FLABOTA SPEECH

I am here to give you some recent history of Iowa with the hope that Florida will learn from the Iowa experience. According to some election watchers, we were hit by a "perfect storm" in Iowa. It combined popular anti-incumbent sentiment, a retention vote scheduled a little more than a year after a highly controversial ruling, and a $1,000,000 ouster campaign that outspent supporters of keeping the judges. I know we are pikers but 1 million goes a long way in Iowa.

Rule of Law, Judicial Independence and Judicial Review

I'm going to begin my portion of the program with a brief refresher course on the rule of law, judicial independence and judicial review. As the people in this room know, America's system of justice is based on the rule of law. The rule of law is a process of governing by laws that are applied fairly and uniformly to all persons. Because the same rules are applied in the same manner to everyone, the rule of law protects the civil, political, economic, and social rights of all citizens, not just the rights of the most vociferous, the most organized, the most popular, or the most powerful. Applying the rule of law is the sum and substance of the work of the courts. And it is your lifeblood as lawyers.

Judicial independence is an integral part of the rule of law. When I speak of "judicial independence" in this context, I am referring to a judiciary that is committed to the rule of law, free of outside influence, whether that influence is political, or social, or the judge's own bias or preference. A commitment to the rule of law, which is the core of judicial independence, ensures that the constitution and statutes are applied fairly and uniformly to all citizens.

Iowa, Florida, and other states created a government under the rule of law when its citizens adopted a constitution that set forth the fundamental rules that would apply to citizens and their government.

In fact, the Iowa Constitution expressly states: "This constitution shall be the supreme law of the land," and it goes on to say that "any law inconsistent therewith, shall be void."

Constitutional provisions like Iowa's supremacy clause and similar ones in other state constitutions are given meaning by the courts because the judicial branch is responsible for resolving disputes between citizens and their government including a citizen's claim that the government has violated his or her constitutional rights. In such cases, it is the duty of courts to determine the constitutionality of the legislature's acts. This does not mean the judicial power is superior to legislative power. Rather, when the legislature has enacted a statute inconsistent with the will of the people as expressed in their constitution, the courts must prefer the constitution over the statutes. Only by protecting the supremacy of the constitution can citizens be assured that the freedoms and rights they included in their constitution will be preserved.

Let me give you a little background about the Iowa Supreme Court. Our court has seven members. At least two had been appointed by a Republican governor and five by a Democrat. We came from a diverse background, from small firms to large, from small towns to Des Moines. Most were not particularly political; I was not. Some had been on the bench before, some not.

My background is that I came out of law school as a tax and corporate lawyer. In the early 80s, I did a lot of bankruptcy during the farm crisis. I then joined forces with a friend where we did almost exclusively plaintiff's work. I was appointed to the district court bench in 2005, the Court of Appeals in 2006, and the Supreme Court in 2008. I obviously can't hold a job. I don't know what it says about me as a plaintiff's lawyer, but I would guess that over half of my support for these appointments came from defense counsel.

Since the early 1960s, Iowa has had a commission-based, merit selection process for choosing judges. The other aspect of Iowa's merit-selection process is retention elections. A judge runs

unopposed and voters simply choose whether to retain a judge for another term. In Iowa, the term for Supreme Court justices is eight years. Historically, politics had played no role in judicial retention elections, and Iowa judges had not found it necessary to form campaign committees, to engage in fundraising, or to campaign.

All right so what happened? The*Varnum* Decision. In *Varnum*, six same-sex couples applied for marriage licenses but were told by the county recorder that a state law which provided that "[o]nly a marriage between a male and a female is valid" prohibited him from giving them licenses. The statute creating this contract stated: "Marriage is a civil contract, requiring the consent of the parties capable of entering into other contracts, ..."

They filed a lawsuit asking that the court order the county recorder to issue the licenses. The six couples claimed the law limiting civil contracts of marriage to one man and one woman violated the equality clause Iowans which states: "[T]he general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."

In Iowa, over 200 benefits and privileges are accorded to married couples under Iowa law. The Iowa Supreme Court considered the constitutionality of the legislature's restriction of these benefits and privileges to a limited class of citizens, using standard equal protection analysis. The court concluded this statute violated the plaintiffs' rights under the Iowa Constitution's equality clause. Because the Iowa Constitution expressly had incorporated Marbury v. Madison and states that any law inconsistent with the constitution is void, we found the statute void and ordered that the county recorder to issue licenses to the six same-sex couples who brought the lawsuit.

Some interesting sidelights. It was a unanimous decision and it really was. This was not *Brown v. Bd of Education* where Chief Justice Earl Warren wanted a unanimous decision. It is

also interesting that the decision was written by a Republican appointed justice who was not up for retention. An urban, maybe I should say rural, legend is that this was on purpose. Actually his name was literally picked out of a hat.

I will also candidly tell you going into the case, I had no preconceived notions as to the outcome. Frankly, I thought the state could advance some rational basis for the law. It was clear, however, that they could not and my vote was clear.

The reaction to the *Varnum* decision, however, came as no surprise. We were called activist judges, elitists, out of touch with the people and a whole lot worse. It is a rare day when someone does not disagree with a court decision (and as lawyers, you know this is almost exactly one-half), and court decisions involving an interpretation of the constitution are no exception.

In the 2010 general election that followed the 2009 *Varnum* decision, three of us were on the ballot for retention. The 2010 retention elections were very different from previous elections. Because of our participation in the *Varnum* decision, the justices on the ballot were targeted by a Mississippi-based group, AFA Action, Inc. with the initial money coming from Newt Gingerich. Other money came from groups in Washington D.C., Virginia and New Jersey. The total raised was almost one Million dollars. Less than 5% came from Iowans.

Persons supporting AFA's campaign against the justices claimed the Iowa Supreme Court had overstepped its constitutional role "by declaring Iowa to be a 'same-sex' marriage state." This claim was not based on a critique of the court's legal analysis. Not once did I hear our opponents claim that we had misinterpreted the Iowa Constitution. Rather, the court was criticized for ignoring the will of the people and for ruling contrary to God's law. This latter criticism is troubling because the court had made an effort in the *Varnum* opinion to clarify the narrowness of its decision.

The law at issue in the *Varnum* case governed a legal contract, not the religious institution of marriage. The court pointed out this distinction in its opinion:

> …we proceed as civil judges, far removed from the theological debate of religious clerics, and focus only on the concept of civil marriage …
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> . . . .
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> As a result, civil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals.

The court pointed out that "religious doctrine and views contrary to this [holding] are unaffected," and "[a] religious denomination can still define marriage as a union between a man and a woman."

Despite this, substantial opposition to the justices' retention came from individuals and groups who believed the court had violated God's law or natural law. Churches were so involved in the election that some of them applied for and were allowed to become pre-election satellite voting sites. Voting booths were set up in churches so members of the congregation could vote while they attended services.

They had TV ads, fliers, robocalls, and a bus tour with our pictures on the side (I think it was a good picture of me). The campaign rhetoric struck a chord with Iowans who were not comfortable with same-sex marriage. This group's local spokesperson, Bob Vander Plaats, argued "appointed judges [are] dictating from the bench which societal beliefs are acceptable and which ones are not." But, he claimed, the retention election was not about gay marriage; it was about liberty. Claiming the court "legislated from the bench," he said, "If they will do this for marriage, all your liberties are up for grabs." In a television ad, the narrator told viewers "If they can redefine marriage, none of the freedoms we hold dear are safe from

judicial activism." These words were spoken as images of parents, Boy Scouts, hunters, and flag-saluting children were shown on the screen. I must confess that I am a parent, I was a Boy Scout, I hunt and I salute the flag. It is significant that our qualifications, competence or ethics were not questioned. Nor as I mentioned earlier was the reasoning in our decision. It was purely political.

I noted at the beginning that some referred to our situation as the perfect storm. Why? It makes us feel good. A perfect storm is a freak occurrence and not likely to happen again. Therefore we need not worry about it. But like many who ignore that the polar ice caps are melting and there is a drought almost everywhere, to view this as a perfect storm is to ignore reality. I do not believe this was a local weather pattern unique to Iowa. I believe that there is a climate change.

Why do I say this? I disagree with those who believe that our election will have no impact. It already has. Opponents of the judiciary now feel empowered to impose their will on judges and will attempt to intimidate them. Our opponents argued judges must be held accountable to the people when the court makes a decision the people do not like. But the message they were really sending was that judges should rule in accordance with public opinion even when that means ignoring the constitution. These people do not want the rule of law; they want majority rule (as they view it) on everything.

I also believe the campaign against us was not limited to removing us, but an attempt to intimidate judges, not only in Iowa, but here in Florida and nationally. That is why Newt Gingrich and other outside money was there. The AFA and NOM were not in Iowa to get rid of us, but to send a warning shot over the bow of every judge in the country that if you decide contrary to us we're coming after you.

I want you to reflect on a couple of thoughts. Politicized judicial elections undermine judicial independence, make no

mistake about it. Over time this trend will result in a judiciary that is less and less likely to be fair and impartial. Why? First, there is the real and perceived corrupting influence of campaign fundraising. Do we really believe that special interest groups and corporations who support a judicial candidate or an anti-retention campaign do not expect that person, or newly appointed judge, to vote a certain way on certain issues? Of course, they do. And that expectation will not be lost on some judges. Why else would contributions be almost $40 million in all 2009 and 2010 state judicial elections? Why else did the CEO of Massey Coal spend $3 million dollars in West Virginia to support a judge with the swing vote in a $50 million case involving Massey Coal? Was this money spent to insure fair courts or was it spent to curry favor? Why would out of state organizations spend over $1 million in Iowa over a judicial election?

Aside from the fundraising aspect of politicized judicial elections, threats of retaliation and intimidation will be understood by sitting judges. Sadly, some judges will be discouraged from following the rule of law when to do so will lead to an unpopular outcome. I had one judge from another state tell me that although we were right, he could never vote that way. A former Michigan Supreme Court Justice had this to say about the influence of campaign money: "It isn't just the appearance of impropriety, this money does have influence. Common sense tells you it does. I've been there."

Even if judges have the courage to disappoint their campaign contributors or ignore the threats of special interest groups, fundraising and campaigning by judges blur the distinction between judges and politicians. When judges are viewed by citizens as politicians, as susceptible to influence, confidence in the courts is undermined, and the integrity and validity of court decisions become suspect.

And this is about you- where you work and what you do. You as lawyers need the court system to be perceived as

legitimate if your means of earning a living is to continue. Can that legitimacy be sustained, however, if court decisions are perceived to have no integrity?

Iowa is not the only place where the politicization of the courts is occurring. And I know what is going on here. I follow it. 30 years ago, do you think a governor would get his undies in a bunch over a judge having something notarized by the clerk's office? Come on.

There are other examples. There was a legislative effort in Montana to have a referendum on the 2012 ballot to elect state supreme court justices by district instead of statewide. The legislative sponsor of this referendum had criticized the Montana supreme court as an "activist judiciary," and believed that district elections would make justices more accountable to their constituents. This measure was struck down by a Montana judge as unconstitutional.

In Oklahoma, a state senator introduced a proposed constitutional amendment to bar judicial review by the state supreme court of laws enacted in the state. The amendment would create a new Oklahoma Ad Hoc Court of Constitutional Review. Really? Is it comprised of legislators who enacted the bill or who? I haven't conducted anywhere close to an exhaustive survey, and I'm sure there are other efforts underway.

Let me talk about our response. We recognized that such opposition would surface when the retention vote came up. We also recognized that as the election became closer that organized opposition would probably occur. We were not naïve. This did not sneak up on us nor catch us by surprise. We are permitted under our rules to form campaign committees to fight such a campaign. Despite this ability, the three of us up for retention made a deliberate decision not to form campaign committees. This decision reflects our beliefs and view of our role as a judge. We strongly believed that the people of Iowa did not want us to be

in the position of raising money for a campaign. We felt we had to lead by example.

Let me also talk about the response of the Bar Association and lawyers in general. First let me note that unlike Florida, ours is a voluntary bar although almost everyone is a member. The bar association was fully aware of the situation and in fact the retention election and the bar's response was the sole topic at the bench bar conference that I chaired months prior to the election. The bar implored us to not form campaign committees assuring us that the bar would have our backs. The professed reason was to maintain the dignity of the court and the fear that the process would become politicized. They didn't.

The bar association formed a separate entity to become active in the retention election, but they formed an educational 501(3)(c) corporation so contributions could be tax deductible and so as not to offend members who were unhappy about the Varnum decision or unhappy with the court for other reasons. (During the years just prior to the retention election, the legislature had significantly cut the judicial branch budget, and the court had made substantial reductions in the office hours in a third of Iowa's least busy courthouses, and rural lawyers were very unhappy about this decision.) In any event, the bar's 501(3)(c) corporation, provided information about Iowa's court system, its merit selection process, and the bar plebiscite, but did not advocate a yes or no vote for any specific judge or justice.

In our case, the efforts of the bar were too little and too late. First, despite warnings for over a year in advance, the effort did not even begin in earnest until after the first round of opposition occurred in August or September and polls showed it might be successful. In addition, other than a website, a few speaking engagements to small groups and letters to the editor, the effort was woefully inadequate to fight a well-funded television and robocall campaign. Third, any counter effort was far too late. It did not really start until about a month before the election. This

watered down support was most problematic because the bar had stated for months that it would defend the justices, which caused other supporters to forego efforts to mobilize support outside the legal community, until a few short months before the election.

I think the bottom line is that the bar was complacent. Attorneys did not really believe it could happen. In our 50 year history, only 4 lower court judges had not been retained, and trust me, they earned it. Frankly, until the day after the election, they never saw it coming although it had been discussed fully and the storm clouds were on the horizon. I still hear it today from lawyers, including the bar leaders.

Besides complacency, I think there was that little voice in the back of some lawyer's minds saying, "I really am not a huge fan of that judge. He or she is too prosecution or defense oriented or too plaintiff oriented. Or they shut down my clerk's office. Maybe if that judge is voted out, someone more to my liking will replace him or her. "

Look- I was born at night but not last night. I know that thought is out there, but I suggest every lawyer take the larger view. You are members of a profession and as a member of a profession, I believe you have been given certain privileges and assume certain responsibilities that make this more than just a job. You as lawyers, as professionals, owe a duty to the larger picture- to the rule of law, to the role of an independent judiciary as envisioned by our founding fathers, and to the need to keep politics out of the courts.

The preservation of our system of fair and impartial justice is not solely the responsibility of judges. It is the responsibility of all citizens and especially lawyers. There are forces in this country that seek to politicize the judiciary so judges will be selected, not on the basis of their neutrality and good character, but on the basis of their commitment to a particular view on certain issues. We must individually and collectively resist and condemn those

efforts whether they take the form of corporate campaign contributions or threats by groups with social agendas.

Let me give you some thoughts for the future- both immediate and further out there.

It will take money. *Citizens United* has changed the landscape. Anonymous money is there and available. Sadly, unless that judge is firmly convinced that an outside group will mount a vigorous defense of that judge, a judge will need to form a campaign committee and raise money.

We need to find simple effective messages, not 15 minute explanations of the role of the courts. “Slippery slope”, “activist judges” and “legislating from the bench” are simple concepts that resonate with a segment of the population. Unfortunately, separation of powers and *Marbury v. Madison* do not make good bumper stickers.

We also need solid non-lawyer spokespeople e.g. In 2008, Hall of Fame baseball player George Brett weighed in on a similar issue with the following:

“Let's keep politics and money out of the courts. On the baseball field, all I want is a fair umpire. Umpires are like judges, and I don't want an umpire or a judge who owes political favors to the other team.” It was effective.

The voters were complacent. Many who voted did not even turn the ballot over to vote on retention. I can’t tell you how many times people, even complete strangers came up to me and said “I couldn’t believe it could happen.” The opponents were motivated and were able to have a disproportionate effect. Get the vote out.

Finally, few understand the basic theories about separation of powers or even that the courts are a third branch of government. They think the courts are a department like the DOT. We need education like the efforts of Justice Lewis with the Justice Teaching Institute where teachers are given the tools to

teach students about the role of the courts. Not all of the voters get this information. The organized bar and organizations like this *can* help here.

Finally, we need to explain the purpose of a retention election. It was designed as a means of getting rid of the unethical, the incompetent, the intemperate or the impaired. It is not a political election. Most voters do not understand this and the foes of the judiciary use this. We need to explain this process to the voters.

Conclusion

I want to finish by talking about Lady Justice. Portraying Justice as a female figure dates back to ancient mythology. Since the 15th century, Lady Justice has often been depicted wearing a blindfold. The blindfold represents objectivity- the scales impartiality.

The founding fathers recognized the critical importance of an independent judiciary, but many do not want an independent court system. They want to take the blindfold off Lady Justice and tip the scales of justice. They seek to have courts bend to political pressures.

It is not enough to discuss these issues in scholarly settings like this or on NPR. We are preaching to the choir. Those who support the rule of law and an impartial judiciary must be prepared to fight on their terms.

At the end of the day, the debate about controversial court decisions and the judges who make them boils down to a simple question: what kind of court system do Americans want? A court system that issues rulings based upon public opinion polls, campaign contributions, and political intimidation or a court system that issues impartial rulings based upon the rule of law?

We cannot again be complacent. You cannot be complacent. It can happen here. We have a lot of work to do. Remember Lady Justice and what she stands for.

Earlier this spring I was awarded the Profiles in Courage award by the Kennedy Library for just doing my job. It should never have been considered courageous. It should be expected. Thank you for inviting me here.