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ADDRESS

By The Honorable Carolyn Dineen King
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The Wednesday luncheon session
of The American Law Institute
convened in the State Room
of The Mayflower, Washington, D.C.,
on May 21, 2008.
President Michael Traynor presided.

President Traynor: Ladies and gentlemen, given our need to get back in the room sharply at 2:00 and given the importance of having ample time for our speaker today, we are going to start just a couple of minutes earlier, while things are still being served.

A graduate of Smith College and Yale Law School, a Judge of the U.S. Court of Appeals for the Fifth Circuit since 1979 and Chief Judge for seven years, and former Chair of the Executive Committee of the Judicial Conference of the United States, Carolyn Dineen King honors us with her presence here today. The many highlights of her judicial career also include her receiving last year the Edward J. Devitt Distinguished Service to Justice Award. Two years earlier, the ABA honored her with the Margaret Brent Women Lawyers of Achievement Award.

Her notable accomplishments as Chief Judge included contingency plans for court operations, well in advance of Hurricanes Rita and Katrina, her creation of an emergency-coordinator post, and her leadership in getting the courts back to their work after Katrina struck. When that happened, I remember looking at the Fifth Circuit's website and being impressed by the care the court was taking about such critical matters as calendar deadlines and extensions of time.

Judge King is a native of Syracuse, New York, and in 2006, she received an honorary law degree from Syracuse University.

At the earliest chance we had after she finished her service as Chief Judge, we invited her to join the Institute's Executive Committee. She participates actively and devotedly, as we knew she would given her previous wise leadership as the Chair of our Committee on Membership and as an Adviser on Products Liability and Transnational Insolvency.

She is an exemplar of the advice she gives to others: "Whatever you do, do it with enthusiasm. Give it all your effort, and do the very best job you are capable of."

In her tribute to Judge John Minor Wisdom, she referred to his zest for life, which she shares, and quoting Justice Brennan said that ""To bring these dispositions that are lovely in private life' into the service of the law—this has been the special hallmark of his entire career."

[Carolyn Dineen King, *Minute in Remembrance*, 22 The ALI Reporter No. 3 (2000), quoting William J. Brennan, Jr., *"Dispositions That Are Lovely": In Tribute to Judge John Minor Wisdom*, 60 TUL. L. REV. 237, 237 (1985) (citation omitted).] I am happy to borrow those words in service of a like description of Carolyn.

Judge King is married to Thomas M. Reavley, an ALI member and Senior Fifth Circuit Judge. Her talk today will focus on the appointment process of federal judges, with particular focus on the intermediate appellate courts. Please welcome our distinguished colleague, Judge Carolyn Dineen King. (*Applause*)

Judge Carolyn Dineen King: Mike said I could talk about anything and I had a number of ideas. Then I heard what I think was the first call from one political party to its base involving federal judicial appointments. We are in the middle of a political season and, I thought, that's what I want to talk about. That's timely.

What I would like to do this afternoon is to examine the challenges to judicial independence posed by the increasing politicization of the appointment process for federal judges that has characterized the last 30 years or so. I would like to pay particular attention to the significant difference between how these challenges play out at the Supreme Court level and at the level of the intermediate federal appellate courts.

My remarks today are an abbreviated reprise of a lecture that I gave last year at Marquette Law School that was reprinted in the *Marquette Law Review*, and I refer you to that for the many sources for what I am about to say. [*See* Carolyn Dineen King, *Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, 90 MARQ. L. REV. 765 (2007).]

First, as you know, yesterday we heard about Madison. So no lunch should begin without a reference to Madison. I want to recall why our Constitution provides for an independent judiciary. What better source? Madison and Alexander Hamilton. They saw an independent judiciary as having an important role in addressing both legislative and executive abuses of power. In *Federalist No. 78*, for example, Hamilton stressed,

and I think these words are just critically important, "though individual oppression may now and then proceed from the courts of justice, the general liberty of the people . . . can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments." Hamilton believed that complete independence is "peculiarly essential in a limited Constitution," where courts are the only mechanism by which the constitutional limitations placed on the legislature could be preserved. Beyond these institutional dangers, he wrote that judicial independence protects against the additional threats that surges of public opinion pose to constitutional limitations and individual rights. Madison and Hamilton emphasized that life tenure and fixed salaries were indispensable for the judicial branch to remain independent. And to limit "an arbitrary discretion in the courts" themselves, what Professor Rakove calls judges "making it up as they go along," it was necessary to bind the courts, in the words again of Hamilton, "by strict rules and precedents."

So the goal of an independent judiciary, separate from the elected branches, was judges who would not be subject to domination or manipulation by the elected branches or by the shifting passions of the people at large. And the judges themselves were to be constrained by the very laws they were to enforce. In the words of a modern-day justice, Stephen Breyer, "judicial independence revolves around the theme of how to assure that judges decide according to the law, rather than according to their own whims or to the will of the political branches of government." Professor Dennis Hutchinson of the University of Chicago, friend of many in this room, I think, has identified the key premise of Breyer's succinct formula: "judicial independence is not an end in itself but is an instrument in service of the rule of law."

Judicial independence and the principal end that it serves, ensuring the rule of law, are undermined by the high degree of political partisanship and ideology that currently characterizes the process by which the President nominates and the Senate confirms federal judges. It should be said at the outset that, at least to some extent, this is nothing new. At several points in our history, Presidents have scrutinized the ideological leanings of prospective Supreme Court nominees with

a goal of nominating justices with views compatible with the respective views or perceived needs of those Presidents. President Roosevelt, for example, was particularly careful about the views of the nominees to the Supreme Court and the intermediate appellate courts after the Court's rulings in the early 1930s invalidating pieces of New Deal legislation that the President thought were crucial to the recovery of the nation. The Senate has engaged in the same kind of scrutiny as a part of the confirmation process.

I do want to be clear. There is nothing inappropriate with political or partisan considerations factoring into the judicial-appointment process. Remember that the Framers vested the nomination and the confirmation powers in the elected branches of government, and it is to be expected that the President and Senators would seek judges whose judicial philosophies seem consistent with their own.

That said, the last 50 years or so and the last 30 years in particular have featured an ever-increasing and contentious focus in the nomination and confirmation process on whether candidates for the Supreme Court and the intermediate federal appellate courts are committed, either by reason of their background and experience or by reason of explicit or implicit commitments they have made as a part of that process, to particular positions on several politically salient issues, including abortion, civil rights, and the rights of criminal defendants. The force of this change has been particularly felt by intermediate federal appellate courts, whose judges had been selected under what was really a more ideologically neutral system of patronage that generally guided appointments until the 1960s.

The conventional explanation for the emerging focus on political ideology in the nomination and confirmation process is the watershed decisions involving the constitutional rights of individuals that began with the Warren Court. You know what those decisions are: Brown v. Board of Education [347 U.S. 483 (1954)] in 1954 and the subsequent decisions dismantling laws that discriminated against blacks in many aspects of their lives, the cases that broadened the rights of criminal defendants under the Fourth, Fifth, and Sixth Amendments, the decisions recognizing privacy rights, including Roe v. Wade [410 U.S. 113

(1973)]. The beneficiaries of these decisions had been, at least in their view, largely unable to obtain the protection of these rights from the elected branches of government. With the advent of these decisions, the federal judiciary became the forum to which the disadvantaged (or those who perceived themselves to be disadvantaged) turned to vindicate their rights. The Supreme Court led the way, but the lower federal courts were entrusted with fashioning remedies to enforce these rights.

Early successes in the federal courts attracted members for, and energized, interest groups that were advocates for the disadvantaged. The federal courts were seen by these groups as the place to achieve social change. Now, you know, one can quarrel whether that should be the case, is the case, but that's what the perception was. By the mid 1970s, conservative interest groups, also energized, stole a page from the book of the liberal interest groups and sought to enlist the aid of the federal courts to overturn or narrow the gains of the so-called liberal activists in the preceding 20 years. And then beginning in the 1960s, which is really when this took hold, these policy-oriented issue activists started to ally themselves with the two political parties, liberals, of course, with the Democrats, with the national Democratic Party—and that is an important distinction—and conservatives with the Republican Party.

With issue activists swelling the ranks of the two political parties, or at least providing votes for their candidates, and with the federal courts being seen by these groups as a vital battleground, appointments to the Supreme Court and the intermediate federal appellate courts became a critical element of party policy. As Professor Stephen Burbank of the University of Pennsylvania Law School puts it, the courts came to be seen as "fodder for electoral politics" with the view "that it is appropriate to pursue chosen ends through the selection of judges who are committed or will commit in advance to pursue those ends on the bench. The impression sought to be created is that not only are courts part of the political system; they and the judges who make them up are part of ordinary politics."

With this historical backdrop, a significant goal of the appointment process for the Supreme Court and for the intermediate federal

appellate courts has been the appointment of judges who could be relied upon to further the activists' policy agendas. The reason for this seems to be that the leading political and issue activists in or allied with each of these parties are the ones who, if they are satisfied with the party's or a candidate's position on critical issues, will mobilize the masses to turn out on election day; if they are dissatisfied, they and their followers will either stay home or, worse yet, actively campaign against the party or its candidate.

Particularly after the reported disappointment of Republican administrations with Justice Souter's perceived infidelity to the ideology of those administrations, reliability has become very important. As Professor Burbank points out, the risk that a judge might be won over by the rule-of-law ideal (*laughter*)—isn't that great?—or might experience a post-appointment "judicial preference change" has caused some Presidents to seek protection by nominating individuals whose preferences seem to be "hard-wired." For candidates whose views are less certain, the candidate might be, in Professor Burbank's words, "induced nonetheless to commit to a desired path of judicial decision in advance."

Another factor at work in the appointment process is the trend towards selecting nominees for the Supreme Court from the intermediate federal appellate courts. All of us have seen that at work. While this has the advantage for the selection process of providing a nominee's track record and information about his temperament—and the advantage for the nominee of providing useful experience—it has the disadvantage of creating an incentive for decisions made with an eye towards advancement. A judge with ambition constantly has his eye on what the present or some future administration or Senate Judiciary Committee would think about a decision under consideration and how the decision would affect his chances for advancement.

Several books and countless articles—and let me tell you, they are countless—have been written on the political ideology that each of the Presidents from Nixon to George W. Bush has looked for in his nominees to the Supreme Court and the intermediate federal appellate courts and on the degree to which that political ideology served as a

litmus test for nominations, and I don't have the time to go into that today in any detail. It has varied very much from one President to another, but it is something that both parties bear responsibility for. Generally speaking, the Republican Presidents were looking for conservative judges who would reverse or narrow the policy gains liberals were perceived to have made in federal-court litigation in the '50s, '60s, and '70s, including gains in the areas of civil rights and the rights of criminal defendants and privacy rights. To achieve these ends, in the view of Professor Goldman, who has written a great deal on this subject, "[l]egislative, patronage, political, and policy considerations were systematically scrutinized for each judicial nomination to an extent never before seen." With Attorney General Meese's arrival, the process began of these very lengthy, probing interviews between the Justice Department and White House officials and prospective nominees, with the goal of ascertaining in advance how the nominees would rule on political issues important to the administration, and those interviews continued through the Clinton Administration and they continue to this day. These selection efforts have been aided by conservative interest groups, such as the Federalist Society, which began to develop in the early 1980s. The groups have come to provide forums and opportunities for advancement for their members and valuable opportunities for Republican administrations to vet their judicial nominees.

The two Democratic administrations in the last 30 years have differed somewhat from the Republican administrations in the way that they attempted to satisfy the party activists. President Carter attempted to satisfy his liberal party base by appointing black and female judges in large numbers, at least as compared with the numbers that had been appointed by prior Presidents. I am an appointee of the Carter Administration—a fourth generation Republican, I might add. When I told President Carter that, he said, "I don't care about your political views," which I have to say was certainly stunning, but he didn't, as it turned out.

Like Carter—but he dealt en masse, he just appointed women and blacks, and that's how he dealt with his activists. Like Carter, President Clinton also sought to satisfy party activists, primarily by diversifying the bench, but he also continued the interview process for

the intermediate-appellate-court judges that began under President Reagan. I am certain that it is fair to say that both Presidents Carter and Clinton were careful not to appoint judges with political views, at least that they knew about, on key issues that would be objectionable to the Democratic Party's base.

As political factors have increasingly come to bear on a President's judicial nominations, the trend has been mirrored in the Senate confirmation process, which has become much more contentious and features an effort to understand in advance exactly how a judge might rule on particular issues.

I need to end this part of this description of what has happened with this particular caveat. Whatever may have been the commitment of a President to his political base with respect to the political ideology of his nominees, not every judge appointed by that President has fit the description of what he was looking for. Indeed, happily for the Republic, many have not.

But it has been clear to me that, in the last 50 years, we have come a long way from the goal of the Framers of a judiciary independent of the executive and legislative branches. In the words of Circuit Judge Diarmuid O'Scannlain of the Ninth Circuit: "By demanding to know in advance how a particular nominee will rule in a given kind of case, the political branches are exerting precisely the sort of direct control over the judiciary that Hamilton and the other Framers sought to avoid with the creation of a separate and distinct third branch." But even without direct or indirect assurances as to how nominees would rule, a highly partisan or ideological judicial-selection process conveys the notion to the electorate that judges are simply another breed of political agents and that judicial decisions should be in accord with political ideology, all of which tends to undermine public confidence in the legitimacy of the courts. The loss of public confidence in the legitimacy of the courts—confidence that courts will impartially, in accordance with the rule of law, decide their cases—could, in turn, undermine compliance by the public with unpopular decisions.

Now having described what I think are the causes of the politicization of the appointment process and how it came to function, I would

like to examine the structure of lower-court decisionmaking and how it combines with strong partisan or ideological views on the part of some of its judges to imperil the fidelity of those decisions to the rule of law. I am going to do that by contrasting the way in which the Supreme Court functions with the way in which a large intermediate federal appellate court functions.

The current Supreme Court takes about 80 fully briefed cases a year. All nine Justices hear and decide each case. Virtually all cases receive oral argument, at which questions can be explored and alternative outcomes and rationales pursued by the Justices themselves as well as by counsel. Each case receives a full opinion, and obviously there are concurring opinions and dissents. They are circulated in draft form, with the Justices examining each critically and asking questions and making suggestions. Now constitutional scholars and even newspapers and people on the street will tell us that there are somewhat consistent voting patterns by some Justices in some types of cases coming before the Supreme Court. But there is clearly no such thing on the Supreme Court as clique voting. Every vote is carefully considered. A Justice concurring in today's opinion may be dissenting in tomorrow's, even on a very similar issue.

The result is that the record in the case, the relevant law, and the resulting opinions are thoroughly vetted by nine of the country's toughest critics. First and foremost, and this, I think, is critical, the Justices are accountable to each other for their work. Once the opinions are released, they are pored over by academics, journalists of every kind and stripe, lawyers, and the public at large. They are held accountable for their work, indeed for their every word. As Chief Justice William Howard Taft remarked: "Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism." It does concentrate the mind.

Contrast this with the way in which the large intermediate federal appellate courts work. First, the workload is different in quantity and quality. Using the most recent year for which statistics are available,

2005, an intermediate federal appellate judge on the average participated in the termination on the merits of 457 cases, as compared to 80 in the Supreme Court. Using another measure of workload, such a judge authored 154 opinions, and that meant he concurred in or dissented from 308 others, for a total of 462 cases that bear his name. With the exception of a few cases that are heard by the full en banc court, we sit in panels of three judges. In my court, the Fifth Circuit, only 20 percent of the fully briefed cases, to give one example, are orally argued. As for differences in quality, most intermediate federal appellate court cases do not demand the kind of effort that most of the Supreme Court cases require, and most would have only one outcome, no matter who appointed the panel members.

But the sheer volume of cases means that not every case gets the full attention of all three judges, let alone the full en banc court. Indeed, it would be an unusual case in which more than one judge on the panel reviewed the record; and not many cases benefit from an in-depth study of the applicable law by all three of the judges. This work pattern necessarily means that the level of interaction among the judges hearing a case is dramatically different than it is on the Supreme Court, and the level of functional accountability for his work of each judge to the other judges is correspondingly different. And as for external scrutiny, when our opinions are issued, most do not receive thoughtful review by anyone other than the parties. Some academics take an interest in some of our opinions, as do some journalists and bloggers, but on the whole, our work doesn't receive anything like the scrutiny that Supreme Court opinions receive.

So what this means is that one or two of what Professor Burbank calls hard-wired judges, whether liberal or conservative—and I can assure you they come in both stripes—on a panel can produce a result that is not true to the rule of law, either because it is not faithful to the record in the case or because it doesn't fairly apply the existing law, without that fact being apparent to anyone other than the litigants. In high-volume courts, judges are often effectively forced to rely on what I call "borrowed intelligence," to concur in opinions without a thorough grasp of the record or the governing law, simply because there are not

enough hours in the day to acquire a thorough grasp of the record and law in 450 cases a year. And it is not a big step from there to clique voting, that is, to voting with or at the direction of other like-minded judges simply because they share common ideological objectives, again, sometimes without a good grasp of the record or the governing law. After three decades of judicial appointments by Presidents of both parties based to some extent on partisan ideology, it should come as no surprise that clique voting happens on occasion, fortunately not often, in more than one of our intermediate federal appellate courts. Madison, who warned about the pernicious effects of factions in *Federalist No. 10*, would be horrified to see them at work in some of our federal courts.

What does this mean for the rule of law, for the principle considered so important to the Framers that judges are to decide cases according to the law, rather than according to their own views of what the law should be or to the will of the political branches or of the popular masses? The politicization of the appointment process, particularly for intermediate federal appellate judges, presents a grave danger to the rule of law. A judge who has been selected primarily for his perceived predisposition to decide cases in accordance with a particular political ideology may be consciously or subconsciously influenced to decide cases in accordance with that ideology, rather than in accordance with an impartial and open-minded assessment of what the law actually is. Such a judge, viewing a case through the prism of his ideology, may misread or gloss over Supreme Court cases with holdings contrary or unhelpful to his position. You know, it bears remembering that it is the Supreme Court cases that are viewed as the problem by many political and interest groups. Or the judge may misread the record in such a way as to distort the question presented or to facilitate a preferred outcome. The result in an individual case may be a decision that is not faithful to the rule of law. The overall result is some courts, and it is just some, that are fragmented into ideological groups, having ceased to function as a court in many cases coming before them.

It is absolutely no answer to say that the Supreme Court is there as a constraining force to restore the rule of law to a case in which an appellate panel has not been faithful to the law. The judge bent

on implementing his ideology knows that the appellate review of his decision is highly unlikely. As Justice Scalia confirmed in his dissent in Kyles v. Whitley [514 U.S. 419, 458 (1995) (Scalia, J., dissenting)], which is one of the rare modern-day Supreme Court cases that solely involves the application of established law to the record, the Supreme Court is not a court of error and, as he put it, "[t]he reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere—with trial judges and juries, state appellate courts, and the lower federal courts."

Instead, the Supreme Court takes cases where the law is unclear or in need of further development or where the circuits are in conflict. And what that means is that the intermediate federal appellate courts are the courts of last resort for all but a handful of cases that the Supreme Court will agree to hear. It is precisely that fact that has resulted in the politicization of the intermediate federal appellate appointment process. Political and issue activists understand only too well that ideologically committed judges on these benches can make an enormous difference in the outcomes of hundreds of cases each year. And it would be a mistake to think that ideologically committed judges affect the outcomes only in cases that involve abortion, civil rights, or the rights of criminal defendants. My own observations suggest that these judges cast a much wider net. They have strong views, pro or con, on plaintiffs' jury verdicts, especially (but not only) large ones; on class actions; on a wide range of federal statutes imposing burdens on corporate defendants; on the death penalty; on religion in the schools and in public places; on the proper balance between federal and state governments; and on and on.

So, for this political season, if candidates for the presidency of both parties continue, as they have now for decades, to energize issue activists within or allied with their parties by promising the appointment of judges who will pursue the respective political and ideological agendas of those parties in their decisions, then judicial independence will continue to be severely threatened, and with it the rule of law in the United States.

There was a wonderful editorial, in 2005 in *The Washington Post*, that captured it: "The war [over Justice O'Connor's successor] is about money and fundraising as much as it is about jurisprudence and the judicial function. It elevates partisanship and political rhetoric over any serious discussion of law. In the long run, the war over the courts—which teaches both judges and the public at large to view the courts simply as political institutions—threatens judicial independence and the integrity of American justice."

I will end with a hopeful note. I'm sure you'll be glad to hear that. (*Laughter*)

Chief Justice John Roberts sent what I thought was a powerful message, not long after his appointment, about the approach that judges should follow in today's highly politicized environment. In a 2007 interview with Professor Jeffrey Rosen of George Washington University Law School that appeared in *The Atlantic Monthly*, Chief Justice Roberts reminded us that Chief Justice John Marshall's continuous effort to unify his Court, to urge his Court to speak with one voice, was based on the recognition that a court so unified fosters public respect for the legitimacy of the court as an impartial institution that rises above ideology. Chief Justice Roberts also reported his firsthand observations of how the D.C. Circuit countered the politicization of that court's appointment process by working to achieve consensus by "function[ing] as a court," as he put it. From these models, Chief Justice Roberts observed that a successful judicial temperament is marked by, and I quote, "a willingness to step back from your own committed views of the correct jurisprudential approach and evaluate those views in terms of your role as a judge." By contrast, what he called the "personalization of judicial politics," in which judges pursue their ideological agendas at the expense of a unified court, undermines the rule of law and may leave the public with the perception that judges are little more than agents of the political powers that put them into office.

If Chief Justice Roberts continues to promote those views, and, I would suggest, to live by them himself—if, in other words, what he

said was not just rhetoric—I am hopeful that judges will aim to follow Marshall's example. By "refocus[ing] on functioning as an institution," in the Chief's words, courts can rebuild the institutional legitimacy that has been diminished by the politicization characterizing the judicial-appointment process for the last 30 years.

Thank you. (*Applause*)

President Traynor: Judge King, thank you for addressing the critically important and timely issue of the nomination and appointment of federal judges. What is reliable to a President or to a United States Senator may be very different from what is reliable to the public or to the litigants before the court. The enormous workload, the processes you have described, combined sometimes with unfortunate ambition, are very, very serious problems, and we hope that we will see maybe the beginning of an end to that politicization that you have described.

Thank you so much for your remarks and for your analysis. It is so helpful on this timely issue.