im-

<sup>24</sup> After Judge Baer reconsidered his suppression decision (and after he then recused himself from the case), the case was reassigned to another Judge. Ms. Bayless then pleaded guilty to three felony charges. Don Van Natta, *A Publicized Drug Courier Pleads Guilty to 3 Felonies*, N.Y. TIMES, June 22, 1996, at 23. Over the course of the next fifteen months, the Judge set and then continued a number of sentencing dates. Ms. Bayless also testified during this period as a government witness in a drug prosecution in Detroit. As of October 1997, she was still awaiting sentencing. After Ms. Bayless finally is sentenced on the counts to which she pleaded guilty, she is likely to appeal her case to the United States Court of Appeals for the Second Circuit. Her guilty plea explicitly preserved her rights to appellate review of Judge Baer's decisions, including his initial denial of a recusal motion and his ultimate denial of the suppression motion. She also may, on appeal, challenge Judge Baer's reconsideration, in a climate of great political pressure, of his initial decision to suppress the drug evidence and the confession.

<sup>25</sup> See *Second Circuit Chief Judges Criticize Attacks on Judge Baer*, N.Y. L.J., March 29, 1996, at 4 (printing statement released by judges on previous day).

peachment whenever a judge makes a decision with which elected officials disagree.

Judges are called upon to make hundreds of decisions each year. These decisions are made after consideration of opposing contentions, both of which are often based on reasonable interpretations of the law of the United States and the Constitution. Most rulings are subject to appeal, as is the one that has occasioned these attacks.

When a judge is threatened with a call for resignation or impeachment because of disagreement with a ruling, the entire process of orderly resolution of legal disputes is undermined.

We have no quarrel with criticism of any decision rendered by any judge. Informed comment and disagreement from lawyers, academics, and public officials have been hallmarks of the American legal tradition.

But there is an important line between legitimate criticism of a decision and illegitimate attack upon a judge. Criticism of a decision can illuminate issues and sometimes point the way toward better decisions. Attacks on a judge risk inhibition of all judges as they conscientiously endeavor to discharge their constitutional responsibilities.

In most circumstances, we would be constrained from making this statement by the Code of Conduct for United States Judges, which precludes public comment about a pending case. However, the Code also place on judges an affirmative duty to uphold the integrity and independence of the judiciary. In this instance, we believe our duty under this latter provision overrides whatever indirect comment on a pending case might be inferred from this statement (and we intend none).

We urge reconsideration of this rhetoric. We do so not because we doubt the courage of the federal judges of this Circuit, or of this nation. They have endured attacks, both verbal and physical, and they have established a tradition of judicial independence and faithful regard for the Constitution that is the envy of the world. We are confident they will remain steadfast to that tradition.

Rather, we urge that attacks on a judge of our Circuit cease because of the disservice they do to the Constitution and the danger they create of seriously misleading the American public as to the proper functioning of the federal judiciary.

Each of us has important responsibilities in a constitutional democracy. All of the judges of this Circuit will continue to

discharge theirs. We implore the leaders of the Executive and Legislative Branches to abide by theirs.<sup>26</sup>

The Chief Justice of the United States,<sup>27</sup> the Chief Judge of the New York Court of Appeals,<sup>28</sup> and many other judges — some of whose contributions are published in this issue — made similar statements, speeches and writings in defense of judicial independence.

Although judicial responses to judge bashing may not persuade or silence the bashers, such responses can have a salutary effect to the extent that they go over the bashers' heads and reach the public directly.<sup>29</sup> The media, of course, may not help, or they even may get in the way. But just as the media find it difficult to ignore elected officials and candidates who attack a judge for rendering particular decisions, they will be hard pressed to ignore clear, principled responses by respected judges and groups of judges.<sup>30</sup> Judges should recognize all the more that the principle of judicial independence has resonance with the general public.<sup>31</sup> When a judge's right to remain in office is unfairly attacked, the idea of judicial independence itself is the weapon with which the courts and judges can fight back.<sup>32</sup>

<sup>26</sup> *Id.*

<sup>27</sup> See William H. Rehnquist, *Keynote Address, Symposium: The Future of the Federal Courts*, 46 AM. U. L. REV. 267, 271-74 (1996) (noting that failed impeachment of Justice Samuel Chase and *Marbury v. Madison* were important in securing judicial independence); *Chief Justice Speaks On Independence, THE THIRD BRANCH*, May 1996, available at <<http://www.uscourts.gov/ttb/may96/indep.htm>> (reporting that Chief Justice stated that judiciary must change with times but that independence is essential to its proper functioning).

<sup>28</sup> See Gary Spencer, *Kaye Warns of Attacks on Court, Press Coverage Seen Harming 'Confidence'*, N.Y.L.J., Apr. 18, 1996, at 1 (regarding Chief Judge Kaye's 1996 State of the Judiciary Message). In an article that appeared in print after this Introduction was written, Chief Judge Kaye considered the topic of judicial independence in detail and the proper roles of lawyers, judges, the media and the public. See Kaye, *supra* note 16.

<sup>29</sup> As Judge Stephen McEwen points out in his interesting contribution to this issue, kind and collegial words by judges about each other bolster the reputations of courts as institutions and make for better working conditions inside the judiciary. See Stephen McEwen, "Not Even Dicta", 12 ST. JOHN'S J. LEGAL COMMENT. 113 (1996).

<sup>30</sup> See Robert Marquand, *Why America Puts Its Supreme Court on Lofty Pedestal*, CHRISTIAN SCI. MONITOR, June 25, 1997, at 1 (suggesting that public overwhelmingly supports and follows decisions of Supreme Court).

<sup>31</sup> See Gary Spencer, *Poll Finds Public Support for Independent Judiciary*, N.Y. L.J., June 19, 1996, at 1 (stating that New York's judges have widespread public support).

<sup>32</sup> Recent legal literature contains a number of powerful defenses by judges of judicial independence. See, e.g., Joseph W. Bellacosa, *Judging Cases v. Courting Public Opinion*, 65 FORDHAM L. REV. 2381 (1997); Hon. Michael Daly Hawkins, *Dining With the Dogs: Reflections on the Criticisms of Judges*, 57 OHIO ST. L.J. 1353 (1996); Louis H. Pollak, *Criticizing Judges*, 79 JUDICATURE 299 (1996).

## THE LEGAL PROFESSION

Judges have not been alone in defending judicial independence. Practicing lawyers,<sup>33</sup> bar associations,<sup>34</sup> law schools and law professors,<sup>35</sup> and former judges<sup>36</sup> have responded to the attacks on Judge Baer and other judges by speaking out and writing, by hosting discussions, and generally by calling attention to the value of judicial independence and the threats it now (and always?) faces.

If there is room for additional useful action, it may be at the level of the individual lawyer. We each should speak out about judicial independence, both when a particular judge faces specific threats and in defense of the principle itself. Each lawyer can — as a parent; as a classroom visitor; as an employer of law student interns — easily reach and casually but crucially teach some group of citizens about the value and history of our independent judiciary. Most lawyers have family members or friends who, having seen or read a “judge causes crime” story,<sup>37</sup> will ask a question

<sup>33</sup> See, e.g., Stephen B. Bright, *Casualties of the War on Crime: Fairness, Reliability and Credibility of Criminal Justice Systems*, 51 U. MIAMI L. REV. 413 (1997); Stephen B. Bright, *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); Mario M. Cuomo, *Some Thoughts on Judicial Independence*, 72 N.Y.U. L. REV. 298 (1997); Feerick, *supra* note 12; John Gibeaut, *Taking Aim*, 82 A.B.A. J. 50 (1996); Edward I. Koch, *The Independence of the Judiciary?*, 1 N.Y. CITY L. REV. 457 (1996).

<sup>34</sup> See, e.g., *Symposium: Independence Under Siege: Unbridled Criticism of Judges and Prosecutors*, 5 J.L. & POL'Y 509, 509 (1997) (transcribing panel discussion sponsored by the Brooklyn Women's Bar Association); *Defending Judge Baer*, N.Y.L.J., Feb. 1, 1996, at 2 (statements submitted by New York Council of Criminal Defense Lawyers and New York County Lawyers' Association); Daniel Wise, *26 Bar Groups Join to Defend Judiciary*, N.Y. L.J., Mar. 8, 1996, at 2 (publishing statement issued by 26 lawyers' organizations and 6 law school deans comprising Joint Committee to Preserve the Independence of the Judiciary).

<sup>35</sup> See, e.g., *Federal Judicial Independence Symposium*, 46 MERCER L. REV. 637, 638-39 (1995) (discussing need for judicial independence); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1165 (1996) (proposing creation of commission to study role of judiciary's interaction with Congress); Thomas E. Plank, *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 WM. & MARY BILL RTS. J. 1, 1 (1996) (identifying four institutional elements of independent judiciary: fixed tenure, fixed and adequate compensation, minimum qualifications, and limited civil immunity).

<sup>36</sup> See H. Lee Sarokin, *A Judge Speaks Out*, THE NATION, Oct. 13, 1997, at 15. Judge Sarokin, a former District Judge, United States District Court for the District of New Jersey, and then a Circuit Judge, United States Court of Appeals for the Third Circuit, retired in 1996 “in protest over the politicization (what I characterize as the ‘Willie Hortonizing’) of the federal judiciary.” *Id.* For another former judge's powerful defense of judicial independence, see Penny J. White, *It's a Wonderful Life, Or Is It? America Without Judicial Independence*, 27 U. MEM. L. REV. 1, 3 (1996).

<sup>37</sup> See, e.g., *Judicial Activism: Assessing the Impact, Hearing Before the Subcommittee on the Constitution, Federalism and Property Rights of the Senate Committee on the Judiciary*, July 15, 1997 (opening statement of Chairman John Ashcroft), available in 1997 WL 12100970 (“But while constituents outside of Kansas City may not always complain about judicial activism by name, often they are complaining about problems — from forced bus-

that can lead to an educational conversation. Some lawyers know the politicians who should know better but judge-bash anyway. These lawyers should, in private, where honesty and persuasion might be possible, call the politicians on their judge-bashing and seek to improve their behavior. Some lawyers are in positions to counsel media clients about the importance of preserving every judge's ability to decide cases independently. These lawyers should become counselors for judicial independence.

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In this issue, the *St. John's Journal of Legal Commentary* assembles significant and varied portions of our profession's ongoing discussion of judicial independence. This issue of the *Journal* includes recent remarks and writings relating to the broad topic of judicial independence by some of our leading judges and lawyers. The distinguished contributors include federal and state high court judges (Justice Stevens, Judge Titone and Chief Justice Abrahamson), a federal appellate judge (Judge Walker), federal and state trial court judges (Judge Pollak and Judge McEwen), state administrative judges (Judges Endris and Penrod) and leaders of the practicing bar (Ms. Ramo and Mr. Cooper). This issue also includes law student Notes and a lawyer's paper. These works address a range of judicial decisions and legal issues that are themselves occasions for, and we hope of, judicial independence.

Justice John Paul Stevens' contribution to this issue is the wide-ranging and notable address that he delivered to the opening assembly of the American Bar Association's 1996 annual meeting. He reminds us that we all — litigants, commentators, and even judges — should be humble in venturing to predict how any person will, as a judge, decide a novel legal issue, because such predictions will often be wrong.<sup>38</sup> Justice Stevens explains what

ing, to high crime, to the decay of our urban areas — where judicial activism is the root cause.”).

<sup>38</sup> Justice Stevens' remarks relate, at least indirectly, to the American Bar Association's long-standing practice of providing, through its Standing Committee on the Federal Judiciary, its independent and professional evaluations on the qualifications of potential nominees to the lower federal courts, and of Presidential nominees to the United States Supreme Court. In this vein, two former ABA Presidents, Roberta Cooper Ramo and N. Lee Cooper, contribute to this issue their opening statements at a May 1996 hearing of the Senate Judiciary Committee. Although these remarks explain and demystify the ABA's judicial evaluation process, they did not calm some Republicans' concerns about the ABA's politics. In February 1997, after the ABA House of Delegates passed a resolution calling for

should be an obvious point but apparently, for too many political critics, is not: that judges are people of good will. They read and listen carefully to the presentations of skilled and committed advocates. As a result, Justice Stevens reports from experience, judges can be and regularly are persuaded to make decisions that differ from the judges' prior assumptions about how they would decide various issues. Judge-watchers (and especially judge-critics) who read and learn from this wise essay may grow to appreciate the honest and conscientious effort that typically is involved in judging, and perhaps then they may temper their criticisms.

Judge Vito Titone of the New York Court of Appeals contributes remarks that he delivered to fellow St. John's University law alumni in October 1996. Judge Titone laments the growing trend of politicians attacking the courts generally and specifically criticizing isolated rulings of individual judges for being "soft on crime." In pointed terms, Judge Titone reminds these judge-bashers — even though the reminder may not have much effect (as he notes, the political judge-bashers tend to be lawyers who already know better but keep on doing what they are doing to achieve short term, politically manipulative ends) — that the judicial job is to protect the legal rights of all citizens, not to "fight crime."

Judge John Walker of the United States Court of Appeals for the Second Circuit shares the remarks he delivered in December 1996, as the representative of the Federal Judges' Association, to the American Bar Association's Commission on Separation of Powers and Judicial Independence.<sup>39</sup> Judge Walker first discusses the heritage of our constitutional system of judicial independence, including the experience in England of the King removing judges from office, the colonial grievances about the absence of an in-

a moratorium on the death penalty, Senator Orrin Hatch (R-UT), Chairman of the Judiciary Committee, announced that he was ending the ABA's official role of advising the Senate on judicial nominees. See Terry Carter, *A Conservative Juggernaut*, 83 A.B.A. J. 32 (June 1997).

<sup>39</sup> The ABA Commission on Separation of Powers and Judicial Independence was created in the summer of 1996, in the climate of judge-bashing that included the attacks on Judge Baer. The Commission, an initiative of then ABA President Cooper to maintain public confidence in the judicial system, see Henry J. Reske, *Where to Draw the Line*, 82 A.B.A. J. 99 (Dec. 1996), was comprised of both ABA and non-ABA members. The Commission held hearings and received testimony, including earlier versions of some of the contents of this issue, in October and December 1996 and in February 1997. This testimony and the Commission's July 4, 1997, final report, AN INDEPENDENT JUDICIARY, are available on the ABA web site, <<<http://www.abanet.org/govaffairs>>>.



dependent judiciary that are recorded in the Declaration of Independence, the federalist perspective leading up to the framing of the Constitution in 1787, and the protections embodied in its Article III. Judge Walker then speaks directly to the attacks on Judge Baer for his initial *Bayless* decision and calls for people (especially lawyers) of "good sense" to distinguish attempts to intimidate judges through personal attacks from proper and thoughtful criticism of judicial decisions. Judge Walker concludes by addressing two systemic threats to judicial independence that exist in the judiciary's relations with the political branches. One threat is the federal budget process, an annual occasion of temptation for Congress and the President to become too involved in the sovereign affairs of the judiciary.<sup>40</sup> The other threat is Congress' general inaction on the issue of inflation eroding the real salaries of federal judges.<sup>41</sup> Judge Walker connects the salary issue directly to the issue of judicial independence by pointing out the inappropriateness of judges, who regularly review the constitutionality and legality of executive and legislative acts, having to come to those branches as supplicants seeking preservation of their own salaries.

Judge Louis Pollak of the United States District Court for the Eastern District of Pennsylvania (and, more specifically, a leading "Philadelphia lawyer")<sup>42</sup> publishes here the remarks he delivered

<sup>40</sup> Judge Walker notes that the Line Item Veto Act, 2 U.S.C. § 691 *et seq.* (Supp. 1997), which does not exempt the judiciary, may someday be used by a President to affect the budget of the federal judiciary.

<sup>41</sup> See generally Judges Barefoot Sanders & Joyce Hens Green, *A COLA for Judges, Too*, WASH. POST., Oct. 5, 1997, at C6 (letter to the editor); Dana E. McDonald, *Judicial Independence Is Threatened When Judicial Pay Doesn't Keep Pace with Inflation*, LEGAL TIMES, Mar. 17, 1997, at 25; William H. Rehnquist, *1996 Year-End Report on the Federal Judiciary*, <<<http://www.uscourts.gov/cj96.htm>>> ("Unfortunately, judges can only regret that Congress failed to repeal Section 140 of the Continuing Resolution Act of December 15, 1981, . . . which provides that no cost-of-living salary increases shall be granted to federal judges without express legislative approval. . . . Congress compounded the negative impact of failing to repeal Section 140 when it declined in October [1996] to approve the 2.3 percent Employment Cost Index ("ECI") adjustment in salary for federal judges in January of 1997.")

In November 1997, Congress passed an appropriations bill that will give federal judges, for the first time in five years, a cost-of-living salary increase of 2.3 percent. See T.R. Goldman, *Spending Bill Alters Legal Landscape*, LEGAL TIMES, Nov. 17, 1997, at 1, 19. This one-time measure does not address the larger problem of federal judicial salary erosion over time, nor does it remove the issue of proper federal judicial compensation from the political vagaries of the annual appropriations process.

<sup>42</sup> This label is offered as a compliment. Cf. Louis H. Pollak, *Philadelphia Lawyer: A Cautionary Tale*, 145 U. PA. L. REV. 495, 495-96 (1997) (regarding the judicial career of Supreme Court Justice Owen J. Roberts, who prior to his tenure on Court was a practicing lawyer and an adjunct professor at University of Pennsylvania Law School and, after leav-

to the ABA Commission in October 1996. Judge Pollak adds to the backdrop that Judge Walker sketches by reviewing our constitutional law and history in the tumultuous few decades that began with Alexander Hamilton's essays of 1788.<sup>43</sup> Judge Pollak considers Hamilton's explanations of the Constitution's provisions creating judges who are secured in office and empowered to check legislative excesses; explains the prudence of the Supreme Court's approval of the Jeffersonian reorganization that eliminated existing lower federal courts; recounts Supreme Court Justices' early uses of the formal separation of powers to justify withdrawing themselves from the embrace — then loving, but one day potentially crushing — of the executive and legislative branches;<sup>44</sup> and recalls that the earliest efforts to impeach and to convict federal judges succeeded when the issue was physical and mental disability (the case of District Judge John Pickering of New Hampshire)<sup>45</sup> but failed when the issue was political disagreement with judicial acts, including rulings from the bench (the case of Supreme Court Justice Samuel Chase).<sup>46</sup> In each of these events, the judicial branch protected itself pragmatically and well, and for the long future, against encroachments from the so-called political branches. Judge Pollak's history lessons thus may sound a hopeful note for those who have been hearing only the din of today's judge-bashing.

Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court contributes the remarks she delivered to the ABA Commis-

ing the Court, its Dean). See generally Loren Singer, *Even if You're From Boston or Austin, You May Be a 'Philadelphia Lawyer'*, WEST'S LEGAL NEWS, Jan. 26, 1996, available in 1996 WL 258193.

<sup>43</sup> THE FEDERALIST, Nos. 78, 79, 80, 81 (Alexander Hamilton).

<sup>44</sup> See *Hayburn's Case*, 2 U.S. (2 Dallas) 409, 411-14 n.† (1792) (reproducing the conflicting 1792 opinions of Circuit Court panels that included, in the District of New York, Chief Justice John Jay and Associate Justice William Cushing; in the District of Pennsylvania, Justices James Wilson and John Blair; and, in District of North Carolina, Justice James Iredell); Letter from Chief Justice Jay and the Associate Justices to President George Washington (August 8, 1793) reprinted in THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1826 486-89 (III Henry P. Johnston ed., 1971) (declining the President's request that the Justices decide questions arising from "transactions within our ports and limits" — which questions "depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land" — involving France and Britain) (quoting Letter from Secretary of State Thomas Jefferson to Chief Justice Jay and the Associate Justices, July 18, 1793).

<sup>45</sup> See ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 43, 45-52 (1992).

<sup>46</sup> See WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 74-105 (1992).

sion in December 1996. She begins by identifying and discussing the two related but separable types of "judicial independence" that are embodied in that concept and at issue in each of the articles that accompanies hers. The first type, institutional or "branch" independence, concerns the relationships between and among the judiciary, the executive and the legislature. The second type, individual or "decisional" independence, concerns a judge's decision-making process and freedom. Chief Justice Abrahamson then discusses these types of judicial independence from a state court perspective, based on her more than two decades of service on Wisconsin's highest court. She explains that, in Wisconsin, the institutional independence of the judiciary benefits from state constitutional protections and legal doctrines that may be unusual. The institutional independence of Wisconsin's courts also stems from their relative success in communicating their needs, particularly for funding, to the political branches. Chief Justice Abrahamson also considers the state of individual judicial independence in Wisconsin. Her discussion and defense of its judicial election system makes an interesting contrast to Justice Stevens' stated belief that electing judges is an awful practice.<sup>47</sup> Chief Justice Abrahamson concludes with discussions of the issues and opportunities that inhere in judicial communication with the legislative branch, and with the general public.

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The tragedy of the *Bayless* case for judicial independence generally is the common belief that Judge Baer, when he faced unprece-

<sup>47</sup> See generally Joel Achenbach, *Why Reporters Love Judicial Elections*, 49 U. MIAMI L. REV. 155 (1994) (describing, with humor and horror, how candidates come to run unopposed in Florida's judicial elections).

Chief Justice Abrahamson and Justice Stevens' contrasting views on the merits of an elected state judiciary may in part be products of their respective geographic bases. Chief Justice Abrahamson explains her support for electing judges in Wisconsin by referring to the state's populist tradition and its voters' history of making sound choices. Cf. Jim Doherty, *In Chilly Green Bay, Curly's Old Team is Still Packing Them In*, SMITHSONIAN MAGAZINE 81, 82 (Aug. 1991) ("The Packers . . . [are] an institution, the heart and soul of a community that extends well outside Green Bay to the farthest reaches of the Badger State, and beyond."). Justice Stevens, a native of Chicago and, with brief exceptions, a life-long Illinois resident until he joined the Supreme Court, may view judicial elections with greater skepticism based on his city and state's experiences with judicial corruption. See Tony Mauro, *Courtside: Chicago Lawyers*, LEGAL TIMES, Apr. 21, 1997, at 8 ("oral argument last week [in *Bracy v. Gramley*, No. 96-6133] made it clear that Justice John Paul Stevens keeps up with the legal scene in his home town of Chicago"). See generally JAMES TUOHY & ROB WARDEN, GREY LORD: JUSTICE CHICAGO STYLE (1989); cf. SAUL BELLOW, THE ACTUAL 87 (1997) ("Judges without exception were on the take, she said, and you couldn't build a prison big enough to hold all the Chicago judges who were eligible.").

dented political criticism and threats to his continued tenure as a federal judge, blinked. Many seem to believe, based on the simple sequence of events in the case — the Judge's initial decision, followed by the criticism, followed by the Judge's second decision, which reached an opposite result from the first — that the storm of political criticism caused Judge Baer to change his mind.<sup>48</sup>

Judge Baer's actions regrettably fueled the perception that he blinked. His initial opinion was so ringing a condemnation of the police, and his remarks when the government first sought reconsideration were so dismissive of what he called the prosecutors' "juvenile project,"<sup>49</sup> that it became hard to conceive that his later change of heart could have been based on the merits of any additional information he received. Judge Baer also issued his reversal of his initial decision on April Fool's Day.<sup>50</sup> That might mean nothing, but it has been understood as some kind of signal from the Judge about the decision he was rendering.<sup>51</sup>

Judge Baer has denied that the *Bayless* "firestorm" compromised his judicial independence.<sup>52</sup> He deserves to be taken at his word — on this matter, and on the sincerity of his credibility determinations regarding the testimony of Ms. Bayless and the police officers who seized the drugs she was transporting in 1995 and

<sup>48</sup> E.g., Monroe H. Freedman, *The Threat to Judicial Independence By Criticism of Judges — A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 739-40 (1997) ("Judge Baer got the message. He conducted a rehearing and reversed his decision. And no one was in doubt about what had happened.") (footnote omitted); Michael Kelly, *Judge Dread*, THE NEW REPUBLIC, Mar. 31, 1997, at 6 ("Under pressure from Clinton, [Judge Baer] reversed himself."); R. Eugene Pincham, *A New Tyranny Against Judiciary*, CHICAGO TRIBUNE, May 23, 1996, at 30 (letter from retired Illinois Appellate Court justice) (referring to Judge Baer's "display of judicial weakness" and calling it "appalling that a weak federal judge would succumb to such criticisms"); Daniel Seligman, *Ask Mr. Statistics*, FORTUNE, June 24, 1996, at 165 ("Baer said, hey, just kidding, and reversed himself").

<sup>49</sup> See Don Van Natta, Jr., *Judge Agrees to Rehear Case on Drugs Seized By the Police*, N.Y. TIMES, Mar. 6, 1996, at B1 ("In a conference call with lawyers a month ago, Judge Baer derided prosecutors' bid to get him to change his mind, calling it a 'juvenile project.'").

<sup>50</sup> See *Bayless II*.

<sup>51</sup> See, e.g., Yale Kamisar, Wayne R. LaFave & Jerold H. Israel, 1996 Supplement to *Eighth Editions, Modern Criminal Procedure, Basic Criminal Procedure, Advanced Criminal Procedure* (1996) at 29 ("At the request of the prosecution, a rehearing was held on March 15th, [1996,] and on the 1st of April (!) Judge Baer reversed his earlier decision.") (exclamation point in original).

<sup>52</sup> See Don Van Natta Jr., *Dismissing Defense Effort, Judge Stays on Drug Case*, N.Y. TIMES, Apr. 13, 1996, at 25 (reporting Judge Baer's denial of Ms. Bayless' motion, following his reconsideration of his suppression ruling, seeking the Judge's recusal from the case). Cf. *Judge Baer Interview*, supra note 20, at 811 (Judge Baer referring to his *Bayless I* "decision, and frankly the courage to reverse myself when the credibility issues and others were resolved").

then obtained her confession.<sup>53</sup> But the suspicion persists that Judge Baer bowed to political pressure when he reversed his initial suppression ruling. We simply will never know if that suspicion is founded or unfair.

The belief that judicial independence can be compromised — the belief that threats can affect, and that they have affected, a judge's decisionmaking independence — is a cancer. It diminishes the stature of the judiciary in the eyes of the public. Even worse, it encourages more judge-bashing in the future, which compounds the danger that some judges truly will give in to pressures not to follow the law or to seek fairness in their decisions.<sup>54</sup>

For the next Judge Baer, whose decision gets demonized and whose tenure on the bench is threatened for political purposes, the wise course will be to keep on judging.<sup>55</sup> If we have done the job of teaching and reminding ourselves why judicial independence matters so much in our system of constitutional government, there will be other voices and groups that can respond effectively — on behalf of the beleaguered Judge, and in defense of judicial independence generally — to the judge-bashers.

<sup>53</sup> See Steven Lubet, *Judicial Independence and Independent Judges*, 25 HOFSTRA L. REV. 745, 746-47 (1997) (stating that judges who in good faith apply the law as they understand it should not face discipline or have to worry about personal consequences for making their decisions).

<sup>54</sup> See Sarokin, *supra* note 36, at 15-16 ("I thought that by stepping down from the court and making my concerns public, I would convey the gravity of this dangerous course [of politicians mischaracterizing judicial decisions and then using them as political weapons]. Now, a year later, I concede that my grand gesture was a complete fizzle, and indeed, rather than dissuade the practice, seems to have emboldened it, since it has been followed by demands . . . to impeach judges for unpopular decisions."). *Id.*

<sup>55</sup> Depending on the particulars of future political controversy that springs up, including the litigation posture of the case that it surrounds, the right way to "keep on judging" may be for a Judge to recuse herself and move on to the next case. In *Bayless*, Judge Baer should have recognized that even entertaining the government's motion to reconsider his suppression decision in the midst of attacks on it and him raised the specter that he could be perceived as giving in to political pressure. On that basis, with trust in the independence and ability of his judicial colleagues, he should have recused himself from the case at that point. His ultimate decision to recuse himself from the *Bayless* case after he had granted the government's motion to reconsider, reopened the suppression hearing and then denied Ms. Bayless' motion to suppress evidence, see *United States v. Bayless*, 926 F. Supp. 405 (S.D.N.Y. 1996); see also Larry Neumeister, *Judge Withdraws from Politically Charged Drug Case*, ASSOC. PRESS, May 16, 1996, suggests that Judge Baer belatedly came to this realization.

For an argument that Judge Baer was legally required to recuse himself from the *Bayless* case, see Freedman, *supra* note 48, at 740-42. Professor Freedman also suggests that judges at all levels should respond to political judge-bashing by recusing themselves from a case en masse. This approach would declare that the bashing had aborted the case and thereby send a message "that irresponsible criticism of decisions in pending cases will backfire against the critics." *Id.* at 742-43.