

# Colorado Bar Association President's Message to Members

## *Protect Colorado Courts II*

by Elizabeth A. Starrs



As lawyers, we have a unique perspective on the judicial branch of government. We deal with the courts daily and are an integral part of them. Even non-litigators, who comprise at least 50 percent of our membership, rely on the judicial system.

We depend on strong courts to uphold the Constitution, and to rule fairly and impartially on every case, based on the facts and the law. Strong courts are an essential part of our democracy and provide vital balance in our government. We have long taken their existence for granted. Can we continue to do so?

### **Lawyer Responsibility to the Public and the Judiciary**

Lawyers in the United States are “officers of the court” because we are involved in the complex functioning of the judicial system as a whole. We know that courts do not choose the cases that will appear on their dockets and that judges have to make difficult decisions all the time. We understand that someone always loses and that those who do often leave angry or disappointed.

Increasingly, those who are on the losing side make a public spectacle through harsh critiques of individual judges or the judiciary. Claims that this ruling or that decision demonstrates an abuse of power by activist judges subvert the role the courts are designed to play in our constitutional democracy. Thus, among our most important responsibilities as lawyers is to further the public’s understanding and appreciation of the judiciary. We also must take steps to ensure that the judiciary is free from the political pressures that influence decisions in the executive and legislative branches.

### ***In Defense of the Judiciary***

We must take the lead in countering a dangerous trend in this state. People are not simply publicly disagreeing with judicial decisions—a right guaranteed to us by the First Amendment—but are vilifying the judiciary. As political chasms grow ever wider, the tenor of these comments attacking our judiciary has become increasingly vicious.

In Colorado, the attacks on our courts seem to be escalating. For example, in June 2006, an editorial in *The Denver Post* called a ruling by the Court of Appeals “ridiculous.”<sup>1</sup> That same month, Dick Lamm, former Colorado Governor, characterized a decision handed down by the Colorado Supreme Court “outrageous judicial activism . . . raw, naked politics.”<sup>2</sup> Failing to de-

ferend the judicial system when this harsh rhetoric occurs encourages extremists to push for laws that undermine the court’s ability to protect individual citizens through the even-handed application of the law to the facts.

### ***An Independent and Apolitical Judiciary***

Certainly, criticism of the courts and battles over judicial philosophy have long been features of American politics. President Franklin D. Roosevelt’s attempt to “pack the [Supreme] Court” in the 1930s and a grassroots movement in the 1960s to impeach Chief Justice Earl Warren are notable examples.<sup>3</sup> But the courts should not be beholden to the concerns of special interest groups, nor forced to pander to political partisans who want courts to rule their way. There always will be rulings by the courts with which people will disagree.

Courts must remain independent and immune to the tyranny of the majority. For instance, in the 1950s, after the decisions in the *Brown v. Board of Education* cases,<sup>4</sup> hundreds of local and federal officials urged disobedience of the rulings.<sup>5</sup> Widespread disagreement at the time did not mean these decisions were wrong; in fact, history has demonstrated that they were correct and long overdue.

The three branches of government were deliberately designed to withstand tension and conflict among them, based on the premise that a government functions best when its powers are not concentrated in a single authority.<sup>6</sup> The separation of powers was not intended to promote efficiency or to avoid friction among the branches; rather, the purpose was to “save the people from autocracy.”<sup>7</sup>

Underlying many criticisms of the judiciary is a demand for greater accountability. In a thoughtful analysis of our country’s various judicial systems, the Institute for the Advancement of the American Legal System (“Institute”) recently suggested that comprehensive, apolitical, and frequent judicial performance evaluations were essential to help educate the citizenry and bridge the gap between having:

“accountable” courts whose decisions are influenced—or even dictated—by the demands of the majority, and “independent” courts that should not be held responsible even for the most unrestrained flights of legal fancy.<sup>8</sup>

Colorado’s system of accountability for judicial officers includes bipartisan Judicial Performance Commissions,<sup>9</sup> a Commission on Judicial Discipline,<sup>10</sup> and mandatory retirement at age 72.<sup>11</sup> This system has worked well for forty years, and adjustments to enhance accountability are

preferable to throwing out the good judges with the bad after only ten years on the Bench. As the Institute points out, judicial performance evaluations work, just as performance evaluations in any job do.

## Vote No 40

Attorneys are *part* of the judicial system and have to be proactive in identifying problems and working toward their resolution. We must sound the alarm against those who would tear the system down for short-term political or personal gain. As officers of the court, we should discourage actions that would result in the courts becoming more influenced by political or popular will.

As I wrote in my October President's Message,<sup>12</sup> and have said in letters addressed to each of you, I strongly believe that the proposal to impose term limits on our appellate judges (Amendment 40) is misguided. The thrust of Amendment 40 is that the voters of Colorado cannot be trusted to decide which judges to retain. If Amendment 40 passes, the voter decisions made in retention elections before 2008 would be ignored. Passage of Amendment 40 also will result in Colorado losing five of seven sitting Supreme Court Justices, and seven of the nineteen Court of Appeals Judges all at once, with no plan in place to deal with the backlog thereby created or the inherent learning curve for new judges. Passage of Amendment 40 would result in the governor being able to appoint almost 50 percent of our appellate Bench—to stack the courts, like Roosevelt wanted to do in the 1930s—every ten years. Passage of Amendment

40 would push out the good judges with the bad for no good reason.

If we do not protect our courts, our courts will not be there to protect us when we need them.

## NOTES

1. Editorial, *The Denver Post*, June 17, 2006, available at [http://www.denverpost.com/search/ci\\_3947563](http://www.denverpost.com/search/ci_3947563).
2. Riley, "Court Bars Immigration Vote," *The Denver Post*, June 13, 2006, available at [http://www.denverpost.com/search/ci\\_3929774](http://www.denverpost.com/search/ci_3929774).
3. Derocher, "Judicial Independence In Peril. Are we doing enough?" *30 Bar Leader Magazine* 8 (Nov.–Dec. 2005, no. 2).
4. *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Brown v. Board of Education II*, 349 U.S. 294 (1955).
5. Greco, "Judges In The Culture Wars Crossfire," *ABA Journal*, Oct. 2005, at 44-49. See, e.g., *Cooper et al. v. Aaron et al.*, 358 U.S. 1 (1958).
6. See American Bar Association Community Outreach Law Day 2006 Talking Points, available at [http://www.abanet.org/publiced/lawday/guide06\\_part5.pdf](http://www.abanet.org/publiced/lawday/guide06_part5.pdf).
7. *Myers v. United States*, U.S. 272 U.S. 52, 293 (1926) (Brandeis, J. dissenting).
8. "Shared Expectations—Judicial Accountability in Context," Institute for the Advancement of the American Legal System, University of Denver, Oct. 2006, available at <http://www.du.edu/legalinstitute/docs/exec-summary.pdf>.
9. CRS §§ 13-5.5-101 *et seq.*
10. Colo. Const., Art. VI, § 23 (3).
11. Colo. Const., Art. VI, § 23 (1).
12. See Starrs, "CBA President's Message to Members: Protect Colorado Courts," *35 The Colorado Lawyer* 5 (Oct. 2006). ■

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# CBA Ad Hoc Drug Policy Committee and Volunteer Committee of Lawyers To Address Sentencing Reform Issues

## CBA Ad Hoc Drug Policy Committee

The Colorado Bar Association ("CBA") recently formed an *ad hoc* Drug Policy Committee ("Committee") to study and evaluate the effects of drug policy on the judicial system and the effective administration of justice. The Committee also plans to discuss options for sentencing reforms, including drug treatment, instead of incarceration, as well as changes to the parole system. Participants include judges, prosecutors, and defense attorneys. Attorneys interested in participating in or contributing to the Committee should contact CBA Executive Director Chuck Turner at (303) 860-1115, (800) 332-6736, or [cturner@cobar.org](mailto:cturner@cobar.org).

## Volunteer Committee of Lawyers

The Volunteer Committee of Lawyers ("VCL") is a group of attorneys from Colorado's large firms and is headed by James E. Scarboro of Arnold & Porter LLC. VCL has scheduled a series of meetings for experts to discuss sentencing issues and the possibility of establishing a sentencing commission in Colorado, as well as the effects of criminal law on the state budget and public safety. The goal of VCL is to develop recommendations to present to Colorado's legislature. Senator Dan Grossman and Attorney General John Suthers have expressed interest in working with VCL. Attorneys interested in participating in VCL efforts should contact Jim Scarboro at (303) 863-2311 or [james\\_scarboro@aporter.com](mailto:james_scarboro@aporter.com).