

# REMARKS

## Before the American Bar Association House of Delegates

Honorable Nathan L. Hecht  
Chief Justice, The Supreme Court of Texas  
President, The Conference of Chief Justices

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Chairman Bay, President Martinez, Members of the American Bar Association House of Delegates.

I wish I weren't here. Not that I don't consider it a privilege to address you as President of the national Conference of Chief Justices. I do. It's just that my predecessor, Chief Justice Mark Cady of Iowa, should be standing where I am—and he would be, but for his sudden and unexpected death in November. I know Mark looked forward to being here. The Conference of Chief Justices is comprised of the presiding judges of the high courts in the states, the District of Columbia, and the five U.S. territories and commonwealths—58 members in all. Since 1949, the Conference has provided leadership for the state courts. Communication with you as leaders of the legal profession is critical.

I miss Mark Cady, but I can channel him for you. Mark's first words as President of the Conference were these: "I hope we can use our collective voices to expand a national conversation of promoting public trust and confidence in our state courts." He was concerned that justice "endure"—his word. That justice, a fundamental value of our democracy, endure? Is it threatened? Yes, always. Mark knew personally that justice has many powerful enemies. Years ago, in reaction to an unpopular decision he authored, voters refused to retain three members of the Iowa Supreme Court. Although Mark himself was retained two years later, reaction against the Court still has not entirely subsided. His concern that justice endure was personal.

Chief Justice Cady would have told you what he told us: "Justice endures when we promote public trust and confidence in our court system. Justice endures when citizens see the value of the services that our court system provides. Justice endures when citizens see their fair and impartial courts as essential to this American democracy. Justice endures when we all speak out against attacks on our fair and impartial courts." Those words, his words, would have been his message to you today.

The President's many denunciations of the judiciary are troubling: warning of judicial tyranny undermining the Constitution, accusing courts of usurping power and judges of being politically motivated despots thwarting the Executive at every turn,

and even calling for the impeachment of Supreme Court Justice . . . Samuel Chase. I refer, as you know, to President Thomas Jefferson. He deplored the thought of judicial independence.

Criticism of judicial independence is nothing new, and it persists because it resonates with the public. Why should judges, they ask, be independent of the accountability all public officials owe the people for their stewardship of power? They should not be, of course, but the measure of fidelity is different. All three Branches must uphold the Constitution, but the political branches must also answer for representing their constituents, for shaping and effectuating the popular will. Judges have no constituencies. They account to the people for their adherence to the rule of law. When judges follow the law, even against the popular will of the time—especially against the popular will of the time—they have done their job.

Judges' defense of their adherence to the rule of law must ordinarily be confined to opinions and orders announcing rulings, lest they be drawn into the very political debate they are obliged to avoid. But there is another avenue of defense. When confidence in the courts is high, the public is more inclined to accept judicial independence as part of why we trust courts. If it ain't broke, don't fix it. Judges can help instill popular trust and confidence in the courts by demonstrating a commitment to improving the justice system. The state courts are working very hard to that end.

To give you some perspective: In very round numbers, some 30,000 state judges dispose of more than 80 million cases a year—something like 200 times the dispositions by Article III judges. Federal and state court caseloads are not comparable, of course, but the numbers show the enormous size of the state justice system. In Texas, I can tell you with more certainty, 3,220 judges disposed of 8.9 million cases in the past fiscal year. State courts *are* the American justice system, and their efforts toward improvement are vast.

Most recently, the National Judicial Opioid Task Force, created by the Conference of Chief Justices and the Conference of State Court Administrators—CCJ and COSCA—has issued its report on more than two years' work. Opioid addiction is not only a devastating public health crisis; it is a crisis in the administration of justice. Opioid addiction heavily impacts not only criminal cases from felonies to traffic offenses, as well as probation and parole, but just as profoundly, family cases, the removal of children and foster care caseloads, guardianships, workers' compensation, insurance, and even business cases. In close consultation with public and private healthcare groups, judges, law enforcement, and court administrators, the Task Force, chaired by Chief Justice Loretta Rush of Indiana and Court Administrator Deborah

Tate of Tennessee, has developed comprehensive tools and resources for identifying and handling addiction issues in every part of the justice system. Today, throughout the country, judges are now being educated on the issues and trained on best practices.

Better judges are not the only goal. The parties in these cases are your clients, which puts you, too, on the front lines of the opioid crisis. The mission of the Task Force is to help lawyers as well as judges, and the entire wealth of its materials, including referral information, is available to you, without charge. Go to the website, [ncsc.org/opioids](http://ncsc.org/opioids); click on what you want; download it. Give it to a colleague or judge. It couldn't be easier.

The justice system, including lawyers, is the number one referral source to get people to treatment. Let me be very direct. Referral of an addict is often a matter of life and death. Adjudicating a criminal defendant without recognizing his addiction may be, for him, the death penalty. Recognition and referral are not special treatment. They are essential for a fair and responsible justice system. I'm not exaggerating: lawyers' and judges' better understanding of opioid and substance use disorders will save individuals, save families, and save generations to come.

CCJ and COSCA's latest initiative is to examine and improve how the justice system handles cases involving people with mental illness. As with opioid addictions, these cases run the gamut from criminal to family to juvenile to the elderly. Like the very successful Opioid Task Force, the Mental Illness Task Force, to be co-chaired by Chief Justice Paul Reiber of Vermont and Michigan Court Administrator Milton Mack Jr., will consult broadly inside and outside the courthouse, drawing on expertise in both the legal and medical communities. The goal is the same: compile resources and formulate best practices to educate and train judges and lawyers. Two years ago, Texas' high courts, the Supreme Court and Court of Criminal Appeals, in their first ever joint endeavor in more than a century, created the Texas Judicial Commission on Mental Health. In my thirty years on the Supreme Court, no other effort to improve the justice system has drawn more interest—because, I think, mental health issues touch many of us close to home. Other states have undertaken similar efforts, and the national task force will build on them and provide resources for judges and lawyers throughout the country.

Both the Opioid Task Force and the new Mental Health Task Force are, in a sense, products of the very successful problem-solving courts model now more than three decades old. These courts include drug and mental health courts, as well as veterans courts, which have been very effective in handling veterans' issues. It is incomprehensible that a just society would deploy its best to defend its values in

harm's way, and then when they return, struggling to reacclimate to civilian life, but finding themselves in criminal court, ignore the toll their service has exacted from them. Post-traumatic stress disorder is real, just like the dangers of combat that produce it, just like the suicides that result. Equal justice must be individual. Problem-solving courts recognize that.

The report of the CCJ/COSCA Task Force on Fines, Fees, and Bail Reform, co-chaired by Ohio Chief Justice Maureen O'Connor and Kentucky Court Administrator Laurie Dudgeon, is helping revolutionize state courts' practices in assessing fines and fees in non-jail cases and in setting pretrial release conditions in misdemeanors and other criminal cases. Jailing criminal defendants who cannot pay their fines and court costs in traffic cases keeps them from jobs and families, casts them as dependents on society, and costs the taxpayers billions—billions—of dollars. Oh, yes, and it mostly violates the United States Constitution. It's a lose-lose-lose-lose proposition. Using the Task Force's recommendations, states are abandoning deeply flawed but entrenched practices. Texas is, to good end by all measures: jail time is down, and collections per case are up. Similarly, jailing misdemeanor defendants who cannot afford cash bail when they do not pose a significant risk of violence, recidivism, or flight unjustly burdens them, their families, their community, and taxpayers, and is against the law. Shame on us, that any of these practices should persist in 21st century America. Automatically turning everyone loose is not a solution. Evidence-based evaluation of risks is.

On the civil side, the CCJ Civil Justice Improvements Committee, chaired by former Chief Justice Tom Balmer of Oregon, has issued its report providing a blueprint for using technology to triage cases when they're filed, efficiently directing them to appropriate dockets providing little, ordinary, or extraordinary judicial supervision as needed. The report shows how to handle growing dockets, especially with self-represented litigants, with greater efficiency, while maintaining fairness in both simple and complex cases. CCJ and COSCA have now launched the Family Justice Initiative. In late 2018, the FJI published *The Landscape of Domestic Relations Cases in State Courts*, the first comprehensive examination of how family court cases are litigated in the state courts, at least 40% of which—maybe a lot more—involve self-represented parties. The FJI has also identified thirteen principles, adopted by CCJ, to guide handling of family court cases. FJI will do for family cases what CJI has done for civil cases.

The justice system's integrity and security are as important as its functioning. Today, as you well know, everyone, including lawyers and law firms, is vulnerable to cyber attacks. So are courts. IT departments in courts that have them report multiple

attacks *per hour* on court management systems. State and local governments have been ransomware— a new transitive verb meaning that hackers have stolen your data and will return it only if you pay the ransom. Phishing is ubiquitous. Firewalls and other safeguards must be used. Staff must be trained and re-trained, weekly if possible, to maintain awareness of, and readiness for, cyber attacks. COSCA, along with the National Center for State Courts and the National Association for Court Management has formed a Joint Technology Committee, co-chaired by Texas Court Administrator David Slayton, which has developed resources to guide courts in ensuring cyber security. But it remains that efforts are inadequately funded.

An emerging cyber threat is disinformation. Yes, the Kremlin interferes with U.S. elections. And having blamed HIV on the U.S., the Kremlin—you may have seen in media reports the past few days—says the U.S. is responsible for the coronavirus. But Russian propaganda extends well beyond elections and public health crises. A report published by the Center for Strategic and International Studies, *Beyond the Ballot*, details the Kremlin's Orwellian targeting of the American justice system as elitist, racist, inept, and a tool of the powerful to suppress the weak. All too often, people believe what they hear. CCJ is providing a different message.

So I return to where I began. The justice system is founded on public trust and confidence. Despite political attacks on the judiciary, cyber attacks on courts, Russian disinformation, and the growing need to adapt to evolving 21st-century demands on the justice system, a November survey of 1,000 voters shows that some 62% of voters believe state courts are strong. While this is down from some 68% a year ago, the Conference of Chief Justice believes that its work and efforts for state courts to meet today's challenges will keep public trust strong.

Sixty-four percent of voters responding in the November survey agreed that the U.S. justice system is the envy of the world. But the awful truth is that the promises of the greatest justice system, not just in the world, but in the history of the world, are out of reach for many it was made to serve—the most vulnerable, the poor, deserving and in need of its protections. The legal profession has given much to help. Texas lawyers contribute millions of dollars a year to legal aid and more than two million hours a year in pro bono services. What's your hourly rate? Times two million equals half a billion dollars', a billion dollars', or more, worth of legal services. The Chief Justices of your states walk the halls of Congress and their legislatures, write letters, make calls, and pass resolutions, all to advocate funding for the Legal Services Corporation and other legal aid providers. Yet with all you do, and all we do, we meet but a fraction of the need. We do not expect doctors to treat the poor for free, or grocers to feed the poor for free, or contractors to house the poor for free. For lawyers,

representing the poor for free is a hallmark of our noble profession. Improving access to justice does not fall solely on the bar. But—please hear me—the integrity of the rule of law is at stake. We cannot, like *Macbeth*'s witches, keep the promise of justice to the people's ear and break it to their hope. Justice for only those who can afford it is neither justice for all nor justice at all.

In his year-end report on the federal judiciary, Chief Justice John Roberts argued that judges' civic outreach promotes public confidence in an independent judiciary. He pointed to federal judges' contributions to civics education. State judges share that interest. And like civics outreach, state-court efforts to improve the justice system, to make it fairer and more workable for all, promotes public trust and confidence in an independent judiciary. I want you to know what the states' Chief Justices are doing, besides deciding cases. They are working for a better justice system—the best justice system in the world—the best justice system in the history of the world.

You, the legal profession, know and appreciate how essential to our democracy is the fair and impartial administration of the law by judges free of the influences of executives and legislators, popular opinion and politics, and even judges' own personal predilections. The burden of jealously guarding judicial independence—to borrow Justice Brennan's words—falls to the legal profession. And the most effective defense is always the one seemingly against interest: the defense of the judge with whose decision you disagree. As divided as our discourse has become, it will turn heads.

Thank you for the privilege of reporting on the state of the state courts. It is strong, and growing stronger.

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