STATEMENT OF THE BOARD OF GOVERNORS,
ASSOCIATION OF BUSINESS TRIAL LAWYERS,
NORTHERN CALIFORNIA CHAPTER ON JUDICIAL INDEPENDENCE

We are united in the view that so long as judicial elections exist, they should be focused on competence and character, and not be allowed to degenerate into partisan struggles, or attacks on who originally appointed a judge, or how a judge ruled in a particular case, or on a judge's age or ethnicity. Sadly, we see attacks of all these sorts being leveled against judges in several Bay Area counties this year.

Judicial independence is the bedrock of our system of justice. The founders of our country believed that judicial independence – including the separation of powers – was essential to the survival of a republic. In Federalist No. 78, Alexander Hamilton, quoting Montesquieu, said "'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" Hamilton added: "in a government in which [the three branches] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."

The founders feared what the other branches might do to the judiciary; they also feared what a majority of the people might do to minorities without an independent judiciary. As Hamilton put it, "This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which … occasion dangerous innovations in the government, and serious oppressions of the minor party in the community…. [I]t would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."

For these reasons and more, our federal Constitution enshrines the separation of powers and offers protections for judges such a lifetime tenure and no reduction in salary.

But these protections apply only to the federal government and not to the states. By the middle of the Nineteenth Century, most of the states switched to some sort of an elected judiciary. In the Gilded Age, political machines such as Tammany Hall often ran and elect "'its handpicked and politically responsive slate of judicial candidates.'" As Dean Roscoe Pound pointed out a 1906 address, "[p]utting courts into politics and compelling judges to become politicians . . . has almost destroyed the traditional respect for the bench." What was widely true in 1906 still characterizes the judiciary in some other states today.

California began its history with a popularly elected judiciary and no restraints upon party support or activity." But in 1911, during the Progressive Era, California changed to nonpartisan ballots for judicial elections, and in 1934 the voters enacted Article VI, Section 26 of the California Constitution, providing for appellate justices to run unopposed in retention elections. Today in California we have a mixture of recall elections, retention elections and – in the trial courts – contested elections.

As Hamilton noted, courts have a special role to play in protecting our constitutional rights against majoritarian overreaching. If judges are too dependent on the will of the majority, our constitutional rights may be whittled away.

It is this independence that creates public trust in a fair and impartial system of justice. That trust erodes if judges are seen as just more office-seekers, running in contested elections that have the look and feel of partisan brawls. Politicizing the judiciary impairs the quality of the bench. We therefore urge Californians, both lawyers and nonlawyers, to speak out against attempts to politicize the retention of judges. We urge each voter to focus on the right things – the character and competence of the candidates – and to resist the entreaties of those who urge otherwise.

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The Association of Business Trial Lawyers was founded in 1973 to develop a better forum for the discussion of business litigation issues. The ABTL is unique in providing a forum in which litigators and judges meet together to address issues important to business trial lawyers. Judicial participation in ABTL programs and events is very strong, in part because the ABTL welcomes all business litigators, including both plaintiff-focused and defense-focused practices. This statement is on behalf of the Board, except the members of the Federal Judiciary, who are not permitted by rule to take a position.