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What Do We Mean by an Independent Judiciary?

MICHAEL P. SENG*

ABSTRACT

Issues continue to arise about judicial independence in the United States. The term judicial independence is often not defined with precision. Judicial independence has its roots in the doctrine of separation of powers. It is also grounded in due process and in ethical standards that require judges to be competent and impartial decision-makers. Judicial independence depends upon society having faith in the integrity of the courts. Accountability is thus the handmaid of an independent judiciary. This article defines both the structures and the ethical standards that ensure an independent judiciary.

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Recently, Supreme Court Justice Anton Scalia provided lectures to the Tea Party members of Congress about the meaning of the Constitution, an action that will certainly be raised to question the Justice's impartiality when new federal legislation comes before the Court.¹ Justice Clarence Thomas' wife has been an outspoken advocate of the Tea Party and has been involved in foundations that may have benefited by the Supreme Court's decision on campaign financing by corporations in which Justice Thomas cast a crucial vote.² Retired Supreme Court Justice Sandra Day O'Connor has been criticized for engaging in public advocacy while continuing to hear cases on the United States courts of appeal.³ The administrative law judges for the United States Department of Housing and Urban Development have accused their director of the Office of Hearings and Appeals of improperly assigning cases based on his assessment of the outcome reached by an individual judge and other actions that significantly encroach on judicial independence.⁴ United States Senators frequently contend in judicial confirmation hearings that judges should "follow the law" and not get involved in political disputes.⁵ What this means to each individual Senator is unclear, but given the context of the questions one can speculate that what it really means is that the Senator hopes the judge will rule on issues in conformity with the Senator's own views.⁶

1. David Savage & Kathleen Hennessey, *Scalia gives talk on Constitution to members of House Justice urges them to hew to Framers' intent; critic decry meeting*, CHI. TRIB., Jan. 25, 2011, at A1.

2. Jackie Calmes, *Activism of Thomas's Wife Could Raise Judicial Issues*, N.Y. TIMES, Oct. 8, 2010, at A1; Eric Lichtblau, *Thomas Cites Failure to Disclose Wife's Job*, N.Y. TIMES, Jan. 24, 2011, at A16.

3. Victor Ryan, *Former Justice O'Connor Criticized for Ethics Violations*, ONLINE JOURNAL, Apr. 11, 2011, http://onlinejournal.com/artman/publish/printer_8098.shtml.

4. Dawn Lim, *Allegations of judicial interference roil HUD office*, GOVERNMENT EXECUTIVE, Feb. 28, 2011, <http://www.govexec.com/dailyfed/0211/022811d1.htm?rss=getoday&oref=rss>.

5. Trish Mehaffey, *Streit: Retention election came down to politics vs. law*, THE GAZETTE, Feb. 4, 2011, <http://thegazette.com/2011/02/04/streit-retention-election-came-down-to-politics-vs-law/>.

6. Despite the deserved reputation of confirmed federal judges as apolitical, it is interesting that in the first four cases decided in the United States district courts concerning the Obama Health Care Act, two judges appointed by Republicans found the Act to be unconstitutional. *Florida v. U.S. Dep't of Health & Human Serv.'s*, 780 F. Supp. 2d 1256, 1305-06 (N.D. Fla. 2011); *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010); see also Kevin Sack, *Federal Judge Rules That Health Law Violates Constitution*, N.Y. TIMES, Jan. 31, 2011, at A1 (noting that Judge Vinson was appointed by President Reagan); Rosalind S. Helderman, *Conservative Judge Considers Va. Attorney General's suit Against Health-Care Reform*, WASH. POST, Dec. 7, 2010 (noting that Judge Hudson has "received all of his

State court justices have been targeted for non-retention by conservative groups who are opposed to their decisions on individual issues.⁷ We have witnessed the polarized race for the Wisconsin Supreme Court, where the election turned less on the qualifications of the candidates than a referendum on the governor's proposal to strip collective bargaining rights from most public workers.⁸ A state judge was prosecuted by federal authorities for racketeering, bribery, and extortion for sending thousands of juveniles to privately run prisons based on his own self-interest.⁹ Each of these situations raises complicated questions about judicial independence.

Judicial independence can be analyzed both from an institutional perspective and from a personal perspective.¹⁰ Institutionally, judicial independence is protected at the federal level by the United States Constitution: the judicial branch must be kept separate from the legislative and executive branches of government under our concept of separation of powers.¹¹ Justice Roberts recently explained the principle of judicial independence protected by separation of powers:

“Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the

appointments . . . from Republicans”). In the same manner, two judges appointed by Democrats found the Act to be constitutional. *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611, 649 (E.D. Va. 2010); *Thomas Moore Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 896 (E.D. Mich. 2010), *aff'd*, 651 F.3d 529 (6th Cir. 2011); *see also* Kevin Sack, *Judge Rejects Health Law Challenge*, N.Y. TIMES, Nov. 30, 2010, at A24 (noting that Judge Moon was appointed by Bill Clinton, a Democrat); *Biography of the Honorable George C. Steeh*, U.S. DIST. COURT E. DIST. OF MICH., http://www.mied.uscourts.gov/judges/guidelines/topic.cfm?topic_id=240 (last visited Oct. 31, 2011) (explaining that Judge Steeh was appointed by President Clinton). This cycle was fortunately broken by the first decision in the court of appeals where the court held that the Commerce Clause did give Congress the power to pass the minimum health insurance coverage provisions of the Patient Protection and Affordable Health Care Act. *Thomas Moore Law Ctr.*, 651 F.3d 534. The opinion was written by a Democratic appointee and a concurring opinion was filed by a Republican appointee. *See id.* at 533-67; Carl Weiser, *6th Circuit Skirmish Part of Larger Fight over Judicial Independence*, ENQUIRER WASH. BUREAU, Sept. 3, 2003 (explaining judge Martin is a Democrat); *see also* Kate Pickert, *What the Sixth Circuit Ruling Means for the Future of Health Reform*, TIME, June 29, 2011, <http://swampland.time.com/2011/06/29/what-the-sixth-circuit-ruling-means-for-the-future-of-health-reform/> (noting that Judge Sutton “was appointed by George W. Bush.”). The dissenter was a Republican appointee. *See id.* (noting that Judge Graham “was appointed by Ronald Reagan.”).

7. *See, e.g.*, A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 3, 2010, at A1.

8. Rick Pearson, *Wisconsin recall elections carry implication for 2012*, CHI. TRIB., Aug. 6, 2011, <http://mobile.latimes.com/p.p?a=rp&m=b&postId=663715&curAbsIndex=3&resultsUrl=DID%3D1%26DFCL%3D1000%26DSB%3Drank%2523desc%26DBFQ%3DuserId%253A7%26DL.w%3D%26DL.d%3D10%26DQ%3DsectionId%253A5219%26DPS%3D0%26DPL%3D3>.

9. Jon Hurdle & Sabrina Tavernise, *Former Judge Is on Trial in ‘Cash for Kids’ Scheme*, N.Y. TIMES, Feb. 8, 2011, <http://www.nytimes.com/2011/02/09/us/09judge.html>.

10. *See Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011).

11. *Mistretta v. United States*, 488 U.S. 361, 371, 380-82 (1989).

dynamic between and among the branches is not the only object of the constitution's concern. The structural principles secured by the separation of powers protect the individual as well."¹²

Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain "made Judges dependent on his Will [sic] alone, for the tenure of their offices, and the amount and payment of their salaries."¹³

The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses.¹⁴ By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the "[c]lear heads . . . and honest hearts" deemed "essential to good judges."¹⁵

A similar concept applies under most state constitutions.¹⁶ While the American concept of separation of powers is peculiar to the United States and does not strictly apply in Great Britain or many non-common law jurisdictions, whether judges can be required to perform non-judicial duties and whether non-judicial actors can intrude on the judicial function are universal concerns.¹⁷

Judicial independence also requires that judges be competent and fair.¹⁸ If a judge is not competent or is not fair, judicial independence is threatened. The American Bar Association's Model Code of Judicial Conduct defines "independent" as "a judge's freedom from influence or

12. *Stern*, 131 S. Ct. at 2609 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011)).

13. *Id.* (quoting THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776)).

14. *See* U.S. CONST. art. III.

15. *Stern*, 131 S. Ct. at 2609 (quoting 1 JAMES WILSON, *Of Government*, in THE WORKS OF JAMES WILSON 363 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896)).

16. *See, e.g.*, R.I. CONST. art. V; FL. CONST. art. II, § 3.

17. Separation of Power, HISTORY LEARNING SITE, http://historylearningsite.co.uk/separation_of_power.htm (last visited Sept. 21, 2011).

18. MODEL CODE OF JUDICIAL CONDUCT R. 2.4 cmt. 1 (2007).

controls other than those established by law.”¹⁹ From a constitutional perspective, this concern is closely associated with the concept of due process.²⁰

I. SEPARATION OF POWERS REQUIRES JUDICIAL INDEPENDENCE

A. Selection, training, and discipline of judges

Judges under the common law system are not a separate corps of civil servants. They are members of the legal profession who are given the responsibility of presiding over courts that resolve disputed questions of law and fact independent of any improper outside influence.²¹ Federal judges and state judges, while they may perform the same functions, are selected, trained, and disciplined differently.²²

1. Selection of Judges

Federal judges are governed by Article III of the United States Constitution and by the United States Code.²³ To assure their independence, they are appointed for life by the President and confirmed by the Senate.²⁴ They fit into an honorable tradition that goes back over two

19. *Id.* at Terminology.

20. The Supreme Court has recognized the right to an independent decision maker in administrative hearings as a component of due process. *Morrissey v. Brewer*, 408 U.S. 471, 486, 490 (1972). The Court has also recognized this in the judicial context. *Caperton v. A.T. Massey Coal Co. (Caperton II)*, 129 S. Ct. 2252, 2263-64 (2009); *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

21. *Job Descriptions, Definitions Roles, Responsibility: Judges, Magistrates, and Other Judicial Workers*, JOBBANKUSA, http://www.jobbankusa.com/career_employment/judges_magistrates_other_judicial_workers/job_descriptions_definitions_roles_responsibility.html (last visited Oct. 31 2011).

22. *The Difference Between Federal and State Courts*, US COURTS.GOV, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/Jurisdiction/DifferencebetweenFederalAndStateCourts.aspx> (last visited Oct. 31, 2011).

23. U.S. CONST. art. III; *see generally* 28 U.S.C. pt. I. (Westlaw 2011).

24. Under the federal system, the President appoints all Article III judges for life. *How the Federal Courts Are Organized*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu!&page=/federal/courts.nsf/page/183> (last visited Oct. 31 2011). The Senate must confirm these appointments. *Id.* It has happened, especially in appointments to the Supreme Court, that the Senate has rejected candidates proposed by the President. *Nominations*, UNITED STATES SENATE, <http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm> (last visited Oct. 31 2011). The Senate hearings to approve the appointments can give rise to some exciting political drama when judicial candidates are questioned about their political and legal views, and whether they have the temperament, background, and knowledge to be a judge. Most federal judges are appointed because of their political connections. However, because of the rigorous selection process, only those members of the profession who are truly distinguished are normally appointed and confirmed. Once judges are appointed and confirmed, they are expected to leave when their political prejudices arise. Federal judges can be removed only by impeachment. Impeachment has been rarely used. *See id.*; *see, e.g.*, Jennifer Steinhauer, *Senate, for Just the 8th Time, Votes to Oust a Federal Judge*, N.Y. TIMES, Dec. 8, 2010, at A27. Thus, the perennial question is how to deal with judges who have lifetime appointments and are unable to serve but have committed no impeachable offense.

hundred twenty years.²⁵ There has been no major scandal that has rocked the federal judiciary, although individual courts and judges have been criticized for their decisions and judges have been removed for improprieties.²⁶

Not all federal judges fit under the provisions of Article III. Many federal judges preside over Article I courts and do not have the lifetime tenure enjoyed by their brothers and sisters who preside over Article III courts.²⁷ Similarly, today many federal disputes are resolved, at least in the first instance, by administrative law judges.²⁸ Regardless of their constitutional status, both Article III and non-Article III judges are governed by the same ethical standards requiring them to be competent and neutral decision-makers.²⁹

State court judges are separate and independent from federal judges. They derive their authority from state constitutions and statutes.³⁰ Almost the only limitations imposed by the federal Constitution on state judges are the requirements that they follow federal law when applicable³¹ and accord all persons due process and equal protection of law.³² State laws provide a

25. Mary L. Clark, *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 452, 494 (2011).

26. See, e.g., Scott Michels, *Philly Judge Criticized for Rape Decision*, ABC NEWS, Oct. 31, 2007, <http://abcnews.go.com/TheLaw/Story?id=3801167&page=2>; Spencer Hunt, *Judge criticized, but murder conviction upheld*, ENQUIRER, Mar. 2, 2010, http://www.enquirer.com/editions/2000/03/02/loc_judge_criticized_but.html.

27. See, e.g., 28 U.S.C. § 631(e) (West 2010) (noting that a full-time magistrate judge serves for eight years, where a part-time serves for four years). The plurality of the Supreme Court has recognized three types of courts that Congress can vest with jurisdiction outside of Article III: “territorial” courts, courts-martial, and courts created to adjudicate cases involving “public rights.” *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 64-70 (1982). In *Commodity Futures Trading Commission v. Schor*, the Supreme Court rejected an argument that a federal statute that allows the Commodity Futures Trading Commission to entertain state law counterclaims in reparation proceedings violated Article III of the Constitution. 478 U.S. 833, 858 (1986). The Court held that the legislative scheme did not “impermissibly intrude on the province of the judiciary.” *Id.* at 851-52. The Court stated that “Article III, § 1 serves both to protect ‘the role of the independent judiciary within the constitutional scheme of tripartite government,’ *Thomas v. Union Carbide Agricultural Prod.’s Co.*, 473 U.S. 568, 583 (1985), and to safeguard litigants’ ‘right to have claims decided before judges who are free from potential domination by other branches of government.’” *Schor*, 478 U.S. at 848 (quoting *United States v. Will*, 449 U.S. 200, 218 (1980)). However, any broader application of *Schor* has been rejected by the Supreme Court. In *Stern* the Court reiterated the narrow circumstances where Congress can confer jurisdiction on non-Article III courts, and held that it violated Article III for Congress to attempt to confer jurisdiction on the bankruptcy courts to enter judgment in a state common law tort claim. *Stern*, 131 S. Ct. at 2620.

28. 5 U.S.C.A. § 3105 (West 2011).

29. See *Codes of Conduct*, USCOURTS.GOV, <http://www.uscourts.gov/RulesAndPolicies/CodesofConduct.aspx> (last visited Oct. 31, 2011).

30. *The Difference Between Federal and State Courts*, US COURTS.GOV, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/Jurisdiction/DifferencebetweenFederalAndStateCourts.aspx> (last visited Oct. 31, 2011).

31. *Virginia v. Browner*, 80 F.3d 869, 880 (4th Cir. 1996) (citing U.S. CONST. art. VI, cl. 2).

32. U.S. CONST. amend. XIV.

variety of mechanisms for selecting judges, including election by the voters.³³ State judges are rarely given lifetime appointments.³⁴ In many states, judges must go back periodically to the voters who decide whether they shall be retained.³⁵

Whenever a jurisdiction moves away from lifetime appointments, there is a threat to judicial independence. Most early state constitutions provided for a process of impeachment to remove judges who committed transgressions; however, many states have moved away from this model.³⁶ Judicial election and retention systems have inherent flaws when it comes to the question of judicial independence. Judges and judicial candidates cannot offend those who determine and control their status.³⁷ While the popular election of judges faces the most criticism, appointment systems—whether the appointments are made by politicians or by blue-ribbon panels—are not immune from improper influences either.³⁸

Even judges appointed under the famous Missouri Plan have been targeted by special interest groups in ways that undermine their independence.³⁹ The Missouri Plan is supposed to insulate judges from the political process.⁴⁰ Under the plan, a blue-ribbon panel selects judges but the judges must stand before the voters periodically for retention.⁴¹ The purpose of the electoral retention system in the Missouri Plan is to retire unfit judges.⁴² However, judges who make unpopular decisions about same-sex marriage, the death penalty, or even medical malpractice liability have been targeted by special interest groups in retention elections.⁴³ This targeting has proved to be successful. Three judges in Iowa, which follows a modified Missouri Plan,⁴⁴ were not retained by the voters in the November

33. *The Difference Between Federal and State Courts*, *supra* note 30.

34. See ARIZ. REV. STAT. ANN. § 12-120.02(A) (West 2011); UTAH CODE ANN. § 20A-7-702(2)(h)(iii) (West 2011).

35. See, e.g., ARIZ. REV. STAT. ANN. § 12-120.02(A); UTAH CODE ANN. § 20A-7-702(2)(h)(iii).

36. See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 37 (Oxford Univ. Press 2009).

37. See A.G. Sulzberger, *Voters Moving to Oust Judges Over Decisions*, N.Y. TIMES, Sept. 24, 2010, at A1.

38. John L. Dodd et al., *The Case for Judicial Appointments*, THE FEDERALIST SOCIETY, (Jan. 1, 2003), <http://www.fed-soc.org/publications/detail/the-case-for-judicial-appointments>.

39. *The Missouri Plan - Keeping the Influence of Politics and Money out of Our Courts*, THE MISSOURI BAR, <http://www.mobar.org/0fc4a650-1ec3-48bd-8583-1c4acb31d700.aspx> (last visited Sept. 21, 2011).

40. *Id.*

41. *Id.*

42. *Id.*

43. Sulzberger, *supra* note 37.

44. *Judicial Selection*, IOWA JUDICIAL BRANCH, http://www.iowacourtsonline.org/Public_Information/About_Judges/Selection/ (last visited Oct. 11, 2011).

2010 elections because they had participated in a unanimous Iowa Supreme Court decision to legalize same-sex marriage.⁴⁵

This is not to say that states should provide lifetime appointments. Lifetime appointments have their own disadvantages. No system perfectly balances judicial accountability against judicial independence. If kept within proper limits, the tension between these two interests can be healthy. But the line is thin.

2. *Training of Judges*

Neither state nor federal judges receive any formal education to be judges.⁴⁶ They are trained as lawyers and most are seasoned practitioners.⁴⁷ Nonetheless, judging requires different skills than those used on a daily basis by most lawyers.⁴⁸ Therefore, it is important that some initial training be given to new judges, and most American jurisdictions require some form of continuing education for judges.⁴⁹ How continuing education is conducted can affect judicial independence.

Judicial independence can be compromised if the judicial training is designed and administered by the executive branch of the government. This is an issue that is rarely discussed in the United States. The issue came before the Constitutional Court of the Czech Republic, which recognized that if mandatory judicial training is under the executive branch, the executive may be in a position to influence the decision-making of the courts.⁵⁰ A similar threat is present if private groups, even nonprofit organizations that conduct judicial education programs, have interests that compromise their impartiality.⁵¹ Therefore, more attention should be given in the United States to who conducts judicial training and how it is done.

45. Sulzberger, *supra* note 7. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

46. *Judges, Magistrates, and Other Judicial Workers*, BUREAU OF LABOR STATISTICS (Dec. 17, 2009), <http://www.bls.gov/oco/ocos272.htm>.

47. *Id.*

48. *See id.*

49. *Id.*

50. Ústavní soud České 18.6.2002 (US) [Decision of the Constitutional Court of June 18, 2002], sp.zn. US 7/02 (Czech).

51. For instance, a proposal was made to the American Bar Association at its summer 2010 meeting asking it to encourage the training of United States judges in financial products and practices as a way of ensuring the groundwork for financial reform. Petra Pasternak, *ABA Delegates to Weigh Judicial Finance Training, Same-Sex Marriage*, LAW.COM (Aug. 2, 2010), http://www.law.com/jsp/article.jsp?id=1202464122301&ABA_Delegates_to_Weigh_Judicial_Finance_Training_SameSex_Marriage&slreturn=1. However, the downside of such a proposal, as suggested by San Francisco Superior Court Judge Richard Kramer, is how one decides what the judge ought to know—would the training cover rudimentary terms and rules that are not the subject of opinion, or would it cover how the markets operate, which is a subject of controversy and opinion? *Id.*

3. Discipline of Judges

Federal judges cannot be removed except by impeachment.⁵² This is a rare and cumbersome process and has seldom been used.⁵³ Congress has authorized the Judicial Conference of the United States to hear complaints against the conduct of federal judges.⁵⁴ Each federal circuit has its own judicial council.⁵⁵ Complaints are first heard by the chief judge of the circuit but the parties may petition review by the judicial council of the circuit where the complaint was lodged.⁵⁶ The judicial council can order that, for a limited time, no further cases shall be assigned to the judge, or it may censure or reprimand the judge by means of either a private communication or a public announcement.⁵⁷ It can also certify that an Article III judge is disabled and request the judge to retire voluntarily.⁵⁸ Federal judges must recuse themselves in individual cases if there is any appearance of bias.⁵⁹ Federal administrative law judges are governed by similar procedures contained in the Administrative Procedure Act,⁶⁰ but because they are employed directly by the agency that regularly appears before them, the *appearance* of bias standard is relaxed and a litigant must show *actual* bias or prejudice.⁶¹ Right now there are no procedures to recuse justices on the Supreme Court of the United States.⁶² They decide

52. Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 662-63 (1988).

53. One of the few court cases involving the impeachment of a federal judge is *Nixon v. United States*, where a federal district judge was convicted of the criminal offense of making false statements before a federal grand jury and then removed from office by the Senate. 506 U.S. 224, 226-28 (1993). On December 8, 2010, the Senate found federal Judge G. Thomas Porteous, Jr. guilty in an impeachment proceeding. Patricia Murphy, *Senate Removes Judge Thomas Porteous Jr. Following Impeachment Trial*, POLITICS DAILY (Dec. 8, 2010), <http://www.politicsdaily.com/2010/12/08/senate-impeaches-judge-thomas-porteous-removes-him-from-office/>. Among the charges was the allegation that Judge Porteous had received cash and favors from attorneys who appeared in his court. Judge Porteous was only the eighth judge in American history to be removed by impeachment and the first since 1989. *Id.*

54. 28 U.S.C.A. §§ 351, 354 (West 2011).

55. *See id.* §§ 352(d), 354.

56. *Id.* § 352(a), (c).

57. *Id.* § 354 (2)(A).

58. *See id.* § 354(a)(2)(B).

59. 28 U.S.C.A. § 455(a)-(b); *Liteky v. United States*, 510 U.S. 540, 548 (1994); *Liljeberg v. Health Serv.'s Acquisition Corp.*, 486 U.S. 847, 858 (1988). In *Nevada Commission on Ethics v. Carrigan*, the Supreme Court commented that there "did not appear to . . . b[e] any serious challenges to judicial recusal statutes as . . . unconstitutionally restricting judges' First Amendment rights," unlike restrictions on a judge's speech during a judicial election campaign. 131 S. Ct. 2343, 2349 (2011).

60. 5 U.S.C.A. § 556 (West 2011).

61. *Bunnell v. Barnhart*, 336 F.3d 1112, 1114 (9th Cir. 2003); *Greenberg v. Bd. of the Fed. Reserve Sys.*, 968 F.2d 164, 167 (2nd Cir. 1992); *Certain Lens-Fitted Packages Order 115: Denying Jazz's Motion No. 406-164 To Recuse*, Inv. No. 337-TA-406, USITC Pub. 115 (Nov. 13, 2003) (Final).

62. 28 U.S.C. §§ 451, 455(a) (West 2011).

individually whether they can be impartial in hearing a particular matter before them.⁶³

The first Model Code of Judicial Conduct was not promulgated by the American Bar Association (“ABA”) until 1924.⁶⁴ Today, every state has adopted a code of judicial conduct.⁶⁵ However, not all state codes conform to the ABA model code in all respects.⁶⁶ Throughout this discussion, the ABA Model Code will be the primary focus of analysis, with the understanding that it is not binding and may vary slightly from state to state.⁶⁷

Many states set up special commissions to handle complaints against judges.⁶⁸ As an example, the 1970 Illinois Constitution establishes a Judicial Inquiry Board (“JIB”).⁶⁹ The JIB consists of judges, lawyers, and members of the public with jurisdiction to investigate allegations of judicial

63. *Id.* § 455(a).

64. *See* MODEL CODE OF JUDICIAL ETHICS Canons (1924).

65. *See, e.g.*, N.J. CODE OF JUDICIAL CONDUCT (1974); MISS. CODE OF JUDICIAL CONDUCT (2002); N.Y. STATE BAR ASSOCIATION CODE OF JUDICIAL CONDUCT (1996).

66. *See, e.g.*, N.J. CODE OF JUDICIAL CONDUCT (1974); MISS. CODE OF JUDICIAL CONDUCT (2002); N.Y. STATE BAR ASSOCIATION CODE OF JUDICIAL CONDUCT (1996).

67. The American Bar Association last revised its Model Code of Judicial Conduct in 2007. *See generally* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18). The Code expressly states that it “should not be interpreted to infringe on the essential independence of judges in making decisions.” *Id.* at Scope 5. The new formulation is much more detailed than the older codes and offers much more guidance to judges on what they should avoid. *Compare id.*, with MODEL CODE OF JUDICIAL ETHICS *supra* note 64. These new changes will now have to be considered by the individual states. *State Adoption of the ABA Model Rules of Professional Conduct and Comments*, AMERICAN BAR ASSOCIATION (May 23, 2011), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.athcheckdam.pdf>. The ABA Model Code is advisory only and each state adopts its own standards of judicial conduct. *Id.* Therefore, whether a state adopts the new version or continues to follow its earlier enacted code will be up to the individual jurisdiction. *Id.* Some states and the Federal Judicial Conference have adopted procedures for judges who are not sure of their ethical or professional responsibilities to request an advisory opinion. *See, e.g.*, *The Advisory Opinion Process*, THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM, http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/Advisory.asp (last visited Nov. 4, 2011); *The Formal Advisory Opinion Board*, STATE BAR OF GEORGIA, http://gabar.org/handbook/rule_4-402_the_formal_advisory_opinion_board/ (last visited Nov. 9, 2011); *Advisory Opinion-DS 6001*, U.S. DEP’T. OF STATE, http://pmdtc.state.gov/licensing/advisory_opinion.html (last visited Nov. 9, 2011). In some states these opinions are given by the disciplinary commissions and in other states by special committees set up by the state or the bar association. *See, e.g.*, *The Advisory Opinion Process, supra*; *The Formal Advisory Opinion Board, supra*; *Advisory Opinion-DS 6001, supra*. Jurisdictions differ on the extent that these advisory opinions are binding or may provide a defense to a judge that relies upon them. *See e.g.*, *The Advisory Opinion Process, supra*; *The Formal Advisory Opinion Board, supra*; *Advisory Opinion, supra*. State laws also differ on the confidentiality of these opinions. The advantage of these advisory opinions is that they give judges guidance on uncertain matters and thereby promote ethical conduct. The disadvantage is that they are rendered in a non-advisory context where the facts and differing viewpoints may not be fully developed.

68. *See, e.g.*, MISS. CODE OF JUDICIAL CONDUCT Preamble 5 (2002); ILL. CONST. art. VI, § 5, cl. b.

69. ILL. CONST. art. VI, § 15, cl. b.

misconduct or individual issues of physical or mental suitability.⁷⁰ The JIB may file a complaint against a judge before the Courts Commission, which also consists of judges, lawyers, and members of the public.⁷¹ The commission is mandated to conduct hearings and decides upon removal or discipline of judges in appropriate situations.⁷²

Rarely will a disciplinary commission actually inquire into the decision-making process in a particular case.⁷³ Such an inquiry would have to be performed with great sensitivity because of the threat to judicial independence and the confidentiality implicit in the decision-making process.⁷⁴ However, such an inquiry did take place in Illinois when a special commission was appointed to investigate two Supreme Court of Illinois justices accused of accepting gifts of stock during a pending criminal case.⁷⁵ The problem became especially sensitive when it was revealed that a decision that would have gone against the defendant was withdrawn.⁷⁶ One of the justices who had received the stock had written the opinion favouring the defendant.⁷⁷ All the justices on the court allowed their depositions to be taken.⁷⁸ After a thorough inquiry, the commission found that the decision was untainted by the misconduct of the justices.⁷⁹

Questions arise about the threat of judicial disciplinary proceedings on judicial independence. Clearly, judicial discipline can intrude into judicial independence. But discipline is also necessary to assure judicial independence. Who is responsible for the discipline is important. Should it be done by the judiciary itself, by the bar, or by non-lawyers?

Justices on the Supreme Court of the United States, unless they have committed an impeachable offense, are left to decide for themselves whether they may have a conflict that breaches their obligation to be

70. *Id.*

71. *Id.* at cl. c.

72. *Id.* at cl. e.

73. *See, e.g., In re Complaint of Judicial Misconduct*, 425 F.3d 1179 (Judicial Council for the 9th Cir. 2005) (committee investigated judge's actions after trial and compared them to cases with similar outcomes involving males rather than investigating the judge's decision-making process); *In re Complaint of Judicial Conduct*, 640 F.3d 354 (Committee on Judicial Conduct and Disability 2010) (committee investigated reasons for judge not explaining his ruling rather than the decision-making process itself).

74. *See* John L. Dodd et al., *The Case for Judicial Appointments*, THE FEDERALIST SOCIETY, (Jan. 1, 2003), <http://www.fed-soc.org/publications/detail/the-case-for-judicial-appointments>.

75. KENNETH A. MANASTER, ILLINOIS JUSTICE 4, 22-28 (Univ. of Chicago Press 2001).

76. *Id.* at 45.

77. *Id.* at 13.

78. *Id.* at 72. The attorney who led the inquiry was John Paul Stevens, who later had a distinguished career on the Supreme Court of the United States. *Id.* at 72, 269-74.

79. MANASTER, *supra* note 75, at 201.

independent in a particular case.⁸⁰ Virtually everyone, except perhaps the Supreme Court Justices themselves, would agree that this system does not work.⁸¹

Today lower federal judges are subject to oversight by their peers.⁸² Peer review is a practical compromise to concerns about the accountability of judges with lifetime appointments.⁸³ Without peer review, the only oversight would be through the impeachment process, which is cumbersome and should be reserved for the most serious cases.⁸⁴ State judges do not generally enjoy the same degree of independence as federal judges.⁸⁵ They are often subject to discipline through panels composed of other judges, lawyers, and even non-lawyers.⁸⁶ Only the purest advocates of separation of powers would argue that these oversight systems impair the independence of the courts.⁸⁷ Rules and procedures can help ensure that the judicial function itself is not impaired through the disciplinary process.⁸⁸

There is a danger that if discipline is solely in the hands of judges, the public will lose confidence in the partiality of the process. In Illinois, judicial discipline is done by a constitutionally-mandated judicial commission and disciplinary panel.⁸⁹ Formerly, judicial discipline in Illinois was administered solely by judges and lawyers.⁹⁰ However, a number of scandals showed that the public had no faith in such a system.⁹¹ After the 1980s Greylord crisis in Chicago, where many judges were convicted of bribery, the Illinois Constitution was amended to allow

80. 28 U.S.C.A. § 455(a).

81. See Andrew Cohen, *Supreme Court and Conflicts of Interest: Pressure Builds for More Transparency*, POLITICS DAILY (Feb. 17, 2011), <http://www.politicsdaily.com/2011/02/17/supreme-court-and-conflicts-of-interest-pressure-builds-for-mor/>.

82. See generally 28 U.S.C. § 351.

83. See, e.g., *A Review of the Mississippi Commission on Judicial Performance*, THE MISS. LEGISLATURE (June 4, 2002), <http://www.peer.state.ms.us/434.html>; *Rules of Judicial Administration*, THE SUPREME COURT OF TEX., <http://www.courts.state.tx.us/tj/ar99/peerrule.htm> (last visited Nov. 9, 2011).

84. See *Methods of Removing State Judges*, AMERICAN JUDICATURE SOCIETY (2009), http://www.ajs.org/ethics/etc_impeachment.asp.

85. See Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2055-56 (1988); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U.L. REV. 1, 8 (1995).

86. See, e.g., TEX. CONST. art. 5, § 1-a, cl. 2.

87. See *In re* Petition of the Judicial Conduct Committee, 855 A.2d 535, 537 (N.H. 2004).

88. *Id.* at 540 (Duggan, J., concurring).

89. ILL. CONST. art. VI, § 15, cl. b.

90. *A History of the Illinois Judicial Systems*, ILLINOIS COURTS, <http://www.state.il.us/court/General/History.asp> (last visited Nov. 9, 2011).

91. JAMES TUOHY & ROB WARDEN, GREYLORD JUSTICE, CHICAGO STYLE 258-60 (G.P. Putnam's Sons 1989).

representatives of the public to serve on the Courts Commission.⁹² This has been in effect for several years and appears to be working well.

However, the Greylord controversy itself raises questions on how investigations of the judiciary should be conducted. Much of the Greylord corruption was uncovered because other judges and attorneys were equipped with devices that recorded the conversations of judges.⁹³ To what extent judicial independence is compromised by having the government eavesdrop on judges performing their official duties is certainly a matter of grave concern. The corruption in Greylord was so blatant that one can perhaps overlook the fact that the government exceeded proper law enforcement measures.⁹⁴ There was certainly no public outcry against the government (except for the criticism of some lawyers).⁹⁵ Nonetheless, in less clear circumstances one can easily see abuses of process occurring.

Just as a competent, independent, and fair judiciary is essential to all societies, a parallel mechanism must be put into place to punish judges who engage in illegal and unethical conduct. Separating such a mechanism from the regular political and judicial institutions is societally necessary to ensure that judicial independence is not compromised and that justice is accomplished. Allowing attorneys and laypersons to sit on judicial disciplinary tribunals has helped assure the public that judicial misbehaviour will not be covered up by the judge's own colleagues. The failure to provide such a mechanism will itself undermine the independence of the judiciary by diminishing the general public's respect for it. Judges can be held accountable in other ways. In addition to disciplinary actions, judges who commit criminal acts can be prosecuted in regular courts.⁹⁶ In *United States v. Lanier*,⁹⁷ a state judge was prosecuted for sexual assaults in his chambers against five women who were present for official business.⁹⁸ As previously mentioned, Illinois in recent years experienced a number of federal prosecutions against state judges in Chicago who were accused and convicted of bribery in the famous Greylord scandals.⁹⁹ There is a danger that the prosecution of a judge will be politically motivated. But the check on this is the check in every criminal prosecution—indictment by a grand

92. *Id.* at 258; see ILL. CONST. art. VI, §15, cl. e.

93. TUOHY & WARDEN, *supra* note 91, at 44, 71-74.

94. *Id.* at 71-74, 259-71.

95. *Id.* at 245.

96. See, e.g., *Ex parte Virginia*, 100 U.S. 339, 348-49 (1880); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974).

97. 520 U.S. 259 (1997).

98. *Id.* at 261.

99. TUOHY & WARDEN, *supra* note 91, at 258.

jury and conviction only upon proof beyond a reasonable doubt that the accused has violated a valid criminal statute.¹⁰⁰

The independence of judges is protected by the common law grant of absolute immunity that protects judges from being sued for damages by private parties for the performance of their official duties.¹⁰¹ This is to ensure that judges are not constrained in their judicial conduct out of fear that they will be personally sued for damages.¹⁰² Rightfully, the immunity does not extend to protect a judge performing non-judicial duties.¹⁰³ For instance, a judge may be sued for discriminating against employees of the court.¹⁰⁴

In a New York case, a law clerk refused to prepare a brief as ordered by the state judge.¹⁰⁵ The clerk claimed that his failure was unrelated to the merits of the case and was the result of the judge's corruption.¹⁰⁶ The judge fired the clerk.¹⁰⁷ The clerk subsequently sued the judge for damages in federal court under the First Amendment.¹⁰⁸ The federal court held that the state judge was not protected by a qualified immunity, but it ultimately held against the law clerk on the ground that his First Amendment right to free speech was not infringed.¹⁰⁹ The federal court ruled that although the law clerk's speech touched upon a matter of public concern, his interest in engaging in such speech was outweighed by the judge's interest in maintaining an effective workplace.¹¹⁰ The judge was not motivated by an intention to prevent disclosure of alleged corruption.¹¹¹

Judges are subject to an order of mandamus.¹¹² This is an order requiring them to perform duties imposed by the law.¹¹³ In appropriate cases, a judge can be sued for an injunction,¹¹⁴ and a prevailing party may

100. *In re Winship*, 397 U.S. 358, 361 (1970).

101. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (citing *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646 (1872)); *Stump v. Sparkman*, 435 U.S. 349, 364 (1978); *Mireles v. Waco*, 502 U.S. 9, 11 (1991).

102. *Pierson*, 386 U.S. at 566.

103. *Id.* at n.6.

104. *Forrester v. White*, 484 U.S. 219, 230 (1988).

105. *Shepard v. Beerman*, 190 F. Supp. 2d 361, 363-64 (E.D.N.Y. 2002).

106. *Id.* at 364.

107. *Id.* at 368.

108. *Id.* at 362.

109. *Id.* at 384.

110. *Shepard*, 190 F. Supp. 2d at 362-63, 384.

111. *Id.* at 384. *But cf.* *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that public employee statements made in one's official capacity is not speech for First Amendment purposes and such statements are not insulated from employer discipline).

112. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004).

113. BLACK'S LAW DICTIONARY 980 (8th ed. 2004); *see Cheney*, 542 U.S. at 391 (upholding a writ of mandamus against a trial judge who for abuse of discovery orders against the Vice-President of the United States).

114. *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 735 (1980).

collect attorney's fees against the judge.¹¹⁵ Independence is not in jeopardy as a judge must be shown to have violated a clear legal duty and the action only requires the judge to do what he or she was legally required to do initially.¹¹⁶

In a 1974 case, African-Americans sued state judges in federal court for an injunction to order them to cease racially discriminating in the administration of the criminal justice system in Cairo, Illinois.¹¹⁷ The Supreme Court of the United States held that a federal court injunction against the state court judges would be too "intrusive and unworkable."¹¹⁸ The Court said that intrusion into the state criminal process would result in "continuous or piecemeal interruptions of the state proceedings."¹¹⁹ This would disrupt the delicate balance between federal equitable power and state administration of its own law.¹²⁰ The Court attempted to mitigate its decision by explaining that judges who violate civil rights can be disciplined or prosecuted if their conduct is criminal.¹²¹ However, few judges have ever been held accountable through these means, and the standard of proof in a criminal proceeding is greater than that required for a civil injunction.¹²² Federalism is a weak excuse when state judges are systematically violating the civil rights of parties before them in contravention of the 14th Amendment.¹²³

B. Judges should not be required to perform non-judicial duties

1. Advisory opinions

Article III of the United States Constitution has been interpreted to forbid federal judges from performing non-judicial duties.¹²⁴ The issue arose early in our history when President George Washington asked the Supreme Court of the United States to advise him about the legality of certain foreign affairs questions.¹²⁵ The Justices responded that the courts,

115. *Pulliam v. Allen*, 466 U.S. 522, 544 (1984).

116. *Id.* at 551 (Powell, J., dissenting).

117. *O'Shea v. Littleton*, 414 U.S. 488, 490 (1974).

118. *Id.* at 499-501; see Michael P. Seng, *The Cairo Experience: Civil Rights Litigation in a Racial Powder Keg*, 61 OR. L. REV. 285 (1982).

119. *O'Shea*, 414 U.S. at 500.

120. *Id.*

121. *Id.* at 503.

122. *Florida v. Graham*, 240 So. 2d 486, 490 (Fla. Dist. Ct. App. 1970).

123. Federalism does not bar an injunction when a state executive official is violating federal rights. *But cf. Ex Parte Young*, 209 U.S. 123, 144-48 (1908); *Pennhurst State Sch. & Hosp. v. Halderman* 465 U.S. 89, 97-98, 126-27 (1984) (Stevens, J., dissenting).

124. See, e.g., *Baker v. Carr*, 389 U.S. 186, 286-88 (1962) (Frankfurter, J., dissenting).

125. 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-89 (Henry P. Johnston ed. 1891).

as institutions, cannot give advisory opinions on the law outside of a formal case brought by adversaries to a proper legal dispute.¹²⁶ Giving legal advice to Congress or the President would compromise the Court's impartiality if those issues later came before the Court in a real controversy between adverse parties.¹²⁷

Judges should not decide until they have heard both sides of an argument by the people most affected by the legal issue.¹²⁸ Important questions in every federal case are whether the plaintiff has proper standing to bring the action, whether the issue is presented to the court in a concrete form, and whether the cause is one that the courts can properly adjudicate.¹²⁹ The defects of an advisory opinion are that the court may be deprived of seeing how the law is enforced and that the case may be presented by a litigant who has no stake in the outcome of the litigation.¹³⁰ As a result, the litigant may not present the argument from the most compelling perspective.¹³¹

Some legal systems, including some states, allow their courts to give formal advisory opinions at the request of the government on the legality or constitutionality of legislative acts.¹³² So long as the judiciary gives its advisory opinions in formal proceedings under established rules where the arguments are fully presented, it cannot be argued that this practice violates principles of natural law.¹³³ However, there is a line between a court as an institution giving an advisory opinion on the interpretation of the law and individual judges rendering opinions to political officers about what is or is not legal or advisable.¹³⁴

There have been several instances in United States history when individual judges have given legal advice to presidents. In the first three

126. *Id.*

127. *Id.*

128. *See* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011) (citing Sanchez-Llamas v. Oregon, 548 U.S. 331, 356-57 (2006)).

129. Warth v. Seldin, 422 U.S. 490, 498 (1975); Camreta v. Greene, 131 S. Ct. 2020, 2027, 2028-30 (2011) (the Supreme Court upheld the right to appeal by a government official who had been found by the Court of Appeals for the Ninth Circuit to have violated the Fourth Amendment rights of an elementary school girl but not to be liable because of qualified immunity. Even though the officer had prevailed in the court of appeals on the immunity issue, the officer still had standing to appeal because he was injured by the Constitutional ruling if he chose to engage in that conduct in the future. The Court found that he could demonstrate "injury, causation, and redressability.").

130. *See In re Lang*, 905 F. Supp. 1385, 1392 (C.D. Cal. 1995).

131. *See id.*

132. *See, e.g.,* MASS. CONST. art. II, pt. II, ch. 3; GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], art. 93(2), May 23, 1949, BGBl. I (Ger.) (The German Constitutional Court allows a federal or state or a third of the members of the federal parliament to petition the court to decide the constitutionality of a law).

133. Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

134. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937).

decades of the 20th Century, Justice Brandeis gave advice to President Woodrow Wilson and later to President Franklin D. Roosevelt.¹³⁵ In 1952, Justice Vinson wrongly advised President Truman about the law when the president seized private steel mills to avert a strike.¹³⁶ The Court ultimately ruled the seizure unconstitutional.¹³⁷ Justice Fortas served as a confidential advisor to his friend, President Lyndon B. Johnson.¹³⁸ These actions should be condemned under any legal system. A judge as an advisor to a political office holder compromises judicial impartiality or at least the appearance of judicial impartiality, which is equally important.¹³⁹

Questionable conduct continues to take new forms. Justice Antonin Scalia conducted a seminar for conservative members of Congress on the Bill of Rights and the role of government in January 2011.¹⁴⁰ There is no general prohibition on judges participating in seminars or teaching courses.¹⁴¹ However, this seminar was sponsored by one faction in Congress, although it was open to all members.¹⁴² Justice Scalia addressed issues of federalism that were near and dear to the hearts of conservatives in Congress¹⁴³ and it is hard to imagine that what he said will not form part of a legislative agenda for those Congressmen. For a Supreme Court Justice to step into the role of legal consultant to Congress breaches separation of powers.¹⁴⁴ Even if Justice Scalia's comments are entirely neutral and do not address any issue that is likely to come before the Court (which is almost impossible) his participation in the seminar creates an appearance of impropriety that, at the very least, requires Justice Scalia to recuse himself in any case where legislation comes before the Supreme Court which could have been influenced by his counsel in the seminar.¹⁴⁵

135. See MELVIN I. UROFSKY, *LOUIS D. BRANDEIS – A LIFE* 497-502, 692-94 (Random House 2009).

136. See ROBERT J. DONOVAN, *TUMULTUOUS YEARS: THE PRESIDENCY OF HARRY S. TRUMAN* 386 (New York 1982). Justice Stevens questions the validity of whether Vinson did in fact warn Truman. See JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 64 (2011).

137. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952).

138. BRUCE A. MURPHY, *THE RISE AND FALL OF A SUPREME COURT JUSTICE* 200-07, 234-68 (William Morrow & Co. 1988); LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 293, 318 (Yale University Press 1990).

139. See CODE OF CONDUCT FOR JUDGES OF THE UNITED STATES Canon 2B (2011).

140. David G. Savage, *Scalia Gives Talk on Constitution to Members of House Justice Urges Them to Hew to Framers' Intent; Critics Decry Meeting*, CHI. TRIB., Jan. 25, 2011.

141. CODE OF CONDUCT FOR JUDGES OF THE UNITED STATES Canon 4 (2011).

142. Savage, *supra* note 140.

143. *Id.*

144. Frankfurter, *supra* note 133, at 1002.

145. See CODE OF CONDUCT FOR JUDGES OF THE UNITED STATES Canon 2B (2011).

2. Legislative and executive activities

Judges may not be required to perform legislative or executive activities.¹⁴⁶ The distinction between a legislative or executive activity and a judicial activity is not always clear.¹⁴⁷ In a recent example, *Mistretta v. United States*,¹⁴⁸ the Supreme Court of the United States upheld a federal law establishing a sentencing commission and placing it in the judicial branch of the government.¹⁴⁹ Defining sentences for crimes, as opposed to imposing sentences, is strictly a legislative function.¹⁵⁰ Congress normally proposes a range of sentences for individual crimes, and it was concerned about the disparity of sentences being handed down by the courts.¹⁵¹ As a result, it set up a sentencing commission composed both of judges and non-judges to create mandatory sentencing guidelines so there would be more uniformity.¹⁵² It was argued that this commission violated separation of powers.¹⁵³ The Supreme Court upheld the law, stating that the non-adjudicatory functions assigned to the commission did not intrude on the prerogatives of any other branch of government and were appropriate to the central mission of the judiciary.¹⁵⁴

The Court in *Mistretta* cited examples where judges in the United States also served in other positions.¹⁵⁵ John Jay was both the first Chief Justice and ambassador to England.¹⁵⁶ Oliver Ellsworth was the second Chief Justice and ambassador to France.¹⁵⁷ The third Chief Justice, John Marshall, served briefly in the dual role of Chief Justice and Secretary of State.¹⁵⁸ However, these appointments occurred before the workload of the Court was fully developed.¹⁵⁹ It is implausible that these dual roles of Chief Justice and executive officer would be allowed today.

United States Justices have also served in dual capacities in exigent circumstances. In 1877, five Justices sat on a special commission to judge

146. Jellum, Linda, *Which is to be Master, The Judiciary or the Legislature?*, 56 UCLA L. REV. 837, 856-60 (2009).

147. *Morrison v. Olson*, 487 U.S. 654, 688-89 (1988) (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935)).

148. 488 U.S. 361 (1989).

149. *Id.* at 412.

150. *Id.* at 374, 384, 412.

151. *Id.* at 364-67.

152. *Id.* at 365.

153. *Mistretta*, 488 U.S. at 370.

154. *Id.* at 412.

155. *Id.* at 398-400 n.21.

156. *Id.* at 398.

157. *Id.* at 398-99.

158. *Mistretta*, 488 U.S. at 399.

159. Gerhard Casper & Richard A. Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUD. 339 (1974).

disputed presidential election results.¹⁶⁰ Justice Roberts served on a commission to investigate the attack on Pearl Harbor that ultimately caused the United States to enter World War II.¹⁶¹ After the war, Justice Jackson served as a prosecutor at the Nuremburg trials.¹⁶² Two decades later, Justice Warren presided over the commission that bears his name in investigating the assassination of President John F. Kennedy.¹⁶³

The Court stated in *Mistretta* that in each of these instances the service did not seriously undermine the integrity or operation of the judicial function.¹⁶⁴ However, the Court cautioned that if there is not an express rule forbidding this type of service, concern should focus in each case on whether an appearance of institutional partiality could arise from the possible judicial involvement in making policy.¹⁶⁵

Experience dictates that service by judges outside the judiciary should not be encouraged. The adoption of rules forbidding judges from undertaking these types of responsibilities may be the wisest course to follow. The ABA Model Code provides that “judge[s] shall not accept appointment to a governmental committee, board, commission, or [to] other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.”¹⁶⁶ Nonetheless, judges do perform many supervisory and executive duties within the judiciary.¹⁶⁷ These duties are proper and are addressed in the ABA Model Code, which requires judges to act fairly and impartially in fulfilling these necessary responsibilities of the judicial office.¹⁶⁸

C. Judicial opinions must be accorded finality

Institutional independence also requires that judicial opinions be final. They cannot be changed by the legislature or by the executive branches of government. In a very early case in 1792, several Supreme Court Justices ruled that it was unconstitutional for Congress to have the courts determine monthly pensions for disabled Revolutionary War Veterans and then allow the ruling to be reviewed by the Secretary of War.¹⁶⁹ A higher court can

160. *Mistretta*, 488 U.S. at 400.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 400-01.

165. *Mistretta*, 488 U.S. at 406-07.

166. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at Canon 3, R 3.4.

167. *Id.* at Canon 2, R 2.12, 2.13.

168. *Id.*

169. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

only review the exercise of judicial power.¹⁷⁰ An executive or legislative official cannot.¹⁷¹

Two cases illustrate the complexity of the issue. In 1868, the United States signed a treaty with the Sioux Indians giving them title to the Black Hills of South Dakota.¹⁷² Gold was subsequently discovered in the Black Hills.¹⁷³ As a result, the United States repudiated the treaty and divested the Indians of their land.¹⁷⁴ The Indians sued the government in the Court of Claims, but the case was dismissed without the court reaching the merits.¹⁷⁵ The Indians later filed a second suit in the Court of Claims.¹⁷⁶ This second suit was dismissed on *res judicata* grounds, barred by the prior judgment and unable to be re-litigated.¹⁷⁷

Congress finally passed legislation telling the courts to review the claim without regard to the government's defence of *res judicata*.¹⁷⁸ The Supreme Court of the United States held that Congress had the power to waive the *res judicata* effect of the prior judgement and allow the case to be heard on its merits.¹⁷⁹ The Sioux ended up receiving the largest damage award ever entered against the United States.¹⁸⁰ However, many Sioux objected to the award of money because they simply wanted their land back.¹⁸¹

In 1995, the Supreme Court invalidated a law passed by Congress that opened certain securities fraud cases.¹⁸² In an earlier case, the Supreme Court made a surprise ruling that injured parties must file their claims within one year after the injury occurred.¹⁸³ Prior to that time, everyone had assumed that the claimants had three years to file.¹⁸⁴ Congress passed a law directing the courts to hear these cases on the merits as if they had been filed in a timely fashion under the law as it previously existed.¹⁸⁵ In *Plaut v. Spendthrift Farms, Inc.*,¹⁸⁶ the Supreme Court ruled that this law was

170. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (1789).

171. U.S. CONST. art. I, II.

172. *United States v. Sioux Nation*, 448 U.S. 371, 374 (1792).

173. *Id.* at 378-79.

174. *Id.*

175. *Id.* at 384-86.

176. *Id.* at 385-86.

177. *Sioux Nation*, 448 U.S. at 387.

178. *Id.* 390-91.

179. *Id.* at 407.

180. *Id.* at 390, 424.

181. Tracy Zlock, *The Native American Tribe as a Client*, 10 GEO J. LEGAL ETHICS 159 (1997).

182. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

183. *Id.* at 213-14 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991)).

184. *Id.* at 214.

185. *Id.* at 214-15.

186. *Id.* at 211.

unconstitutional because it required the courts to reverse a decision already made, violating the separation of powers principle.¹⁸⁷

The Supreme Court distinguished *Sioux Nation* because the government was only waiving its defense of res judicata in a case in which it was the defendant.¹⁸⁸ In this instance, Congress was reopening a final judgement between private parties.¹⁸⁹ One can question the correctness of the *Plaut* holding because the courts had never adjudicated the merits of the lawsuit.¹⁹⁰ Nonetheless, the underlying principle enunciated by the Court—that judicial decisions must be final—is sound; Congress may not reopen a case by retroactive legislation.¹⁹¹ Ostensibly, Congress can change the law prospectively for future claimants.¹⁹²

Congress and individual states can create a statutory right where the Supreme Court of the United States has held that a right does not exist under the Constitution. For instance, the Supreme Court has held that persons with disabilities do not in themselves fall into a suspect classification under the Equal Protection Clause of the 14th Amendment,¹⁹³ but Congress has provided extensive rights to persons with disabilities through legislation.¹⁹⁴ State courts can provide greater protection from searches and seizures than would be allowed under the Fourth Amendment so long as the state court identifies that it is giving those rights solely as a matter of state law.¹⁹⁵

The Supreme Court held parts of the Religious Freedom Restoration Act (“RFRA”) unconstitutional because it was beyond Congress’ power under Section 5 of the 14th Amendment.¹⁹⁶ Congress had enacted RFRA to require closer judicial scrutiny in free exercise of religion claims than the Supreme Court had stated was required under the Constitution.¹⁹⁷ But that case (*City of Boerne v. Flores*) largely turned on federalism grounds.¹⁹⁸ Subsequently, in *Gonzales v. O Centro Espirita Beneficente Uniao Do*

187. *Plaut*, 514 U.S. at 240.

188. *Id.* at 230-31 (citing *Sioux Nation*, 448 U.S. 371).

189. *Id.* at 233-34.

190. *See id.*

191. *Id.* at 240.

192. *Plaut*, 514 U.S. at 240; U.S. CONST. art. I.

193. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445-47 (1985); *Bd. of Tr’s. Univ. of Ala. v. Garrett*, 531 U.S. 356, 365-66 (2001) (citing *Cleburne*, 473 U.S. 432).

194. *See Tennessee v. Lane*, 541 U.S. 509, 527-29 (2004); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C. and 47 U.S.C.).

195. *Michigan v. Long*, 463 U.S. 1032, 1037, 1047 (1983).

196. *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997).

197. *Id.* at 512-13 (citing *Emp’t Div. v. Smith*, 494 U.S. 872 (1990)).

198. *Id.*

Veetal,¹⁹⁹ the Supreme Court applied RFRA when reviewing federal legislation.²⁰⁰ Justice Roberts for a unanimous Court stated:

We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue.²⁰¹

D. Judges should not render political opinions

In *Marbury v. Madison*,²⁰² Justice John Marshall stated that federal courts are prohibited from issuing political opinions.²⁰³ He framed the issue in terms of separation of powers and used the common law writ of mandamus to illustrate that matters within the discretion of executive officials fall within the political sphere.²⁰⁴ Issues of law are what the courts can properly resolve.²⁰⁵

Justice Brennan emphasized in *Baker v. Carr*²⁰⁶ that in each case, the courts must determine if the particular question is textually committed by the Constitution to a coordinate political department or can be resolved through the use of judicially manageable standards.²⁰⁷ The Court concluded that a challenge under the Equal Protection Clause of the 14th Amendment to a state's apportionment scheme is a question of law for the courts to decide.²⁰⁸

In more recent cases, the Supreme Court has held that questions of political gerrymandering²⁰⁹ and how impeachment cases are to be tried by the Senate²¹⁰ are political questions. Legal questions are how a state counts

199. 546 U.S. 418 (2006).

200. *Id.* at 439.

201. *Id.*

202. 5 U.S. 137 (1803).

203. *Id.* at 166.

204. *Id.* at 137.

205. *See id.* at 177.

206. 369 U.S. 186 (1962).

207. *Id.* at 217.

208. *Id.* at 204.

209. *Vieth v. Jubelirer*, 541 U.S. 267, 304-06 (2004).

210. *Nixon v. United States*, 506 U.S. 224, 237-38 (1993).

electoral votes in a presidential election,²¹¹ whether the House of Representatives can refuse to seat a member beyond the terms proscribed in the Constitution,²¹² and whether Congress violated the Origination Clause in enacting a revenue bill.²¹³

The question of how active the judiciary should be in reviewing acts of the legislature is an issue that is decided by the courts.²¹⁴ However, it has not been free from controversy.²¹⁵ Are the courts or the legislature in a better position to determine whether there is a factual basis to support legislation? If the courts undertake the inquiry, what degree of deference should they give to the legislature? The issue is justiciable but it clearly borders on the political.²¹⁶

E. Legislators may not impose rules of decision on the courts

After the Civil War, Congress disapproved President Andrew Johnson's pardon of large numbers of Southerners who served on the Confederate side during the War.²¹⁷ After being pardoned, these Southerners were allowed to go to the federal courts to seek compensation for property destroyed during the War.²¹⁸ Congress passed a law that if a Southerner applied for compensation to the courts and he had received a pardon, the court should dismiss the case for "lack of jurisdiction."²¹⁹

In a somewhat confusing opinion in *United States v. Klein*,²²⁰ the Supreme Court ruled the law unconstitutional because it interfered with the independence of the courts by forcing them to rule a certain way.²²¹ The substance of the holding seems to be that once Congress confers jurisdiction on the courts, it must leave them to perform the process of adjudication free from outside control.²²²

211. *Bush v. Gore*, 531 U.S. 98, 109-11 (2000).

212. *Powell v. McCormack*, 395 U.S. 486, 532-33 (1969).

213. *United States v. Munoz-Flores*, 495 U.S. 385, 397 (1990).

214. *See Morse v. Frederick*, 551 U.S. 393 (2007).

215. *See, e.g., Skelly Wright, The Role Of The Supreme Court In A Democratic Society*, 54 CORNELL L. REV. 1 (1968).

216. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 145-52 (1938) (the issue comes up under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549, 562-63 (1995) (Commerce Clause); *Citizens United v. Fed. Elections Comm'n*, 130 S. Ct. 876, 888-89 (2010) (First Amendment); *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (Fourteenth Amendment); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 (2010) (citing *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964)) (Fourteenth Amendment).

217. *See United States v. Klein*, 80 U.S. 128, 139-42 (1871).

218. *Id.* at 139-43.

219. *Id.* at 144.

220. *See generally id.*

221. *Id.* at 147.

222. *Klein*, 80 U.S. at 145-46.

Even in cases that do not strictly involve a “rule of decision” imposed by Congress, the Supreme Court has struck down attempts by Congress to interfere with the ability of the courts to perform the process of adjudication. In *Crowell v. Benson*,²²³ the Court held that Congress can assign determinations of facts and law in public rights and private rights cases to non-Article III courts for adjudication.²²⁴

Congress cannot completely oust the courts:

[O]f all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.²²⁵

More recently in *Boumediene v. Bush*,²²⁶ the Supreme Court reviewed the Detainee Treatment Act of 2005.²²⁷ The Act allowed the courts of appeal to review the factual determinations made by Combatant Status Review Tribunals (“CSRT”).²²⁸ The CSRTs were established by Congress to determine whether individuals detained at Guantanamo were “enemy combatants.”²²⁹

The Act fell short in that it did not give detainees the opportunity to present evidence discovered after the CSRT proceedings had concluded.²³⁰ It limited the scope of collateral review in a habeas corpus proceeding to a record that might be inadequate or incomplete.²³¹ This could prevent the defendant from having a full and fair opportunity to develop the factual predicate of his claims.²³²

State courts have confronted similar issues. In *McAlister v. Schick*²³³ and *DeLuna v. St. Elizabeth’s Hospital*,²³⁴ the Supreme Court of Illinois considered whether the legislature could limit medical malpractice cases by

223. *Crowell v. Benson*, 285 U.S. 22, 57-58 (1932).

224. *Id.*

225. *Id.* at 57.

226. 553 U.S. 723 (2008).

227. *Id.* at 787-90.

228. *Id.* at 789-90.

229. *Id.* at 790.

230. *Id.*

231. *Boumediene*, 553 U.S. at 790.

232. *See id.*

233. 588 N.E.2d 1151, 1152 (Ill. 1992).

234. 588 N.E.2d 1139, 1141 (Ill. 1992).

requiring plaintiffs to attach an affidavit and report from a health professional to their complaints in order to verify they had “a reasonable and meritorious cause”²³⁵ to institute the action.²³⁶ One argument against this requirement was that it delegated the decision of whether the lawsuit had merit to a non-judicial officer and made that decision binding on the court.²³⁷

The Supreme Court of Illinois rejected this argument.²³⁸ It found that the health professional did not decide any legal question, but merely provided certification declaring the meritorious basis for the lawsuit.²³⁹ The majority distinguished an earlier case, *Wright v. Central Du Page Hospital Ass’n*,²⁴⁰ where the court had held unconstitutional a legislative requirement that medical malpractice cases be referred to a review panel prior to filing in courts.²⁴¹ The findings of the review panel, which consisted of a judge, a doctor, and a lawyer, were not binding on the court.²⁴² Nonetheless, the supreme court had held that the panel was performing a judicial function.²⁴³ Contrarily, under the certification procedure, the court stated that there was no sharing in the judicial power by a non-judicial officer because the judge finally determined if the complaint was insufficient.²⁴⁴

In contrast to the majority, the dissenters pointed out that the health care professional effectively decides the merit of the case.²⁴⁵ They rejected the analogy that supplying the certificate was no different from calling an expert to testify at trial.²⁴⁶ To complete the certificate, they argued, the health care professional does more than merely provide evidence as to standard of care.²⁴⁷ The professional actually decides the standard of care.²⁴⁸

235. *McAlister*, 588 N.E.2d at 1152 (quoting ILL. COMP. STAT. ANN. 2 § 622(a)(1) (1987)).

236. *DeLuna*, 588 N.E.2d at 1141.

237. *McAlister*, 588 N.E.2d at 1157.

238. *Id.*

239. *Id.*

240. 347 N.E.2d 736 (Ill. 1976).

241. *McAlister*, 588 N.E.2d at 1154 (citing *Wright*, 347 N.E.2d at 739-40).

242. *Id.*

243. *Id.*

244. *Id.* at 1154, 1157-58.

245. *DeLuna*, 588 N.E.2d at 1149 (Clark, J., dissenting).

246. *Id.*

247. *Id.* at 1149-50.

248. *Id.*

F. Legislators may not strip the courts of jurisdiction so as to destroy their core function

Congress controls the jurisdiction of the federal courts.²⁴⁹ It creates the lower federal courts and can consequently limit their jurisdiction.²⁵⁰ Article III provides that Congress can make exceptions in the Supreme Court's appellate jurisdiction.²⁵¹ In appropriate cases, Congress can remove federal issues from the jurisdiction of the state courts.²⁵² However, can Congress totally isolate the deprivation of constitutional rights from judicial review? Or can it completely transgress limitations imposed by separation of powers and remove the jurisdiction of the courts to decide the constitutionality of congressional or executive action?

In *Ex parte McCardle*,²⁵³ Congress passed legislation stripping the Supreme Court of review in a habeas action after the Court heard oral argument but before it rendered its decision in the case.²⁵⁴ Even though it was clear that Congress stripped the Court of jurisdiction to prevent it from declaring part of its Reconstruction legislation unconstitutional, the Court deferred to Congress and dismissed the appeal.²⁵⁵ However, the Court commented that the petitioner still had other forms of redress available to him.²⁵⁶

The Supreme Court has never directly addressed the issue of whether Congress, consistent with the Constitution, could take away all judicial review. In most cases, the Court has avoided the question by reading the law narrowly so that some form of judicial redress will still be available. For instance, in *Webster v. Doe*,²⁵⁷ the Supreme Court read a statute that deprived the courts of jurisdiction to hear civil service appeals when employees claim that they are unlawfully discharged by the Central Intelligence Agency as not to preclude the courts from hearing constitutional claims involved in the discharge.²⁵⁸

Justice Scalia dissented and read the statute to deprive the Court of jurisdiction to review all claims, whether statutory or constitutional.²⁵⁹ He did not see any constitutional impediment to Congress precluding judicial

249. See U.S. CONST. art. III.

250. *Id.*; see *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

251. U.S. CONST. art. III, § 2, cl. 2.

252. *Tennessee v. Davis*, 100 U.S. 257, 271 (1880).

253. 74 U.S. 506, 514 (1869).

254. *Id.* at 514-15.

255. *Id.* at 513-15.

256. *Id.* at 515.

257. 486 U.S. 592 (1988).

258. *Id.* at 603.

259. *Id.* at 611-614.

review of a constitutional claim.²⁶⁰ Scalia's assertion would turn our constitutional system on its head.²⁶¹ Judicial practice to date leads to the conclusion that the Court ultimately would not allow our system based on the supremacy of the Constitution and the judiciary's penultimate role in enforcing the Constitution to be scrapped by Congress.²⁶²

In *Boumediene v. Bush*,²⁶³ the Supreme Court read the Suspension Clause of Article I, Section 9 to prevent Congress from withholding habeas corpus review in the courts by aliens detained at the Guantanamo military base in Cuba.²⁶⁴ The Court stated:

The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.²⁶⁵

II. DUE PROCESS OF LAW AND PROFESSIONAL ETHICS REQUIRE THAT JUDGES BE NEUTRAL AND INDEPENDENT DECISION-MAKERS

In addition to institutional independence, judges must be independent decision-makers. A clear cut example of a violation of the principle of neutrality is the system of "telephone justice" that existed in the Soviet Union.²⁶⁶ Communist party members would telephone the judge to direct him how to rule in a case.²⁶⁷ At a minimum, due process requires that

260. *Id.* at 615.

261. *Compare id.* at 611-14, *with id.* at 603.

262. *See Johnson v. Robinson*, 415 U.S. 361 (1974).

263. 553 U.S. 723 (2008).

264. *Id.* at 745.

265. *Id.*

266. *See* George P. Fletcher, *Small Steps Toward Reform*, N.Y. TIMES, July 16, 1989, at 11.

267. *Id.* That practice may not be completely dead, at least within the Russian judicial system. A court employee has claimed that the Russian judge who presided over the trial of Mikhail B. Khodorkovsky, a billionaire oil tycoon, was monitored by senior judicial officials who dictated the major rulings in the case. Clifford J. Levy, *Russian Court Pressed Judge in Tycoon's Trial, Assistant Says*, N.Y. TIMES, Feb. 15, 2011, at A4.

judges be neutral.²⁶⁸ Neutrality is also the minimum required by any reasonable system of judicial ethics.²⁶⁹

A. *Judges must be free from self-interest*

The framers of the United States Constitution recognized that federal judges needed to be insulated as much as possible from concerns of self-interest.²⁷⁰ The framers gave judges life appointments and provided that their salaries could not be diminished.²⁷¹ Most state judges serve limited terms and face periodic elections.²⁷² Nonetheless, both types of judges are vulnerable, like all of us, to putting their self-interest first.

1. *Bribery*

The clearest threat to judicial independence is a corrupt judge. Judges who accept bribes in return for favorable rulings in cases undermine the judicial process. Bribery not only affects the results of an individual case, it can also pollute other cases. For instance, the Chicago Greylord scandal in the 1980s presented the fundamental question of whether a judge who takes bribes in criminal cases may convict innocent persons who do not pay the bribes so that the judge's overall record of performance does not make him or her seem "soft on crime."²⁷³ In such a case, persons who did not engage in bribery are directly injured by the greed of a judge who accepts bribes in other cases.²⁷⁴ This has been recently highlighted by the federal prosecution of a Pennsylvania judge for racketeering, bribery, and extortion, where federal prosecutors are claiming that the state judge schemed to send thousands of juvenile offenders to privately-owned corrections facilities.²⁷⁵

In addition, bribery and corruption undermine public confidence in the

268. See generally *Caperton II*, 129 S. Ct. 2252. A debate on whether due process really requires the appearance of neutrality occurred in *In re* marriage of O'Brien, 2011 IL 109,039, 2011 WL 3359713 (Ill. Sup. Ct.). The Court held that there must be a probability of "actual" prejudice to support a petition seeking for-cause substitution of a judge.

269. See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 2.2.

270. See THE FEDERALIST NO. 78 (Alexander Hamilton).

271. See U.S. CONST. art. III, § 1.

272. *Comparing Federal and State Courts*, UNITED STATES COURTS, <http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/ComparingFederalAndStateCourts.aspx> (last visited Sept. 21, 2011).

273. See generally TUOHY & WARDEN, *supra* note 91.

274. See generally *id.*

275. Jon Hurdle & Sabrina Tavernise, *Former Judge Is on Trial In 'Cash for Kids' Scheme*, N.Y. TIMES, Feb. 9, 2011, at A20.

judiciary, which affects public psyche and morale.²⁷⁶ If the judiciary cannot be trusted to uphold and apply the law, who can?

What constitutes bribery can be the subject of differing definitions.²⁷⁷ Clearly, the judge must accept something of value.²⁷⁸ This could be money or it could be something less tangible.²⁷⁹ For example, a judge who imposes a death sentence primarily because it will please his or her superiors and result in his or her advancement is as corrupt as the judge who has accepted a monetary gift from the victim's family.²⁸⁰ But the former may be harder to detect and even harder to discipline than the latter. So long as we have judges, we will have men and women who succumb to bribery and corruption. The challenge is to define bribery in a manner in which it can be identified, punished, and ultimately deterred.

2. Gifts and Other Benefits

In *Citizens United v. Federal Elections Commission*,²⁸¹ the Supreme Court Justices debated among themselves the extent to which bribery—or as the Court called it, quid pro quo contributions—is a part of our electoral system.²⁸² Justice Kennedy suggested that “few if any contributions to candidates will involve quid pro quo arrangements.”²⁸³ He also stated that “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”²⁸⁴

In his dissenting opinion, Justice Stevens pointed out that money or other forms of contributions may themselves be corrupting even if they are not of the quid pro quo variety that violates the criminal laws.²⁸⁵ Corruption can take many forms and operates along a spectrum.²⁸⁶

Justice Stevens' observations about the election process apply to the judicial system. Justice Stevens may well have been influenced by the

276. See *Criminal Division Department of Justice; Committee: House Judiciary; Subcommittee: Crime, Terrorism, and Homeland Security*, CQ Congressional Testimony (2011).

277. See JOHN T. NOONAN JR., BRIBES 702-05 (Macmillan 1984) (describing bribery throughout history and discussing how societies have dealt with the problem. Judge Noonan identified four reasons why bribery should be condemned: (1) Bribery is universally shameful; (2) Bribery is a sell-out to the rich; (3) Bribery is a betrayal of trust; and (4) Bribery violates the divine paradigm).

278. See *id.* at 703.

279. *Id.*

280. *Id.*

281. 130 S. Ct. 876 (2010).

282. *Id.*

283. *Id.* at 908 (citing *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 260 (1986); *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm'n*, 470 U.S. 480, 500 (1985); *Fed. Election Comm'n v. Nat'l Right to Work Comm'n*, 459 U.S. 197, 210 (1982)).

284. *Id.* at 910.

285. See *id.* at 965 (Stevens, J., concurring in part and dissenting in part).

286. *Citizens United*, 130 S. Ct. at 961 (Stevens, J., concurring in part and dissenting in part).

controversy that first brought him to national attention.²⁸⁷ When he was still in private practice, Justice Stevens participated in a commission that investigated two justices on the Supreme Court of Illinois who had received gifts of stock from a defendant in a case pending in that court.²⁸⁸ The commission found that the decision of the supreme court was untainted by the impropriety.²⁸⁹ Nonetheless, the commission recommended that the judges resign, and they did.²⁹⁰

Just before the Illinois supreme court scandal, two Justices on the Supreme Court of the United States were accused of improperly receiving gifts from potential litigants.²⁹¹ Justice Fortas was accused of accepting a \$20,000 fee from a foundation that had ties to a respondent in a pending SEC investigation.²⁹² It later was disclosed that the fee was to be paid to him annually and, after his death, to his wife.²⁹³ Consequently, Justice Fortas resigned from the Court.²⁹⁴ Justice Douglas was similarly threatened with impeachment, but he weathered the storm.²⁹⁵ These two events prompted the United States Judicial Conference, at the urging of Chief Justice Earl Warren, to adopt strict rules regulating off-court activities of federal judges and requiring financial disclosure.²⁹⁶

Justice Stevens' concerns in *Citizens United* are especially poignant given later disclosures that Justice Thomas participated in the case, even though he attended a political retreat several years before the case came to the Supreme Court.²⁹⁷ The retreat was sponsored by donors who may have benefited from the Court's ruling.²⁹⁸ Critics argue that Justice Thomas

287. See generally MANASTER, *supra* note 75.

288. *Id.* at 37-40.

289. See *id.* at 220-21.

290. See *id.* at 238-39. Early in the history of the Supreme Court, Chief Justice John Marshall recused himself in a case involving land titles in the State of Virginia when he stood to benefit financially because of land that he owned. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). He was not so scrupulous when he presided over a case in which he had no financial interest but which was the direct result of his failure to perform a duty required under the law when he was Secretary of State. See *Marbury*, 5 U.S. 137.

291. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 18-20 (Simon & Schuster 1979); BRUCE A. MURPHY, *FORTAS: THE ROSE AND RUIN OF A SUPREME COURT JUSTICE* 545-77 (William Morrow & Co. 1988).

292. WOODWARD & ARMSTRONG, *supra* note 291; MURPHY, *supra* note 291.

293. WOODWARD & ARMSTRONG, *supra* note 291; MURPHY, *supra* note 291.

294. WOODWARD & ARMSTRONG, *supra* note 291; MURPHY, *supra* note 291.

295. WOODWARD & ARMSTRONG, *supra* note 291, at 20; WILLIAM O. DOUGLAS, *THE COURT YEARS: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 359-75 (Random House 1980).

296. BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT – A JUDICIAL BIOGRAPHY* 760-62 (N.Y. Univ. Press 1983).

297. See *Citizens United*, 130 S. Ct. at 965 (Stevens, J., concurring in part and dissenting in part); Eric Lichtblau, *Court Is Asked to Clarify Thomas's Ties to a Retreat*, N.Y. TIMES, Feb. 15, 2011, at A17.

298. Lichtblau, *supra* note 297.

received a “four-day, all-expenses paid trip in sunny Palm Springs,” which he did not adequately disclose on his financial disclosure report for that year.²⁹⁹

Clearly judges who have an economic interest in a case or who have a family member who might benefit from a case should recuse themselves.³⁰⁰ Thus, where a judge’s wife owned stock in a company, he was required to recuse himself from a class action brought by stockholders, even though the wife’s maximum financial interest in the litigation was only \$29.70.³⁰¹ Based on this standard, when a case involving the Pfizer Pharmaceutical Company was before the Court in 2010, Justice Roberts sold stock he owned in the company worth \$15,000 so that he would not be required to recuse himself.³⁰²

Rules strictly limit the financial activities of judges. In the State of Illinois, and in many other states, judges must file yearly statements of their economic interests.³⁰³ Judges are generally forbidden from engaging in outside employment that would interfere with their judicial duties.³⁰⁴ Certain activities, such as teaching a part-time course at a law school, would be considered permissible because it would not compromise a judge’s independence.³⁰⁵ The receipt of honoraria is limited.³⁰⁶ An Illinois judge may receive a total honorarium of no more than \$5,000 in a six-month period.³⁰⁷

One would expect the same strictness when it comes to gifts to judges. However, the Model Code of Judicial Conduct of the ABA is surprisingly flexible on what should be considered an improper “gift” to a judge.³⁰⁸ The rules lean toward disclosure rather than prohibition.³⁰⁹ For instance, free educational seminars provided to judges by private not-for-profit companies are arguably helpful in improving the competence of judges.³¹⁰ But if the company is promoting a particular agenda, it clearly can compromise the independent decision-making of the judges and create an appearance of

299. *Id.* Thomas’s wife worked for a foundation that may have benefitted from the decision.

300. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 2.11(A)(3).

301. *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1313 (9th Cir. 1982), *aff’d*, 459 U.S. 1191 (1983).

302. Adam Liptak & Duff Wilson, *Justices to Examine Rights of Corporations*, N.Y. TIMES, Sept. 29, 2010, at A20.

303. *See* ILL. CODE OF JUDICIAL CONDUCT R. 68 (1986); MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 3.5.

304. *See* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 3.1.

305. *Id.* at R. 3.1 cmt. 1.

306. *See id.*

307. *See id.* at R. 66(A).

308. *See* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 3.13.

309. *Id.*

310. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 3.14 cmt. 1, 2, 3.

impropriety.³¹¹ The new ABA Model Code of Judicial Conduct requires that such remuneration be reported.³¹² However, many would argue that the Code should go further in restricting such “gifts.”

A more flagrant example involved an Ohio-based power company flying Chief Justice Rehnquist of the Supreme Court to Columbus, Ohio to deliver a speech dedicating a judicial center.³¹³ The company had over a dozen environmental cases in the federal courts.³¹⁴ The company flew the Chief Justice in its corporate jet paid for by money raised from a \$75-a-plate dinner after the dedication.³¹⁵ The company argued that it was not bearing the cost of the trip.³¹⁶ A Supreme Court spokeswoman stated that Supreme Court rules “allowed hosting organizations to pay for the travel and accommodations of justices.”³¹⁷ At that time, the Chief Justice was feeble.³¹⁸ Travel by private jet may have eased his travel and security precautions.³¹⁹ Nonetheless, there was certainly an appearance of impropriety that the Chief Justice should have avoided.³²⁰ Critics of the Chief Justice pointed out that the cost for the private jet was over \$3,800, while he could have flown first class on a commercial airliner for no more than \$1,100.³²¹

The ABA Model Code allows a judge to accept reimbursement for travel and lodging expenses for extrajudicial activities permitted by the Code.³²² The act of dedicating a judicial center would appear to be such an activity.³²³ However, there is a limitation on a judge participating in extrajudicial activities if participation would “appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”³²⁴ This would seem to be the case involving the Chief Justice’s travel.³²⁵

311. *See id.*

312. *Id.* at R. 3.14(C).

313. Michael Janofsky, *Ohio Groups Question Justice's Trip On Utility Jet*, N.Y. TIMES, May 15, 2004, at A11.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *See Janofsky, supra* note 313.

319. *See id.*

320. *See id.*

321. *Id.*

322. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 3.14.

323. *See id.*

324. *Id.* at R. 3.1(C).

325. *See id.*

3. Campaign contributions

In many jurisdictions judges are required to be elected.³²⁶ The question of campaign contributions obviously becomes an important issue. Money is required for a judge to conduct an election campaign.³²⁷ Recent candidates for the judicial office sometimes spend over one million dollars in their election campaigns.³²⁸ Additionally, judicial elections have become more contentious. Special interest groups spend money to insure that the judges who are elected share their priorities.³²⁹

Consequently, the Model Code of Judicial Conduct prohibits judges from “personally solicit[ing] and accept[ing] campaign contributions.”³³⁰ In most jurisdictions, candidates for judicial office are required to form election committees to raise money.³³¹ However, if the candidate has knowledge of who made contributions, this knowledge could be viewed as corrupting if those contributors later appear in a case before the successful candidate.³³²

Several courts of appeal have addressed whether the ban on judges and judicial candidates soliciting campaign contributions violates the First Amendment.³³³ The United States Court of Appeals for the Eighth Circuit reviewed a State of Minnesota rule that prohibited a judicial candidate from personally signing letters asking for campaign contributions.³³⁴ The rule also prohibited judicial candidates from addressing appeals for money to large audiences.³³⁵ The court held that the rule violated the First Amendment because it was not narrowly tailored to prevent bias.³³⁶ The contribution was made to the candidate’s *committee*, and the committee did

326. Erwin Chemerinsky & James Sample, *You Get the Judges You Pay For*, N.Y. TIMES, Apr. 18, 2011, at A23 (“In 39 states, at least some judges are elected.”).

327. *See id.*

328. *See id.*

329. *See, e.g.*, Ameet Sachdev, *Politics Creep into Illinois Supreme Court Race; Conservatives Target Justice Thomas Kilbride, who Voted Against Caps on Medical Malpractice Damages*, CHI. TRIB., Aug. 24, 2010, at C17 (explaining it has been reported that in Illinois conservative activists are targeting one of the justices who is up for retention because he voted to overturn an Illinois law that placed monetary caps on damages awarded in medical malpractice cases).

330. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 4.1(A)(8).

331. *See id.* at R. 4.4(A); ILL. CODE OF JUDICIAL CONDUCT R. 67(B)(2) (1994).

332. *See* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 4.1; *see also* Chemerinsky & Sample, *supra* note 326.

333. *See, e.g.*, *Republican Party of Minn. v. White*, 416 F.3d 738, 744 (8th Cir. 2005), *cert. denied*, 546 U.S. 1157 (2006); *Carey v. Wolnitzek*, 614 F.3d 189, 193 (6th Cir. 2010); *Wersal v. Sexton*, 613 F.3d 821, 826 (8th Cir. 2010); *Weaver v. Bonner*, 309 F.3d 1312, 1318 (11th Cir. 2002); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 140-42 (3d Cir. 1991).

334. *Republican Party of Minn.*, 416 F.3d at 766.

335. *Id.*

336. *Id.*

not disclose to the candidate those who either contributed or rebuffed a solicitation.³³⁷ However, the Court of Appeals for the Seventh Circuit refused to use a strict scrutiny standard of review and upheld a Wisconsin regulation that restricted judges from directly soliciting campaign contributions.³³⁸

The Supreme Court of the United States has recognized the corrupting influence of campaign contributions in judicial elections.³³⁹ The Court has held that due process of law may require judges to recuse themselves because of the probability of actual bias created by a large campaign contribution.³⁴⁰ Following a judicial election, the Supreme Court of Appeals of West Virginia reversed a \$50,000,000 judgment against a coal company by a five-to-three vote.³⁴¹ One of the newly-elected judges on the court was in the majority.³⁴² He received a campaign contribution of over \$3 million from and through the efforts of the board chairman and principal officer of the corporation that had been found liable in the trial court for the \$50 million in damages.³⁴³

The Supreme Court of the United States held that due process required the recusal of the state court justice.³⁴⁴ The Court did not question the justice's subjective motives, nor did it determine that there was actual bias.³⁴⁵ Rather, the Court applied an objective standard in determining the due process issue:

Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the

337. *Id.* at 765.

338. See *Siefert v. Alexander*, 608 F.3d 974, 986-90 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011); *Bauer v. Shepard*, 620 F.3d 704, 713 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2010); *Winnig v. Sellen*, No. 10-cv-362-wmc, 2010 WL 4116977 (W.D. Wis. Oct. 19, 2010); see also *Simes v. Ark. Judicial Discipline & Disability Comm'n*, 368 Ark. 577, 581, 585 (2007).

339. See *Caperton II*, 129 S. Ct. 2252, 2266.

340. *Id.* Cf. *In re marriage of O'Brien*, 2011 IL 109,039, 2011 WL 3359713 (Ill. Sup. Ct.) (rejecting an "appearance of impropriety" standard under due process).

341. *Caperton v. A.T. Masey Coal Co. (Caperton I)*, 223 W. Va. 624, 630 (2008).

342. See *Caperton I*, 223 W. Va. at 630 (2008); *Caperton II*, 129 S. Ct. at 2254.

343. *Caperton II*, 129 S. Ct. at 2254.

344. *Id.* at 2267.

345. *Id.* at 2263.

contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.³⁴⁶

The Court, however, refused to enter a bright-line rule, and in cases where the facts are less egregious the judge may be exonerated if he or she does not recuse herself.³⁴⁷

Several states have begun to place restrictions on judges who receive large campaign contributions from attorneys or parties who appear before them. For instance, New York has proposed an amendment to its rules of judicial conduct to disqualify a judge from hearing a case when a lawyer or a litigant has donated more than \$2,500 in the preceding two years to the judge's campaign.³⁴⁸

4. Charitable solicitation

Judges soliciting money for religious or charitable organizations is closely related to judges receiving campaign contributions and direct gifts. Obviously one could try to ingratiate oneself with a judge by making a substantial contribution to the judge's favorite charity or cause. This is particularly true if the judge sits on the board or holds some other position with the organization. The Model Code states that a judge may participate in activities sponsored by educational, religious, charitable, fraternal, or civil organizations that are not conducted for profit and does not interfere with the judge's performance of his or her official duties.³⁴⁹ However, Illinois takes a strict approach and prohibits judges from directly assisting in fund-raising activities for those organizations.³⁵⁰

B. Judges cannot be influenced by their family and friends

Codes of judicial conduct in the United States disqualify judges from adjudicating cases that involve members of their families.³⁵¹ The justification for these rules is self-evident. Judicial independence can also be compromised because of friendship.³⁵² Friendship is, of course, an

346. *Id.* at 2263-64.

347. *See id.* at 2252.

348. William Glaberson, *State Is Cutting Judges' Ties to Lawyers Who Are Donors*, N.Y. TIMES, Feb. 14, 2011, at A1.

349. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 3.7, R. 3.7 cmt. 2.

350. ILL. CODE OF JUDICIAL CONDUCT R. 65(B)(2) (2006).

351. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 2.11(A).

352. *Id.* at (A)(1).

admirable quality, and persons are expected to take care of their friends. But this is not the case with judges. Friendship should not be allowed to have any impact on the independence of a judge.³⁵³ Even if a friendship has no real impact on the decision that a judge makes, judicial independence may be compromised in the public's perception.³⁵⁴ Who is a friend and who is a mere acquaintance may be difficult to differentiate in individual cases.³⁵⁵ Foremost in answering this concern should be the perception of third parties.³⁵⁶

A troublesome problem arose in Chicago where a federal court of appeals criticized a federal trial judge who was presiding over a federal bribery trial involving a state judge.³⁵⁷ The federal judge and the prosecutor were friends.³⁵⁸ They planned to vacation together with their families immediately after the federal bribery trial was concluded.³⁵⁹ The judge and prosecutor never told the defendant or his counsel of their plans.³⁶⁰ The appellate court had no doubts that the trial judge was impartial.³⁶¹ However, the court criticized the judge for his non-disclosure because the defendant and the public might perceive partiality upon learning of such close ties between the prosecutor and the judge.³⁶²

A similar controversy arose in 2004.³⁶³ It was discovered that Justice Scalia went duck hunting in Louisiana with then-Vice President Cheney while a case was on appeal before the Supreme Court involving the Vice President's refusal to disclose whether he had met with private oil company executives before announcing the Bush administration's energy policy.³⁶⁴ Justice Scalia refused to recuse himself from the case on the ground that the case did not involve Mr. Cheney personally but only involved him in his official position.³⁶⁵ Presumably Justice Scalia assumed that the public

353. *See id.*; *see* Charles A. Boyle, *Personal, professional ties compromise judges*, CHI. SUN TIMES, Dec. 14, 2008, at A27.

354. *Id.*

355. *See* John Schwartz, *For Judges on Facebook, Friendship Has Limits*, N.Y. TIMES, Dec. 11, 2009, at A25.

356. *See id.*

357. *United States v. Murphy*, 768 F.2d 1518, 1537-38 (7th Cir. 1985).

358. *Id.* at 1536.

359. *Id.*

360. *Id.* at 1537.

361. *Id.*

362. *Murphy*, 768 F.2d at 1538.

363. *See Cheney*, 541 U.S. 913.

364. *Id.*

365. *See id.* at 916.

would likewise divide a person into two personalities.³⁶⁶ He thought he was hunting with Cheney the man, not Cheney the Vice President.³⁶⁷

After the Court stepped into the question of independent campaign spending by corporations and unions in 2010,³⁶⁸ questions of judicial independence have focused on the activities of the wife of Justice Clarence Thomas.³⁶⁹ Virginia Thomas is the founder and head of a non-profit group that funds conservative causes.³⁷⁰ These activities are very much related to campaign finance restrictions which have been attacked in the courts as violating the First Amendment.³⁷¹ Her activities may or may not be protected by the First Amendment, but it is questionable whether Justice Thomas should participate in cases that decide the issue.³⁷²

Supreme Court Justices decide for themselves whether they can be impartial.³⁷³ There is no review of their decision.³⁷⁴ This practice has been severely criticized and is not the practice in the lower federal and in most state courts.³⁷⁵ The problem is handled differently in the lower federal courts.³⁷⁶ In Illinois, a state statute requires the recusal of a judge for cause and allows a party one opportunity to remove a judge as a matter of right without stating any reason for the action.³⁷⁷ This is an especially desirable provision because the attorney does not run the risk of offending anyone.

A judge's use of his or her position to assist a family member to advance in the legal profession can compromise judicial independence.³⁷⁸ The line between what is permissible and what is impermissible is fine. It may be permissible for a judge to discuss strategy with a family member who is trying a case before another judge so long as the discussion does not breach judicial or attorney confidences.³⁷⁹ However, it would not be permissible for a judge to use information available only through the course of performing judicial duties to assist the family member in representing a

366. *Id.*

367. *Id.*

368. *See Citizens United*, 130 S. Ct. 876.

369. Jackie Calmes, *Activism by Thomas's Wife Could Raise Judicial Issues*, N.Y. TIMES, Oct. 9, 2010, at A1.

370. *Id.*

371. *Id.*

372. *See id.*

373. 28 U.S.C. § 455(a) (2011).

374. *Id.*

375. Editorial, *Can Justice Be Bought? Soaring spending on judicial elections requires tighter rules for disqualifying judges*, N.Y. TIMES, June 16, 2011, at A34.

376. *Id.*

377. 735 ILL. COMP. STAT. ANN. 5/2-1001 (LexisNexis 2011). *See In re marriage of O'Brien*, 2011 IL 109,039, 2011 WL 3359713 (Ill. Sup. Ct.).

378. *See* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 3.10.

379. *See id.*

client.³⁸⁰ A judge may serve as a reference “for an individual based upon the judge’s personal knowledge.”³⁸¹ However, a judge crosses the line when he or she urges potential clients or employers to hire family members.³⁸² Similarly, it may be improper for a judge to attend a trial conducted by a family member as an observer if the judge’s presence could be perceived to influence the outcome.³⁸³

C. Judges should not defer to other judges beyond what is required by the rules of stare decisis

A feature of the common law is that judges follow the law laid down by higher courts.³⁸⁴ When reviewed by a higher court, they follow that court’s orders on remand.³⁸⁵ However, judges alone are accountable for reaching the correct decision in every individual case that comes before them.³⁸⁶ Therefore, judges must be careful that they are not influenced in their decision-making by any other judge, whether their equal or a superior. This means that a judge should not fear the loss of collegiality or, worse, the loss of advancement in the system, depending upon how the judge rules in a particular case.

Separation of powers means that a judge is to be independent of legislative and executive officers.³⁸⁷ Judicial independence in the sense of impartiality also means that a judge should not be improperly influenced by other judges.³⁸⁸ A judge may discuss a legal matter with court staff and other judges sitting on the same court unless the other judges have been previously disqualified from hearing the matter.³⁸⁹ But the judge hearing the case must take reasonable efforts to avoid receiving factual information that is not part of the record.³⁹⁰ A judge must make up his or her own mind and decide the case based on personal analysis and considered opinion.³⁹¹ To do otherwise is a violation of judicial independence.³⁹²

380. *See id.* at R. 3.5.

381. *Id.* at R. 1.3, cmt. n.2.

382. *See id.* at R. 3.10, cmt. n.1.

383. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 3.10, cmt. n.1.

384. 2A FED. PROC., L. ED. § 3:789 (2003).

385. *See id.*

386. *See id.*

387. *See Bond*, 131 S. Ct. at 2365 (stating that “[s]eparation-of-powers principles are intended . . . to protect each branch of government from incursion by the others.”).

388. *See* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 2.4(B).

389. *Id.* at R. 2.9(A)(3), cmt. n.5.

390. *Id.* at R. 2.9(A)(3).

391. *Id.* at R. 2.9(A).

392. *Levy*, *supra* note 267, at A4 (an egregious example, if true, occurred recently in Russia. A court employee has claimed that the Russian judge who presided over the trial of Mikhail B. Khodor-

Not surprisingly, this is not an issue that is likely to be litigated. The parties will never know what subtle pressures may have been exerted on a judge by his judicial colleagues. Nonetheless, an examination of human nature makes this more than a hypothetical concern. If a judge wants to advance in a system where promotion is determined by the vote of colleagues or superiors, the judge may be tempted to please in order to advance.

Appellate courts can exert unfair pressure on a lower court judge in a way that jeopardizes judicial independence. Obviously, a lower court must conform its opinion to the law laid down by a superior court and, when reversed or corrected, follow the directives of the superior court.³⁹³ But an appellate court should never go so far as to dictate a decision outside the proper course of judicial review.³⁹⁴

A case that comes dangerously close to such a transgression is the order of the Court of Appeals for the Seventh Circuit in *In re United States*.³⁹⁵ The opinion can be justified as an effort to see that the orders of the appellate court are effectuated.³⁹⁶ But the action of the court of appeals can also be viewed as dangerously dictating to a trial judge the result a reviewing court wants in a pending case when the reviewing court has not itself heard the evidence.³⁹⁷

The federal district judge first excluded fingerprint evidence in a criminal case on the ground that it was not produced in a timely fashion under the district court's discovery order.³⁹⁸ The court of appeals reversed his decision on the ground that "[e]xclusion of the government's fingerprint evidence was too drastic a remedy."³⁹⁹ On remand, the judge excluded expert testimony about the recovery of latent fingerprints because he suspected the government tampered with the evidence.⁴⁰⁰ The government filed a petition for a writ of mandamus in the court of appeals.⁴⁰¹ The court of appeals, on its own initiative, removed the district judge and ordered that the trial, which was already in progress, be assigned to another trial judge.⁴⁰²

kovsky, a billionaire oil tycoon, was monitored by senior judicial officials who dictated his major rulings in the case).

393. 2A FED. PROC., L. ED. § 3:789.

394. *See id.*

395. 614 F.3d 661 (7th Cir. 2010).

396. *See id.*

397. *See id.*

398. *Id.* at 664.

399. *United States v. Herrera*, 366 Fed. App'x 674, 676-77 (7th Cir. 2010).

400. *Id.* at 662.

401. *Id.*

402. *Id.*

The court of appeals justified its extraordinary order on the ground that it feared that the judge would declare a mistrial occasioned by government misconduct or would exclude the evidence, which would result in an acquittal of the defendant.⁴⁰³ In either case, double jeopardy would bar an appeal.⁴⁰⁴ The appellate court commented that “[t]he transcript of the district judge’s remarks concerning the evidentiary issue reveals a degree of anger and hostility toward the government that is in excess of any provocation that we can find in the record.”⁴⁰⁵ Appellate removal of a lower judge in a pending case assumes that the judge will not follow the law. It comes dangerously close to impairing judicial independence by sending a message that the next trial judge should show more deference to the prosecutor.

D. Judges may not even give the appearance of bias and prejudice

Judges must not even give an appearance of bias or prejudice.⁴⁰⁶ They must proceed impartially without regard to the popularity of the particular laws or litigants and inappropriate outside influences.⁴⁰⁷ Also, judges may not belong to organizations that practice “invidious discrimination.”⁴⁰⁸ If judges have a personal bias against a party or lawyer or if they have personal knowledge of the facts of a case, they should disqualify themselves from hearing the matter.⁴⁰⁹

1. Previous work

Judges must recuse themselves if they have worked on a case prior to being appointed as a judge.⁴¹⁰ In a famous case in 1972 which involved the U.S. Army spying on American civilians, the parties moved to disqualify Justice Rehnquist because of statements he had made before a Senate committee.⁴¹¹ “[A]s an ‘expert witness for the Justice Department,’” he

403. *Id.* at 662, 664.

404. *In re United States*, 614 F.3d at 662, 664.

405. *Id.* at 665.

406. See 28 U.S.C.A. § 455(b)(1) (West 2011); MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at Canon 1; see, e.g., Lim, *supra* note 4 (explaining that the appearance of impropriety is not applied so strictly against administrative law judges who are employed directly by the agency that appears before them and actual prejudice must be shown in that instance. However, where an administrative law judge is personally involved in litigation against the agency, the presumption of impartiality would appear to be breached.); Secretary v. Corey, Notice of Disqualification and Order to Transfer, HUDALJ 10-M-207-FH-27 (Apr. 15, 2011).

407. See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 2.3(A), 2.4(A), cmt. n.1.

408. *Id.* at R. 3.6(A).

409. *Id.* at R. 2.11(A)(1).

410. Laird v. Tatum, 409 U.S. 824, 828 (1972).

411. *Id.* at 824-25.

made statements ““on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information.””⁴¹² Justice Rehnquist made these statements prior to becoming a judge.⁴¹³ He refused to recuse himself because he had not worked directly on the case under consideration.⁴¹⁴ Justice Rehnquist stated that most judges in the United States come to the court with prior experience which touches on their judicial work.⁴¹⁵ Justice Rehnquist further commented that past practice supports him.⁴¹⁶

Justice Black, who was in the Senate and authored the Fair Labor Standards Act, sat as a judge on the case that upheld the Act’s constitutionality.⁴¹⁷ Similarly, Justice Frankfurter, who drafted the Norris-LaGuardia Act that limited labor injunctions, wrote the Court’s opinion in the leading case interpreting that Act.⁴¹⁸ A more famous example is Justice John Marshall, who—as Secretary of State—failed to deliver the commissions that were the subject of his famous opinion in *Marbury v. Madison*.⁴¹⁹

Justice Clarence Thomas similarly raised questions among legal experts when he wrote an opinion deciding whether a law requiring employers to contribute to pension plans of older workers should be applied retroactively.⁴²⁰ As chairman of the Equal Employment Opportunity Commission, Thomas argued that the law should not be applied retroactively, but the Internal Revenue Service had disagreed with him.⁴²¹ Thomas refused to recuse himself on the ground that the arguments were made in different cases involving different companies.⁴²² Whether these are practices that should be emulated is doubtful. Many judges might draw the line differently.

Most recently, Justice Elena Kagan has recused herself from almost half of the cases involving a variety of important issues that the Supreme Court accepted for the 2010 term.⁴²³ Justice Kagan came to the Court after

412. *Id.* at 825-26 (quoting Respondents’ motion for Justice Rehnquist’s recusal).

413. *Id.* at 839.

414. *Id.* at 828, 830.

415. *Laird*, 409 U.S. at 835.

416. *Id.* at 831, 833.

417. *Id.* at 831 (citing *United States v. Darby*, 312 U.S. 100 (1941)).

418. *Id.* at 832 (citing *United States v. Hutcheson*, 312 U.S. 219 (1942)).

419. 5 U.S. 137 (1803).

420. *Lockheed Corp. v. Spink*, 517 U.S. 882, 884 (1996).

421. LAWRENCE S. WRIGHTSMAN, *THE PSYCHOLOGY OF THE SUPREME COURT* 79 (Oxford Univ. Press 2006).

422. *Id.*

423. Robert Barnes, *Recusals could force newest justice to miss many cases*, WASH. POST, Oct. 4, 2010, at A15.

serving as the Solicitor General of the United States, where she was the government's chief legal representative before the Supreme Court.⁴²⁴ She either participated in drafting the briefs in these matters or was otherwise actively involved in them.⁴²⁵

Her action could leave the Court deadlocked in a number of important decisions.⁴²⁶ This eventuality has prompted Senator Patrick Leahy to introduce legislation to allow the Court to assign a retired Justice to hear cases when an active Justice is disqualified.⁴²⁷ This bill differs from President Roosevelt's so-called Court Packing Plan of 1937.⁴²⁸ The Court Packing Plan would have allowed the President to appoint an additional Justice once a sitting Justice reached the age of seventy.⁴²⁹ It was blatantly proposed to allow the President to appoint judges that would be favorable to the New Deal legislation.⁴³⁰ The Leahy proposal is more limited. It would not increase the size of the Court and could be used only to prevent the Court from splitting four-to-four in a case where a sitting Justice was not able to take part in the deliberations.⁴³¹

2. *No personal interest in the case*

Clearly, judges should not sit on cases if they have previously acted as counsel for any of the parties in the matter or served as a material witness to the facts in question.⁴³² In *United States v. Alabama*,⁴³³ a federal appeals court disqualified a trial judge from presiding over a school desegregation case.⁴³⁴ The fact that the judge was African-American, had children in school, was a civil rights lawyer prior to coming to the bench, and had spoken out against segregation as a member of the state senate did not disqualify him.⁴³⁵ Before becoming a judge, he had played a critical role in confirming nominees to the school boards and he had participated as a lawyer in developing some of the facts that were at issue in the lawsuit.⁴³⁶

424. *Id.*

425. *Id.*

426. *See id.*

427. S. 3871, 111th Cong. (2010).

428. *See* WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 132-34 (Oxford Univ. Press 1995).

429. *Id.* at 134.

430. *See id.* at 95 ("Clearly, it is running in the President's mind that substantially all of the New Deal bills will be declared unconstitutional by the Supreme Court. This will mean that everything that this Administration has done of any moment will be nullified.")

431. S. 3871, 111th Cong. § 1 (2010).

432. 28 U.S.C.A. § 455(b)(2) (West 2011).

433. 828 F.2d 1532 (11th Cir. 1987).

434. *Id.* at 1545-46.

435. *Id.* at 1541-43.

436. *Id.* at 1544.

The court felt that he should step down from hearing the case because “he had extrajudicial, personal knowledge of disputed facts”⁴³⁷

Similarly, a federal court of appeals held that a judge who was African-American was not required to recuse herself from a voting rights case filed on behalf of all African-American citizens of the city.⁴³⁸ The judge had no financial interest in the litigation.⁴³⁹ The mere “interest of a judge as a resident, taxpayer, or property owner,” the court said, was not so direct or immediate to qualify her as a “party” to the litigation.⁴⁴⁰

The most famous case concerning a question of recusal of an African-American judge in a civil rights case involved Judge Leon Higginbotham.⁴⁴¹ He sat as a trial judge in an employment discrimination case filed in a federal court in Pennsylvania.⁴⁴² The defendant, who was accused of racial discrimination, argued that the judge should recuse himself because he was African-American, a civil rights leader, and gave a speech before a meeting of African-American historians where he discussed injustices to African-Americans.⁴⁴³ Judge Higginbotham eloquently wrote that the fact that he was African-American and was committed to equal justice under law did not indicate a personal bias that should disqualify him from hearing civil rights cases.⁴⁴⁴ Indeed, carried to its logical end, white judges would similarly be required to disqualify themselves from cases involving racial discrimination.

The issue has arisen more recently in the gay marriage context.⁴⁴⁵ Can an allegedly homosexual judge be impartial in deciding a case involving whether a ban on gay marriages violates the Constitution? The answer is, of course, that the homosexual judge can be impartial to the same extent that a heterosexual judge can be impartial in the same case.

437. *Id.* at 1545-46.

438. *In re City of Houston*, 745 F.2d 925, 926-30 (5th Cir. 1984).

439. *Id.* at 928.

440. *Id.* at 930.

441. *Commonwealth v. Local Union 542*, 388 F. Supp. 155 (E.D. Pa. 1974).

442. *Id.* at 156-57.

443. *Id.* at 157.

444. *Id.* at 163, 181-82.

445. Ian Lovett, *California Judge Upholds a Ruling on Gay Marriage*, N.Y. TIMES, June 15, 2011, at A18. A challenge was made to a ruling that struck down California’s ban on gay marriage on the ground that the judge who ruled on the matter had a ten-year relationship with another man. However, there was no evidence that the judge intended to marry the other man and the district court ruled that the single characteristic that the judge was gay did not bar him from ruling on a case involving same-sex marriage.

3. *Impartiality of the judge*

Judges must conduct themselves in an impartial manner on the bench.⁴⁴⁶ Each party has the right to be heard either in person or through a lawyer.⁴⁴⁷ A judge should preside over a trial with dignity and courtesy.⁴⁴⁸ The Model Code requires that a judge promote public confidence in the “integrity” of the judiciary.⁴⁴⁹ “Integrity” is defined as “probity, fairness, honesty, uprightness, and soundness of character.”⁴⁵⁰

A judge may encourage parties to settle a matter before the court but may not unduly coerce a party into a settlement.⁴⁵¹ There is a debate in the United States as to how far a judge may proceed in effectuating a settlement between the parties.⁴⁵² Facts or circumstances may arise during settlement discussions that could prejudice a judge if the case is not settled and the judge later has to decide the case on the merits.⁴⁵³ There is no bright line that can be drawn in these situations. Often in the United States, a judge will refer a matter to another judge or a magistrate to effect a settlement to prevent any appearance of impartiality if the case does not settle and goes to trial.⁴⁵⁴

4. *Ex parte communications*

Ex parte communications with parties or their lawyers concerning pending or impending matters is generally impermissible unless there is full disclosure and consent of all the parties.⁴⁵⁵ A judge may not seek the written advice of an outside legal expert on the law without first notifying the parties and giving them a reasonable time to object.⁴⁵⁶ In the United States, the parties control the question of expert testimony.⁴⁵⁷ Under normal circumstances, each party decides independently whether expert testimony would assist the court or the jury in deciding the issues and each side makes

446. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 2.2.

447. 28 U.S.C.A. § 1654 (West 2011).

448. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 2.8(B).

449. *Id.* at R. 1.2.

450. *Id.* at Terminology.

451. *Id.* at R. 2.6(B).

452. *See, e.g.*, United States v. Bruce, 976 F.2d 552, 555-58 (9th Cir. 1992) (holding that it is improper for a court to be involved in the plea bargaining process).

453. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 2.6, cmt.3.

454. *Settlement Conferences*, U.S. DIST. COURT N. DISTRICT OF CAL., <http://cand.uscourts.gov/settleconf> (last visited Nov. 10, 2011); Justice Christopher C. Connor, *Judicial Preferences*, http://www.pamd.uscourts.gov/prefs/cc_prefs.htm (last visited Nov. 10, 2011).

455. *See* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 2.9(A).

456. *Id.*

457. *See* FED. R. CIV. P. 26(a)(2)(A)-(B), (b)(4)(D); ONTI, Inc. v. Integra Bank, No. Civ.A. 14514, 1998 WL 671263, at *3 (Del. Ch. Aug. 25, 1998).

the decision on what expert to use.⁴⁵⁸ Thus, it is quite normal for a defendant and a plaintiff both to call different experts on the same issue. The experts' testimony can sometimes be conflicting. In Europe, the expert is usually under the control of the court.⁴⁵⁹

A judge may discuss a legal matter with court staff and other judges sitting on the same court⁴⁶⁰ as long as the other judge has not previously been disqualified from hearing the matter and the judge hearing the case takes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility personally to decide the matter.⁴⁶¹

Judges may not conduct their own investigations of a case outside the courtroom.⁴⁶² Nor may they solicit the advice of experts on technical matters that come before the court.⁴⁶³ The new Model Code explicitly states that a judge shall not attempt to check facts involved in a case on the Internet.⁴⁶⁴ Clearly, a judge may not prejudge a case by trying to learn facts that are not in evidence through the Internet, just as it would not have been proper for the judge to consult newspapers or journals to resolve a fact in dispute in a case.

However, matters that are the subject of judicial notice would appear to be matters that a judge could formulate by checking the Internet, just as a judge could check commonly-used directories or almanacs for matters of general knowledge.⁴⁶⁵ The judge must be open about the source of the information with all the parties in the case.⁴⁶⁶ Additionally, the accuracy of the information from the Internet must be unquestioned.⁴⁶⁷

The rules requiring a judge to be impartial require that a judge be especially cognizant of avoiding any appearance of impropriety.⁴⁶⁸ The concept can take many forms. During my first year out of law school, I clerked for a federal judge in Oregon. The courthouse was an older

458. See FED. R. CIV. P. 26(a)(2)(A)-(B), (b)(4)(D); *ONTI, Inc.*, 1998 WL 671263, at *3.

459. See, e.g., Civil Procedure Rules, 2010, R. 35.3(1)-(2); 35.4(1) (U.K.).

460. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 2.9(A)(3).

461. *Id.* at R. 2.9(A)(3), cmt. n.5.

462. *Id.* at R. 2.9(C), cmt. n.6.

463. *Id.* at R. 2.9(A)(2).

464. *Id.* at R. 2.9 cmt. n.6.

465. See FED. R. EVID. 201.

466. *Id.*

467. See *id.* at 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned."); see also *Scanlan v. Texas A&M*, 343 F.3d 533, 536-37 (5th Cir. 2003) (holding that the trial court was correct in not taking judicial notice of a fact accessed through the internet on the ground that it was not "capable of accurate and ready determination.").

468. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 1.2.

building and only had one bank of elevators that was used by everyone. The judge always had me check to see if any litigants or attorneys were waiting for the elevator before he took it. If the elevator stopped and a litigant or attorney got on the elevator, he would get off. The judge stated that he did not want the elevator doors to open and for someone to see him alone with a litigant or their attorney. To an outsider looking in, this might appear excessive. Nonetheless, it explicitly upholds the principle of impartiality—judges should always be concerned about how third parties perceive their impartiality and independence.

E. Judges should normally refrain from extrajudicial comment

Judges may not speak out on issues in a way that would compromise their neutrality in cases before them. The Model Code of Judicial Conduct forbids judges from publicly commenting on pending or impending proceedings in any court.⁴⁶⁹ The Code also forbids judges from making any statements that manifest bias or prejudice, especially those based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.⁴⁷⁰

The Supreme Court of the United States has drawn a distinction between what a judge does on the bench and what a judge may do in an election campaign. In *Nevada Commission on Ethics v. Carrigan*,⁴⁷¹ the Supreme Court held that a state statute requiring a state legislator to recuse himself when he had a personal interest in legislation did not violate the First Amendment.⁴⁷² A state legislator had challenged a Nevada law that prohibited a legislator who had a conflict from voting on the proposal and also from advocating its passage or failure.⁴⁷³ The Court compared the state statute to federal statutes requiring the recusal of judges and commented that there did not appear to be any serious challenges to judicial recusal statutes as unconstitutionally restricting judges' First Amendment rights,⁴⁷⁴ unlike restrictions on a judge's speech during a judicial election campaign.⁴⁷⁵ Clearly, comment about the merits of a pending or impending case before a judge would appear to be beyond any protection provided by the First Amendment.⁴⁷⁶

469. *Id.* at R. 2.10(A).

470. *Id.* at R. 2.3(B).

471. 131 S. Ct. 2343 (2011).

472. *Id.* at 2346, 2349.

473. *Id.* at 2346-47.

474. *Id.* at 2348-49.

475. *See Republican Party of Minn.*, 536 U.S. at 788.

476. *Cf. Bauer*, 620 F.3d at 710-11, 713; *Carey*, 614 F.3d at 200-01.

During the same year that Justice Scalia went duck hunting with then-Vice President Cheney,⁴⁷⁷ Justice Scalia recused himself from deciding a case involving whether the Pledge of Allegiance to the United States Flag, recited in most schools, violated the First Amendment because it referenced God.⁴⁷⁸ Justice Scalia had given a public speech where he stated his views of the lower court decision in that matter.⁴⁷⁹ In this instance, Justice Scalia's comments directly related to a pending case. His action in recusing himself from participation in the case because of his earlier comments was in accord with the standards of the Model Code of Judicial Conduct.⁴⁸⁰

1. *Comments on matters of public interest*

Whether judges can comment on a matter of public interest often arises in the judicial selection process. In the federal system, judges are appointed by the President but confirmed by the Senate.⁴⁸¹ The Senate holds hearings where the candidate is questioned about his or her views on important public issues.⁴⁸² Many candidates have refused to answer these questions.⁴⁸³ Clearly the confirmation process is compromised when candidates refuse to answer questions that probe the candidate's prejudices and biases. Most commentators would likely agree that stating one's views about general political and legal matters in a confirmation hearing is not a breach of the professional standards.⁴⁸⁴ Recent court decisions on the free speech rights of judges during an election campaign would seem to support this view.⁴⁸⁵

Controversy arose in Illinois when a respected African-American judge attended a meeting of a respected civil rights organization and recommended rhetorically that any African-American who did not vote for the African-American candidate for mayor should be hung.⁴⁸⁶ The judge was charged with making improper comments.⁴⁸⁷ While intemperate, the

477. Michael Janofsky, *Scalia's Trip With Cheney Raises Questions of Impartiality*, N.Y. TIMES, Feb 6, 2004, at A14.

478. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 3-5 (2004); Linda Greenhouse, 8 *Justices Block Effort To Excise Phrase In Pledge*, N.Y. TIMES, June 15, 2004, at A1.

479. Greenhouse, *supra* note 478.

480. See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 2.10(A).

481. U.S. CONST. art. II, § 2, cl. 2.

482. *Judicial Nominations and Confirmations*, U.S. SENATE, <http://judiciary.senate.gov/nominations/judicial.cfm> (last visited Nov. 14, 2011).

483. See Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38, 38 (2006).

484. See *id.* at 38, 47-48.

485. See *Republican Party of Minn.*, 536 U.S. at 788.

486. See *Pincham v. Ill. Judicial Inquiry Bd.*, 681 F. Supp. 1309, 1312 (1988), *aff'd*, 872 F.2d 1341 (7th Cir. 1989).

487. See *id.*

remarks did not reflect on any issue that would have reasonably been before the judge and should fall within the protections of the First Amendment.⁴⁸⁸

Similarly, a Mississippi judge wrote a letter to a newspaper and radio station alleging that gay men and lesbian women should be placed in mental institutions.⁴⁸⁹ The Supreme Court of Mississippi held that the judge's comments were protected by the First Amendment.⁴⁹⁰ As for casting doubt on the judge's impartiality, the court commented that rather than concealing his prejudices, the judge displayed them, which has the benefit of allowing litigants to seek recusal.⁴⁹¹

This reasoning accords with the Supreme Court's analysis in *Republican Party*.⁴⁹² Judges are thinking human beings. It is not expected for them to be without their own opinions. Therefore, it may be the better policy to let everyone know where they stand with a particular judge so that if the judge's bias really does impede the fairness of the judgment the parties can take appropriate action before the damage is done.

The ABA Model Rules and most state rules prohibit judges and judicial candidates from "act[ing] as a leader in, or holding an office in, a political organization," "mak[ing] speeches on behalf of a political organization," or "publicly endors[ing] or oppos[ing] a candidate for any public office."⁴⁹³ These provisions are vulnerable on First Amendment grounds as a result of *Republican Party*.⁴⁹⁴ Courts of appeal have held broad restrictions on the political activities of judges to be unconstitutional.⁴⁹⁵ They argue that there is no real distinction between judges who participate in political party activities and judges who state their views on disputed legal and political issues.⁴⁹⁶

The Court of Appeals for the Seventh Circuit has drawn a distinction between a sitting judge stating his or her affiliation in a political party and a sitting judge endorsing a political candidate, holding the regulation of the former to be unconstitutional and the regulation of the latter to be constitutional.⁴⁹⁷ In *Siefert v. Alexander*,⁴⁹⁸ the Seventh Circuit held that a Wisconsin rule that prohibited judges from announcing their affiliation with

488. Cf. *Bauer*, 620 F.3d at 710-13; *Carey*, 614 F.3d at 200-01; see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908-11, 927 (1982).

489. *Miss. Comm'n on Judicial Performance v. Welkerson*, 876 S.2d 1006, 1008 (Miss. 2004).

490. *Id.* at 1016.

491. *Id.* at 1015-16.

492. 536 U.S. at 781-82.

493. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 4.1(A)(1)-(3).

494. 536 U.S. at 781-82.

495. See, e.g., *Carey*, 614 F.3d at 204, 207; *Wersal*, 613 F.3d at 833-34, 838-39, 841-42.

496. *Carey*, 614 F.3d at 197, 201-02; see *Wersal*, 821 F.3d at 828-29, 831-34, 838-39, 841-42.

497. *Siefert*, 608 F.3d at 981-83, 988.

498. 608 F.3d 974.

a political party violated the First Amendment, but held that endorsement is given less legal protection under the First Amendment.⁴⁹⁹ The Wisconsin rule that prohibited a sitting judge from endorsing partisan candidates was necessary to preserve the impartiality of a judge.⁵⁰⁰ Endorsement, the court stated (quoting the ABA comments) involves ““abusing the prestige of judicial office to advance the interests of others.””⁵⁰¹ The court also cited Supreme Court cases that allowed the government to regulate the speech of public employees when it directly related to their employment duties.⁵⁰² The court did not decide whether the rule would be unconstitutional as applied to judicial candidates.⁵⁰³

2. Campaign promises or commitments

Judges are elected in the State of Illinois and in many other states.⁵⁰⁴ They campaign for the office.⁵⁰⁵ Are judicial candidates limited in what they can say during the selection process? Do judicial candidates enjoy First Amendment rights? Does the public have a right to know where the candidates stand on important issues?

Illinois had a former rule with a number of restrictions.⁵⁰⁶ It forbade judicial candidates from making pledges or promises of conduct in office other than the faithful and impartial performance of the office.⁵⁰⁷ Candidates could not announce their views on disputed legal or political issues, but it provided the candidates could announce their views on measures to improve the law, the legal system, or the administration of justice.⁵⁰⁸

499. *Id.* at 981-83, 988.

500. *Id.* at 983-86, 988.

501. *Id.* at 983-84 (quoting MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at R. 4.1 cmt. n.4).

502. *See id.* at 980 (citing U.S. Civil Serv. Comm’n v. Letter Carriers, 413 U.S. 548 (1973); *Garcetti*, 547 U.S. 410; *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

503. *Siefert*, 608 F.3d at 991 (Rovner, J., dissenting).

504. *See, e.g.*, *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 225 (7th Cir. 1993); *Judicial Selection in the States: Alabama*, AMERICAN JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/index.cfm?state=AL (last visited Oct. 20, 2011); *Judicial Selection in the States: Ohio*, AMERICAN JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/index.cfm?state=OH (last visited Oct. 20, 2011).

505. *See, e.g.*, *Buckley*, 997 F.2d at 226 (citing Ill. S. Ct. R. 67(B)(1)(c)); *Judicial Selection in the States: Alabama*, *supra* note 504; *Judicial Selection in the States: Ohio*, *supra* note 504.

506. *Buckley*, 997 F.2d at 225.

507. *Id.*

508. *Id.*

This rule was struck down by the Seventh Circuit Court of Appeals because it unduly restricted First Amendment rights.⁵⁰⁹ The court noted that judges could not discuss their judicial philosophies, due process of law, economic rights, criminal procedure, or prison conditions.⁵¹⁰ Nor could they talk about economics, race relations, health care, or foreign policy—all of which involve disputed legal or political issues.⁵¹¹ The court found the restriction to be overbroad.⁵¹² The Illinois rule now restricts only those statements “that commit or appear to commit the candidate with respect to cases, controversies or issues within cases that are likely to come before the court.”⁵¹³ Judges or judicial candidates obviously should not announce their views about cases that are pending or are likely to be filed with the court.⁵¹⁴

In *Republican Party of Minnesota*, the Supreme Court of the United States interpreted the First Amendment similarly to the way the court of appeals did in *Buckley*.⁵¹⁵ The Court held that a Minnesota rule prohibiting judicial candidates from announcing their views on disputed legal and political issues violated the First Amendment.⁵¹⁶ The State had argued that the law was necessary to ensure that judges remained “impartial.”⁵¹⁷ The Court discussed Minnesota’s meaning of “impartial.”⁵¹⁸ If the state defined “impartial” as meaning that judges should not be biased against a party, the Supreme Court stated that the “announce” restriction was not narrowly tailored to prevent this type of bias as it did not focus on the parties but rather on the rule of law.⁵¹⁹

If by “impartial” Minnesota meant that judges should not have a preconception on any legal issue, the “announce” restriction stated a goal that was impossible to achieve.⁵²⁰ The Supreme Court observed that:

A judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law Indeed, even if it were possible to select judges who

509. *Id.* at 227-31.

510. *Id.* at 230.

511. *Buckley*, 997 F.2d 224 at 230.

512. *Id.*

513. ILL. CODE OF JUDICIAL CONDUCT Canon 7, R. 67A(3)(d)(i).

514. *Cf. Bauer*, 620 F.3d 704; *Carey*, 614 F.3d 189.

515. *See generally Republican Party v. White*, 536 U.S. 765 (2002).

516. *Id.* at 788.

517. *Id.* at 775-79.

518. *Id.* at 771-78.

519. *Id.* at 775.

520. *White*, 536 U.S. at 777.

did not have preconceived views on legal issues, it would hardly be desirable to do so.⁵²¹

Finally, if by “impartial” Minnesota meant that judges should be open-minded so that litigants are given an equal chance to convince the court of the rightness of their position, the Supreme Court stated that the law did not narrowly address this issue.⁵²² The Supreme Court commented that a candidate’s whole life record, including prior writings and speeches, were available to the public.⁵²³ Therefore, a restriction forbidding a judge from announcing his or her views during an election campaign was singularly ineffective to achieve the state’s desired objective.⁵²⁴

On remand, the court of appeals held that the Minnesota rules prohibiting judicial candidates from identifying themselves as members of a political party, attending political gatherings, seeking, accepting, or using endorsements from political organizations, and rules that prohibited judicial candidates from signing letters for political donations or asking for funds before large groups of persons, violated the First Amendment.⁵²⁵ They were not narrowly tailored to prevent bias.⁵²⁶ The donations were made to the candidate’s committee and the committee did not disclose to the candidate either those who contributed or who rebuffed a solicitation.⁵²⁷ Similarly, the United States Court of Appeals for the Eleventh Circuit has held that a state rule prohibiting judicial candidates from negligently making either false statements or true statements that were misleading or deceptive did not leave enough “breathing space” to protect the candidate’s speech during a campaign.⁵²⁸

The Supreme Court’s opinion in *White* was distinguished by a subsequent district court decision in Wisconsin.⁵²⁹ The Wisconsin Code of Judicial Conduct prohibited judges from making “pledges, promises, or commitments” on how they would rule in specific situations.⁵³⁰ This rule was found not to be overbroad and did not facially violate the First

521. *Id.* at 777-78.

522. *Id.* at 778-79.

523. *Id.* at 779.

524. *Id.* at 778.

525. *Republican Party of Minn. v. White* 361 F.3d 1035 (8th Cir. 2004).

526. *Id.* at 1043.

527. *Republican Party of Minn.*, 416 F.3d at 765 (8th Cir. 2005); *see Carey*, 614 F.3d 189; *Wersal*, 613 F.3d 821; *Seifert*, 608 F.3d 974.

528. *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002).

529. *Duwe v. Alexander*, 490 F. Supp. 2d. 968 (W.D. WI 2007) (distinguishing *Republican Party of Minn.*, 361 F.3d 1035).

530. Wis. SUP. CT. R. 60.06(3)(b).

Amendment.⁵³¹ The district court held that the rule furthered the state's legitimate goal of "open-mindedness" in its judges.⁵³² The court stated:

There is a very real distinction between a judge committing to an outcome before the case begins, which renders the proceeding an exercise in futility for all involved, and a judge disclosing an opinion and predisposition before the case. A disclosure of a predisposition on an issue is nothing more than acknowledgment of the inescapable truth that thoughtful judicial minds are likely to have considered many issues and formed opinions on them prior to addressing the issue in the context of a case.⁵³³

Another part of the Wisconsin rule that required recusal of a judge if he or she made a campaign statement that "appears to commit" him or her on an issue in a case was held to be unconstitutionally vague and overbroad.⁵³⁴

The Court of Appeals for the Seventh Circuit has upheld an Indiana rule prohibiting judges and judicial candidates, in connection with cases, controversies, or issues that are likely to come before the court, from making "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."⁵³⁵ The Court stated:

Under Indiana's language, judges and candidates can tell the electorate not only their general stance ("tough on crime" or "tough on drug companies") but also their legal conclusions ("I would have joined Justice White's dissent in *Roe*" or "the death penalty should be treated as cruel and unusual punishment" or "I am a textualist and will not resort to legislative history" or "I will follow *stare decisis*" or "I am a progressive who will use a living-constitution approach"). Judges who have announced these views, on or off the bench, sit every day without being thought to have abandoned impartiality. Indeed, judges who have announced legal views in exceptional detail, by writing a treatise about some subject (Weinstein on Evidence, or Martin on Bankruptcy) have not made an improper "commitment," even though a litigant can look up in the treatise exactly how the judge is apt to resolve many disputes. A judge who promises to ignore the facts and the law to pursue his

531. *Duwe*, 490 F. Supp. 2d at 975.

532. *Id.*

533. *Id.* (citing *White*, 536 U.S. at 779).

534. *Id.* at 976-77.

535. *Bauer*, 620 F.3d at 714-15.

(or his constituents') ideas about wise policy is problematic in a way that a judge who has announced considered views on legal subjects is not. The commits clauses condemn the former and allow the latter.⁵³⁶

The Seventh Circuit distinguished the Sixth Circuit's opinion in *Carey v. Wolnitzek*,⁵³⁷ which invalidated Kentucky's "commit" provision as overbroad.⁵³⁸ Kentucky more broadly prohibited judges or judicial candidates from "intentionally or recklessly mak[ing] a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way in a case, controversy, or issue that is likely to come before the court"⁵³⁹ The Seventh Circuit distinguished the Kentucky rule from the Indiana rule.⁵⁴⁰ The Kentucky rule applied to *all* commitments, whereas the Indiana rule applied only to "commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."⁵⁴¹ The Seventh Circuit also rejected the argument that this clause was itself too vague to provide guidance to a judge or judicial candidate.⁵⁴²

All of these rules and rulings have been severely tested in the 2011 race for the Wisconsin Supreme Court which focused on whether voters favored Governor Walker's attempts to limit collective bargaining rights of public employees.⁵⁴³ The incumbent justice stated that "he would 'complement' Walker and the new Republican-controlled Legislature" and outside groups had spent \$3.5 million dollars on the election.⁵⁴⁴ Regardless of the First Amendment and a technical breach of any rules, thoughtful observers have to question whether this is the way to select justices and, when selected, whether these justices are fit to sit on a case that involves any issue of public policy.

536. *Id.* at 715-16.

537. 614 F.3d 189.

538. *Id.* at 193-94.

539. *Id.* at 195 (quoting KY. SUP. CT. Canon 5B(1)(c)).

540. *Bauer*, 620 F.3d at 710.

541. *Carey*, 614 F.3d at 209 (Appendix C) (quoting IND. CODE OF JUDICIAL CONDUCT Canon 4, R. 4.1(A)(13)).

542. *Bauer*, 620 F.3d at 716-18. The court of appeals also upheld the Indiana rule that required judges who violate the commits clause to recuse themselves. *Id.* The court stated that this clause did not present a constitutional argument at all. *Id.*

543. Nicholas Riccardi, *Wisconsin High Court Election Turned on It's Head*, CHI. TRIB., Apr. 8, 2011.

544. Nicholas Riccardi, *14,300 Votes Discovered in Wisconsin County*, CHI. TRIB. Apr. 8, 2011, § A, at 14.

3. *Comments to press about pending case*

In *United States v. Microsoft Corp.*,⁵⁴⁵ the court of appeals chastised and removed a federal district court judge from the Microsoft anti-trust case because the judge made *ex parte* comments to the press about the case and the defendant while the case was pending.⁵⁴⁶ The problem was exacerbated by the fact that the conversations were secret and the press was told to keep silent about the conversations.⁵⁴⁷ Here, the court of appeals found that the only possible reason why the judge had initiated these conversations was to ingratiate himself with the reporters.⁵⁴⁸ It was especially bad because the parties to the litigation had no knowledge that it was going on or to counter its effects.⁵⁴⁹ The court properly removed the judge from future participation in the case.⁵⁵⁰

III. INDEPENDENCE IS NOT A PLENARY VIRTUE

All judges must be neutral in finding the facts and applying the law to cases. However, all judges are expected to bring their backgrounds and experience to the bench. Judges do not decide cases in a vacuum. For this reason it is good to have judges who reflect a variety of backgrounds on the bench.

Justice Thurgood Marshall was the first African-American Justice on the Supreme Court.⁵⁵¹ He had been general counsel for the NAACP Legal Defence Fund.⁵⁵² He litigated most of the major civil rights cases in the United States before his appointment to the Supreme Court.⁵⁵³ He brought a wealth of practical insights to the Court, which unfortunately are missing today because no current Justice has the array of experiences he had. Sandra Day O'Connor was the first woman on the Supreme Court.⁵⁵⁴ She brought her experiences to not only cases involving sex discrimination, but also to other issues where women may have unique perspectives, such as abortion-related cases.⁵⁵⁵ Also, it is important that judges do not become

545. 253 F.3d 34 (D.C. Cir. 2001).

546. *Id.* at 46.

547. *Id.* at 112.

548. *Id.*

549. *Id.* at 112-13.

550. *Microsoft Corp.*, 253 F.3d at 112-14.

551. Neil Lewis, *A Slave's Great Grandson Who Used Law to Lead the Rights Revolution*, N.Y. TIMES, June 28, 2011.

552. *Id.*

553. *Id.*

554. See generally JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE (Harper Collins 2005).

555. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

isolated from the rest of society. We want judges who understand humanity and the problems and challenges government officials and working people face on a daily basis. Judicial decisions must be grounded in the real world.

Judge Leon Higginbotham wrote a famous letter to Justice Clarence Thomas when President George H.W. Bush appointed Thomas to the Supreme Court.⁵⁵⁶ Judge Higginbotham reminded Justice Thomas that as only the second African-American man on the Supreme Court, he should not forget the historical struggles of African-American persons for equality in the United States and that he should remember what it is like “to be poor and black in America, and especially to be poor because you are black.”⁵⁵⁷

Judges must rise above their backgrounds in the pursuit of truth and justice. A shining example is Judge Sirica, who was a life-long Republican.⁵⁵⁸ When he was assigned to hear the Watergate break-in cases, he pursued them until he brought down a fellow Republican, President Richard Nixon.⁵⁵⁹

IV. HELPING JUDGES WHO HAVE IMPAIRMENTS

Many judges get into professional trouble because of problems with alcohol and drugs. This behavior can affect their private lives and carry over into the performance of their duties on the court. It has been stated that while 10% of the population in the United States suffer from some type of alcohol or drug abuse, 15-20% of judges and lawyers do.⁵⁶⁰ Some 50% of all disciplinary actions against judges and lawyers involve alcohol or drug abuse.⁵⁶¹ The ABA and many states are now establishing Lawyer (and Judicial) Assistance Programs where judges and lawyers can seek help and the matter will be handled confidentially.⁵⁶² Also, the identity of attorneys and judges who refer their colleagues for assistance will be kept confidential.⁵⁶³

556. A. Leon Higginbotham Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992).

557. *Id.* at 1027-28.

558. Anthony J. Gaughan, *Watergate, Judge Sirica, and the Rule of Law*, 42 MCGEORGE L. REV. 343, 351 (2011).

559. *Id.* at 344-45.

560. Alcohol and Drug Abuse, LAWYERS' ASSISTANCE PROGRAM, <http://www.illinoislap.org/alcohol-and-drug-abuse> (last visited Sept. 25, 2011).

561. *Id.*

562. *Id.*

563. *Id.*

V. JUDGING IN AN UNJUST ENVIRONMENT

Judicial independence can be impaired by an unjust legal system. What happens when a formal legal system exists but it is subverted so that judges cannot reach just results? How must judges confront an unjust legal system? The problem is presented in stark relief by Nazi Germany, where judges continued to dispense formal justice.⁵⁶⁴ But their decisions could not be justified according to any objective standard of justice.⁵⁶⁵ The problem also existed in Communist and other authoritarian regimes.⁵⁶⁶ Ingo Müller argued that not only did German judges enforce the Nazi laws as written, but they helped the Nazis to power by bending German law.⁵⁶⁷ They actively interpreted the laws and facts of cases to provide support to the Nazi regime.⁵⁶⁸

Even today the Germans have failed to come to terms with this breach.⁵⁶⁹ They have glossed over and covered up the truth in protecting former judges.⁵⁷⁰ For instance, Germans refused to vacate the conviction and grant posthumous rehabilitation to Carl von Ossietzky.⁵⁷¹ Ossietzky won the 1935 Nobel Peace Prize.⁵⁷² He subsequently died in a concentration camp in 1938 after he was convicted for his pacifism and opposition to German rearmament.⁵⁷³

Judges in Latin America have actively aided authoritarian regimes by turning their back on victims of torture and oppression.⁵⁷⁴ Despite a strong tradition of using the writ of habeas corpus, judges installed after the Argentine military coup in 1976 turned down over five thousand petitions for the writ in Buenos Aires alone during the years of 1976 to 1979.⁵⁷⁵ During the entire period the military was in power in Argentina (1976-1983), only two persons were released because of habeas corpus.⁵⁷⁶ One was the journalist, Jacobo Timmerman.⁵⁷⁷

564. See INGO MULLER, *HITLER'S JUSTICE-THE COURTS OF THE THIRD REICH* 46-47 (Harvard Univ. Press 1991).

565. *Id.* at 48.

566. *Id.* at 72-73.

567. *Id.*

568. *Id.* at 72-75.

569. Stephen Kinzer, *Exoneration Still Eludes An Anti-Nazi Crusader*, N.Y. TIMES, Jan. 13, 1996, at A2.

570. *Id.*

571. *Id.*

572. *Id.*

573. *Id.*

574. NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 386-87 (Farrar, Straus, Giroux 1984).

575. *Id.* at 396.

576. *Id.* at 397.

577. *Id.*

Similar stories can be recounted about judges in the antebellum United States and apartheid South Africa.⁵⁷⁸ One can also ask the same question in the United States today about the various military tribunals that have been established to review the detention of accused terrorists.⁵⁷⁹ To what extent do these tribunals act as independent arbiters in deciding the rights and interests of accused persons?

The unfortunate conclusion we must face is that nowhere in the world have judges in any large numbers stood up for justice or resisted human rights abuses when it would mean the loss of their jobs. What is even more disturbing is that judges rarely do come forward, even after the fact, and admit that they may have been complicit in an unjust regime. Dean Martha Minow observes in her comprehensive study, *Between Vengeance and Forgiveness*, that members of the South African Truth and Reconciliation Commission invited judges to offer submissions on their complicity with apartheid, but no judges sought amnesty for their individual contributions to the injustices perpetrated by the apartheid regime.⁵⁸⁰

Admittedly, it is difficult to determine what constitutes a violation of human rights. The German judge, Oswald Rothaug, was convicted by the Nuremberg court of committing a crime against humanity for sentencing an elderly Jewish man to death for allegedly having sexual relations with a young German woman.⁵⁸¹ Judge Rothaug claimed he was only following German law and criminal procedure.⁵⁸² But when is simply following the law an excuse? The Nuremberg judges who convicted Judge Rothaug of a crime against humanity themselves relied upon an ex post facto application of the criminal law.⁵⁸³ Doesn't an ex post facto application of the criminal law itself violate human rights?

Similarly, judges in the United States routinely impose the death penalty even though in some areas of the world, such as the European Union, application of the death penalty is held to violate human rights.⁵⁸⁴

578. See, e.g., John P. McCormick, *Book Review: Judging the Judges, Judging Ourselves*, 25 N.Y.U. REV. L. & SOC. CHANGE 109 (1999); Elizabeth B. Clark, "The Sacred Rights of the Weak: Pain, Sympathy, and the Culture of Individual Rights in Antebellum America," 82 J. AM. HIST. 463 (1995).

579. Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terror*, 96 A.J.I.L. 345 (2002).

580. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 76 (1998). She acknowledges that "[o]nly a few leading judges signed and submitted a document acknowledging that the judiciary as an institution enforced apartheid and failed to protect people from torture."

581. MULLER, *supra* note 564, at 113-15.

582. *Id.* at 113-15, 271-73.

583. *Id.* at 271-72.

584. Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131, 131-32 (2002).

As a result, are United States judges vulnerable to being charged with committing a crime against humanity for their death penalty decisions?

VI. CONCLUSION

The question of judicial independence is multidimensional. It has aspects grounded in the American separation of powers doctrine.⁵⁸⁵ It has other aspects grounded in due process and in ethical requirements that judges be impartial in their decision-making.⁵⁸⁶ There is no panacea that will ensure an independent judiciary.

The inquiry begins with how judges are selected and trained.⁵⁸⁷ It concerns every aspect of the decision-making process, including how judges will be retained and disciplined. We want judges to follow their individual consciences guided by the law and the constraints in the system. However, judges who misuse their office must be held accountable. If they are not accountable, the public will lose faith in the judicial system. Allowing judges to decide for themselves when they have crossed the bounds of propriety, such as is presently the practice on the Supreme Court of the United States, is simply unacceptable.

Public confidence in the judiciary is crucial to an independent judiciary. It is perfectly understandable that many judges in post-Communist or post-totalitarian countries are very cautious about any attempt by ministries of justice or any group even within the judiciary to oversee how a judge performs his or her functions.⁵⁸⁸ However, in many of these post-authoritarian societies, citizens believe that judges are corrupt. Whether or not this perception is true, it cannot be ignored. Cases of corruption must be aired and punished expeditiously in order to preserve judicial independence.⁵⁸⁹

585. *Supra* Part I.

586. *Supra* Part II.

587. *Supra* Part I, A.

588. *Supra* Part V.

589. Ranking next to corruption in the public's perception of the judiciary is delay. A judicial system that cannot decide cases expeditiously will be perceived as corrupt and broken. These problems must be dealt with forthrightly if public confidence in the judiciary is to be maintained. The ABA Model Code addresses the question of delay by stating that "prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end." MODEL CODE OF JUDICIAL CONDUCT, *supra* note 18, at Canon 2, R. 2.5, cmt. 3. The comment also states that "in disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs." *Id.* at Canon 2, R. 2.5, cmt. 4.

The question of judicial independence is a subject that requires constant re-examination in light of new and developing issues and problems. Lawyers, politicians, and citizens all have a stake in the debate—not just judges themselves—and need to be involved in the on-going discussion. As in all matters public, revising the rules on professionalism when necessary to meet new challenges and to provide transparency in operations will better preserve judicial independence than introverted appeals to self-regulation and professional privilege.

Recent events put the United States's commitment to the rule of law in jeopardy. If judges in the United States depart from the appearance of impartiality and enter the political affray, can they demand the respect that we have traditionally accorded to the judicial branch of government? Similarly, can we trust judges who are targeted by special interest groups because these groups do not like the decisions made by these judges? These are serious questions. If our judges are not perceived to be independent, our whole governmental system is in jeopardy and our judicial system will cease to be a model for the rest of the world.

Another problem is lack of consistency in decisions. The public loses confidence in a judiciary that produces unreasoned or unexplained different results in similar cases. This problem is perhaps not as prevalent in common law societies because of the role of *stare decisis*, but it does happen. It can be a greater problem in civil law countries where judicial precedent plays a less decisive role. Unpredictable decisions can lead to charges that the decisions are reached through other than legitimate means. The resulting lack of public confidence in the judiciary will raise cries for accountability and external control.

