Excerpt from *The Political Activities of Judges: Historical, Constitutional, and Self-Preservation Perspectives*, 80 U. Pitt. L. Rev. 245, 298-313 (2018) (footnotes omitted).

2. Circling the Wagons in California

California provides a timely example of the judiciary's collective move toward self-protection through an expanded role in the political process. The California Code of Judicial Ethics provides judges greater leeway to engage in political activities than the judicial codes of most other jurisdictions. Contrary to the 2007 ABA Model Code, California judges may personally solicit campaign funds for their own campaigns.389 They may also publicly endorse or oppose other candidates for judicial office regardless of whether the endorsing judge is on the ballot in the same election.390 California judges may also attend political functions and contribute monetarily to political parties and candidates for public office.391

At the behest of the California Supreme Court Advisory Committee on the Code of Judicial Ethics,392 the California Supreme Court recently amended its judicial code to further expand the ability of judges to aid judicial candidates.393 The amendment to Canon 5B(4) of the California Code authorizes judges to "solicit ***300** campaign contributions or endorsements for their own campaigns *or for other judges and attorneys who are candidates for judicial office*."394The amendment permits judges to solicit contributions and endorsements "from anyone," except subordinate judicial officers and court staff.395 The importance of this new provision cannot be overstated because when a judge seeks funding or endorsements for present or future colleagues, jealously guarded judicial prestige is necessarily invoked. Acknowledging this fact, amended Canon 5B(4) only proscribes the use of judicial prestige in seeking endorsements and funds when used "in manner that would reasonably be perceived as cohesive."396 In other words, the California Supreme Court considers the political threat to judicial impartiality and independence severe enough to allow the use of judicial prestige to level the partisan playing field.

What compelled the California Supreme Court Advisory Committee on the Code of Judicial Ethics to seek explicit permission for judges to hit the fund-raising and endorsement trail on behalf of other judicial candidates? The Advisory Committee Report accompanying the proposed amendment states that a greater fund-raising role for judges is essential to combat interest groups commandeering the judicial election process and thereby threatening the independence and impartiality of the courts.397 According to the Committee:

Contested elections are very expensive and will become even more expensive in the future. Indeed, there is a national trend for well-funded interest groups to politicize state judicial elections and to back certain judicial candidates, thus challenging the independence of the judiciary. In view of these realities and to preserve the independence of the judiciary, the committee concluded that judges should not be hamstrung in their efforts to raise money and solicit endorsements for judicial campaigns, including raising campaign funds and seeking endorsements for other judicial candidates.398

***301** But it was not only a general fear of partisan interest groups controlling judicial selection that led the California Advisory Committee to propose the amendment to Canon 5B(4). The first

recall attempt of a California judge since 1932, served to personalize and highlight the danger identified by the Committee.399

In February 2018, the recall of Judge Allen Persky was placed on the ballot in Santa Clara County. Judge Persky was targeted for what critics claimed was an intolerably lenient sentence of a Stanford University student convicted of sexually assaulting an intoxicated woman after leaving a fraternity party.400 The recall effort was well-organized and well-funded, and it was supported by numerous pubic officials, candidates, unions, political organizations, professors, and business, education, literary, entertainment, and community leaders.401 The "supporters and endorsers" of the removal effort included the National Organization of Women; U.S. Senator Kirsten Gillibrand (NY); Kevin de Leon, California President pro Tempore of State Senate; Laurie Smith, Sheriff of Santa Clara County; Georgia State Senator Jason Carter; South Bay Labor Council (AFL-CIO); California Nurses Association; International Brotherhood of Electrical Workers, Local 332; SEIU Local 521; Eric Bauman, California State Democratic Party Chair; Christine Pelosi, California State Democratic Party Women's Caucus Chair; Santa Clara County Democratic Club; Donna Brazile, former Chair Democratic National Committee; Jeff Bleich, former President of California Bar Association; former Special Advisor to President Obama, Amanda Renteria; former National Political Director, Hillary for America, Sharon Stone; and Professor Anita F. Hill.402

Newspaper editorial boards also supported the recall effort. *The Mercury News* dismissed concerns over judicial independence by declaring "[that] ship has already sailed."403 In supporting the recall effort, the *Palo Alto Weekly* editorialized that "[w]hile Judge Persky is regarded as fair and thoughtful in county legal circles and ***302** should not be vilified for his bad judgment in this case, he is accountable to the voters for betraying the values of our community."404

Judge Persky mounted a defense but it could not compare to the recall effort in organization,405 supporters,406 or financial backing. As of a month before the recall election, Judge Persky had raised about $270,000, and an independent "No Recall" campaign raised another $137,000,407 by any measure an enormous amount of money for a trial court election. But the proponents of the recall had raised 1.2 million dollars, paying at least $350,000 to a "signature gathering company" to obtain the necessary signatures to place the recall initiative on the ballot.408 Other funds were used to produce and distribute "glossy mailers juxtaposing photos of Persky with President Donald Trump."409

Judge Persky refused to engage personally in the recall debate until one week before the election when he gave an interview to CBS News.410 Even in that interview, Judge Persky declined to discuss the Stanford case because, as he put it, "based on the code of judicial ethics, I can't really discuss the details of the case or ***303** my decision making."411 The recall effort was successful with 60% of the electorate voting in favor of Persky's removal.412
Adding to the concern of the California judiciary, in 2018, four assistant public defenders challenged sitting judges of the San Francisco Superior Court.413 In the view of an appellate

court judge who came to the defense of the incumbent judges, the attempt to unseat the judges had nothing to do "with either the quality of their work or the measure of their character," but rested solely on their appointment by a Republican Governor.414 According to one challenger, "a Schwarzenegger appointee doesn't reflect the values of our community, it's that simple."415

Appellate Court Justice J. Anthony Cline authored a letter to the editor in which he denounced the challengers' "effort to defeat four of the most able, compassionate, and experienced judges in northern California simply because they were appointed by a Republican Governor in an overwhelmingly Democratic county is an unmitigated act of political opportunism."416 Justice Cline also emphasized that all the justices on the appellate court having jurisdiction over the trial courts of San Francisco had endorsed the four incumbents, an action that none of the justices had thought necessary in any prior election.417 Justice Cline concluded his endorsement letter beseeching all lawyers "committed to the high principles of the legal profession" to join the effort to support the court and ward off the attack on the *304 court's integrity.418 The appellate court's endorsement of the trial court judges helped the four incumbent judges win retention by large margins.419

Even before the recent amendment to the California Code of Judicial Ethics, California judges enjoyed more freedom to engage in political activity than the average judge. That freedom includes the ability to contribute to political parties and candidates and attend political events regardless of whether a judge is campaigning for office.420 Other states have joined California in expanding permissible political activities by judges,421 and others may follow since it no longer can be ignored that politics influences judicial selection, affects judicial budgets, and ferments attacks on judges. California's ethics code provision that permits all judges to endorse or oppose judicial candidates may gain favor with other jurisdictions in light of the increase of partisan attacks on judges similar to those in California.422 Additionally, the recent authorization of California judges to hit the campaign and fund-raising trail on behalf of judicial candidates may prevail over the ABA's idealized vision of judicial campaign neutrality, especially in jurisdictions lacking other effective means to counter baseless attacks on the judiciary.423 One final lesson taught by the California experience is that the judiciary's traditional inclination to remain aloof and refrain from defending itself is a luxury the third branch can no longer afford. Judges in recall and contested retention campaigns who vigorously defend themselves usually prevail.424 Those, like Judge Persky, who do not defend themselves, usually fail.425

*305 3. Retention Elections

Attacking judges during their retention bids has become the go-to method of removing judges from office, or at least teaching judges that there is a price to pay for unpopular decisions. In 2010, three Iowa Supreme Court judges were targeted for defeat because they joined in a unanimous decision invalidating a state statute prohibiting same sex marriage.426 The well-organized opposition to the retention of the justices used $700,000 contributed by two out of state organizations to fund a "highly visible campaign" including a bus tour, YouTube videos, and television ads.427 The campaign in support of retaining the justices got off to a slow,

unfocused start, was not as well financed as the opposition, and lacked a compelling message.428 Most significantly, the three justices "were reluctant to speak out on their own behalf and refused to raise money to run a retention campaign."429 One of the targeted justices, Justice Marsha K. Ternus, explained:

We [the justices] decided early on not to form campaign committees and not to engage in any fundraising .... Judges must be fair and impartial. They cannot be obligated to campaign contributors and just as importantly, they should not be perceived as beholden to campaign contributors. We strongly believed our role as fair and impartial members of the Iowa Supreme Court would have been forever tarnished had we engaged in fundraising and campaigning. We decided we would not contribute to the politicization of the judiciary in Iowa even though we knew this decision might cost us our jobs.430

True to their conviction not to ask voters for a "yes" vote on the retention ballot, the justices backed out of a scheduled appearance at the University of Iowa after learning ***306** that the event was billed "as a 'Vote Yes on Retention' event, rather than an event aimed at educating voters about the operation of the courts."431

Judicial retention election researcher Albert Klumpp blamed the Iowa justices' failed retention effort largely on the justices' refusal to campaign.432According to Klumpp, "[i]f the Iowa justices had campaigned at all, statistics show they would have improved at least five points and they would have been retained."433 Indeed, Klumpp identified a lack of campaigning as the "single biggest factor" common to all supreme court justices who lost retention bids since 1936.434

Learning from the defeat of the three Iowa justices, judges targeted in politically motivated anti-retention campaigns in other states have energetically campaigned to keep their jobs. When the retention elections of three Florida Supreme Court justices drew active opposition by the state's Republican Party and affiliated groups, the justices wasted no time going on the offensive by hiring campaign consultants, establishing fund-raising committees, and hitting the campaign trail.435 For the first time in Florida history, a tax-exempt political organization was formed to run television ads supporting the judges' retention.436 "The justices' active resistance, along with a strong, unified defense of the court by the organized bar, carried the day" and the justices were retained.437

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4. Responding to Legislative Threats to the Authority and Independence of the Judiciary

The Brennan Center for Justice determined that as of April 4, 2018, "legislators in at least 16 states are considering at least 51 bills that would diminish the role or independence of the judicial branch, or simply make it harder for judges to do their job."447 The proposals sought to control court decisions, reduce court funding and judicial compensation, shorten terms of office, override state supreme court rules, gain a partisan advantage in the courts, and subject judges to discipline for exercising independence.448 Many legislative attempts to intrude on the judicial function are spawned by court decisions unpopular with legislators. For example,

Iowa legislators have threatened that if the Iowa Supreme Court enforces its decision to ban guns from courthouses, the courts will be required to pay $2.00 per square foot in rent for spaces occupied by the courts.449 In addition, each chief judge would be required to *309 pay, from his or her salary, the wages of an armed security guard.450 Another bill would reduce each Iowa Supreme Court justice's yearly salary to that of a member of the general assembly--a reduction from approximately $178,000 to $25,000.451 The sponsor of the salary reduction bill justified the decrease by explaining, "[i]f the Supreme Court wants to act like legislators they need to start getting paid like legislators."452 Yet another Iowa proposal would increase the number of state supreme court justices necessary to find a state statute unconstitutional from a simple majority of four to a supermajority of five.453

In Washington State, three legislators introduced a bill that would allow the legislature to override a decision of the state supreme court.454 Under the proposal, a majority vote by the house and senate reversing the court's decision would be "binding on all persons affected by it from the effective date of the act, notwithstanding the opinion of the judiciary."455 The Washington state legislators repeated a common refrain in attempts to reduce the status of the judiciary to less than a co-equal branch; according to its sponsors, the bill was necessary:
to restore the balance of powers between and among the branches of government as established by the people in the state Constitution, to ensure that all political power is retained by the people, to protect, maintain, and secure individual rights and the perpetuity of free government, to guarantee the right of self-government, and to establish a process for preserving the independence of the legislative, executive, and judicial departments.456

*310 Similarly, when Kansas legislators took umbrage at a state supreme court decision concerning the funding of public education, they proposed a constitutional amendment designed to put the judiciary in its place. The proposed amendment provided:
As all political power is inherent in the people, *the legislature shall* determine suitable provision for finance of the educational interests of the state. The determination of the total amount of funding that constitutes suitable provision for finance of the educational interests of the state is exclusively a legislative power .... No court, or other tribunal, established by this constitution or otherwise by law shall alter, amend, repeal or otherwise abrogate such power, nor shall such power be exercised by, either directly or indirectly, by any such court or other tribunal.457

Attacks such as these on the judicial branch damage public confidence in the judiciary to the same extent as unfounded attacks on individual judges. This is especially true since legislators often design system-wide assaults not so much to pass legislation "reigning in" judges but to intimidate judges and cast the judiciary in bad light before the public.458

Just like attacks on individual judges, political branch attacks on the integrity and independence of judiciary usually go unanswered. And while at times silence is golden, when legislators attempt to advance partisan objectives or intimidate the judiciary by introducing blatantly specious legislation, judges have a duty to inform the public of the consequences of the proposal and motives of the sponsors. These "Big Lies," made by powerful individuals such as legislators "who enjoy[] some stature and credibility, or notoriety, in the community, and who

employ[] this position of prominence to gain access to a large audience," need to be met head on.459 As observed by Judge Irving Kaufman, one of the drafters of the 1972 ABA Code, *311 "judges should play the role of lions in the policymaking process, rather than lambs who withdraw to the safety and isolation of their chambers."460

Occasionally, judges come out of their chambers to confront threats by legislators, but seldom do they come out as lions. Unhappy with a ruling of the North Carolina Supreme Court, the state's senate and house leaders issued a joint statement in an attempt to bully the state supreme court justices into reversing a decision.461 The joint statement concluded:
Judges are not legislators and if these three [state supreme court justices] want to make laws, they should hang up their robes and run for a legislative seat. Their decision to legislate from the bench will have profound consequences, and they should immediately reconvene their panel and reverse their order.462

One of the "profound consequences" proposed by the legislative leaders was to require district judges to run for retention every two years instead of every eight years.463 After seeking and receiving advice from the North Carolina Judicial Standards Commission concerning the ethical ramifications of responding to the attack, Chief Justice Mark Martin quietly issued a brief statement explaining the court's opposition to the senate bill proposing two-year judicial terms.464 The statement distinguished the role of judges from the role of legislators and addressed the practicalities of requiring judges to constantly campaign for office.465 The chief *312 justice directed his eight sentence, one hundred twenty-eight-word reply to court staff without any public fanfare.

Like Chief Justice Martin, many judges may hesitate to defend the judiciary because they are unsure about the ethical parameters of presenting a defense, especially when the attack has political or partisan overtones. That fear is not unfounded. Ethical rules prohibit any response that would appear to compromise judicial impartiality, independence or integrity,466 fail to promote public confidence in the judiciary,467 create an appearance of impropriety,468 appear to misuse judicial power or prestige,469 appear to constitute an ex parte communication,470 allow the impression that political interests or relationships influence the judge's conduct,471 give the impression that any person or organization is in a position to influence a judge,472 or seems coercive.473 Constructing a response to a baseless attack within the bounds of these vague and ambiguous constraints is not an easy task, especially for risk-adverse judges.474

Another factor adds to a judge's difficulty in responding to attacks against the judicial system. While Comment 9 to Rule 4.1 of the 2007 ABA Code permits judicial candidates to "respond directly to false, misleading, or unfair allegations" during a political campaign,475 no comparable code provision grants authority to judges, including supervising or chief judges, to defend the judiciary as a whole. Moreover, while Rule 2.10(E) of the 2007 ABA Code gives a judge the right to respond to allegations concerning the judge's conduct in a case476 no similar provision grants judges the right to defend the courts. Clouding matters further, the *313 1972 ABA Code specifically allowed judges to undertake political activity for the purpose of

improving the law, the legal system, and the administration of justice.477 Following suit, the 1990 Code authorized judicial engagement in political activities concerning the law, the legal system, and the administration of justice.478 The 1972 and 1990 Code provisions were tailor-made to provide judges ethical cover when countering political assaults.479 But the 2007 ABA Code includes neither the 1972 nor the 1990 Code provision allowing political activity in law-related matters. Some states, sensitive to the need to respond to unjust criticism by political actors, continue to include either the 1972 or 1990 political activity provision in their codes of conduct.480 Other states, following the ABA's most recent model code, have abandoned the provision.481