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What Do We Mean by an Independent Judiciary?

Michael P. Seng¹

abstract

Judicial independence has roots in separation of powers and in ethical standards that require judges to be competent and impartial. 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 insure an independent judiciary.

Judicial independence means many things in American discourse. Everyone would agree that judges should generally be free to make decisions without external restraints. United States Senators frequently contend in judicial confirmation hearings that judges should “follow the law” and not get involved in political disputes. Judges sometimes argue that the oversight of judges should be under the control of the judiciary and not some external body. Judicial independence depends very much upon the context. While we want an independent judiciary, we do not want a judiciary that is free of accountability. The term “judicial independence” by itself is meaningless. We invoke it when we find it convenient and we seek to restrain judges when their actions or behavior is not congruent with professionally-established norms and guidelines.

When we speak about judges in the United States, we have to first distinguish between federal judges and state judges. Federal judges are governed by the United States Constitution and the United States Code. They are appointed for life by the President and confirmed by the

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Senate.² They fit into an honorable tradition that goes back over 220 years. There has been no major scandal that has rocked the federal judiciary,³ although individual courts and judges have come in for criticism for their decisions and judges have been removed for improprieties.

Federal judges preside over courts of limited jurisdiction. Their jurisdiction is limited by federal statute and the United States Constitution.⁴ Thus while federal judges hear important cases and many of the great controversies in American history have been resolved in the federal courts, especially but not exclusively in the United States Supreme Court, it is exceptional for federal judges to have contact with ordinary citizens involved in ordinary litigation.

² Under the federal system, the President appoints all Article III judges for life. The Senate must confirm these appointments. It has happened, especially in appointments to the Supreme Court, that the Senate has rejected candidates proposed by the President. 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 their political prejudices arise. Federal judges can be removed only by impeachment. Impeachment has been rarely used, which leaves the perennial question on how to deal with judges who have lifetime appointments and are unable to serve but have committed no impeachable offense.

Federal judges cannot be removed except by impeachment; however, Congress has authorized the Judicial Conference of the United States to hear complaints against the conduct of federal judges. 28 U.S.C. §351 et seq. Each federal circuit has its own judicial council. 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. 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. It can also certify that an Article III judge is disabled and request the judge to retire voluntarily. 28 U.S.C. §354(a)(2).

³ One of the few cases involving the impeachment of a federal judge is *Nixon v. United States*, 506 U.S. 224 (1993), 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.

⁴ *Marbury v. Madison*, 5 U.S. 137 (1803); *Strawbridge v. Curtis*, 7 U.S. 267 (1806).

We must also remember that not all federal judges fit under the provisions of Article III. Many federal judges preside over Article I courts and do not have the life-tenure enjoyed by their brothers and sisters who preside over Article III courts.⁵ Similarly, today many federal disputes are resolved, at least in the first instance, by Administrative Law Judges.

State court judges are separate and independent from federal judges. They derive their authority from state constitutions and statutes. Almost the only limitations imposed by the federal constitution on state judges are the requirements that they accord all persons due process and equal protection of law. State laws provide a variety of mechanisms for selecting judges and, in many states, judges must go back periodically to the voters who decide whether they shall be retained.

Whenever a jurisdiction moves away from lifetime appointments, there is a threat to judicial independence. As discussed later, judicial election systems have inherent flaws when it comes to the question of judicial independence. Appointment, whether by politicians or blue ribbon panels, can be misused.

⁵ 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.” *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64-70 (1982).

In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), 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. The Court held that the legislative scheme did not “impermissibly intrude on the province of the judiciary” “Article III, § 1 serves both to protect ‘the role of the independent judiciary within the constitutional scheme of tripartite government,’ ... and to safeguard litigants’ ‘right to have claims decided before judges who are free from potential domination by other branches of government.’” 478 U.S. at 848.

Even judges appointed under the famous Missouri plan have been targeted by special interest groups. Under the Missouri plan, a blue ribbon panel selects judges, but the judges must stand before the voters periodically for retention. The purpose of the electoral retention system in the Missouri Plan is to retire unfit judges. However, it is increasingly being used to target judges who make unpopular decisions about same-sex marriage, the death penalty, or even medical malpractice liability.⁶

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.

Each jurisdiction, state and federal, defines the rules of conduct for judges and sets up its own procedures to discipline judges. Most early state constitutions provide for a process of impeachment to remove judges who committed transgressions. The first model code of judicial conduct was not promulgated by the American Bar Association until 1924.⁷

Today, every state has adopted a code of judicial conduct. However, not all state codes conform to the ABA model code in all respects. Throughout this discussion, the ABA model

⁶ See New York Times, Sept., 25, 2010, at A1, c. 5.

⁷ Canons of Judicial Ethics (1924), http://www.abanet.org/cpr/pic/1924_canons.pdf.

code will be the primary focus of analysis, with the understanding that it is not binding and may vary slightly from state to state.⁸

The State of Illinois will be used as an example of a state system. Illinois courts are structured similarly to federal courts. However, judges are appointed and are required to stand periodically for retention.⁹ Illinois judges are also subject to discipline. This includes removal from office for ethical violations.¹⁰ The 1970 Illinois Constitution establishes a Judicial Inquiry Board (JIB). The JIB consists of judges and members of the public with jurisdiction to investigate allegations of judicial misconduct or individual issues of physical or mental suitability.¹¹ The JIB may file a complaint against a judge before the Courts Commission, which

⁸ The American Bar Association last revised its Model Code of Judicial Conduct in 2007. See, http://www.abanet.org/judicialethics/approved_MCJC.html. The Code expressly states that it “should not be interpreted to infringe on the essential independence of judges in making decisions.” The new formulation is much more detailed than the older codes and offers much more guidance to judges on what they should avoid. These new changes will now have to be considered by the individual states. The ABA Model Code is advisory only and each state adopts its own standards of judicial conduct. Therefore, whether a state adopts the new version or continues to follow its earlier enacted code will be up to the individual jurisdiction.

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. In some states these opinions are given by the disciplinary commissions and in other states by special committees set up by the state or by the bar associations. Jurisdictions differ on the extent that these advisory opinions are binding or may provide a defense to a judge that relies upon them. 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 may not be fully developed and where differing viewpoints may not be adequately developed.

⁹ Illinois Constitution (1970), Art. VI, Sec. 12.

¹⁰ Illinois Constitution (1970), Art. VI, Sec. 15(e).

¹¹ Illinois Constituion (1970), Art. VI, Sec. 15 (b).

also consists of judges and members of the public.¹² The Commission is mandated to conduct hearings and decides upon removal or discipline of judges in appropriate situations.¹³

In addition to independence, the qualities of a good judge that form the basis for the ABA and most state codes of judicial conduct focus on two basic attributes: competence and fairness.¹⁴ Competence and fairness directly relate to the question of judicial independence. If either is deficient, judicial independence is threatened.

“Competence” means Judges should be capable of impartially performing his or her duties. Judges should be well-educated and open-minded. Education, of course, does not end with the judicial appointment. Continuing education is crucial and its importance never ceases. Most American jurisdictions require some form of continuing education for judges. How continuing education is conducted can affect judicial independence.

Judicial independence can be compromised if the education is designed and administered by the executive branch of the government. As recognized by the Czech Constitutional Court, if mandatory judicial training is under the executive branch, the executive may be in a position to influence the decision-making of the courts.¹⁵ Similarly, private groups, even not-for-profit

¹² Illinois Constitution (1970), Art. VI, Sec. 15(c).

¹³ Illinois Constitution (1970), Art. VI, Sec. 15(e).

¹⁴ ABA Model Code of Judicial Conduct (2007),
http://www.abanet.org/judicialethics/approved_MCJC.html.

¹⁵ Judgment of the Constitutional Court of 18 June 2002, No. Pl. US 7/02.

organizations that conduct judicial education programs may have interests that compromise their impartiality.¹⁶

Judicial independence can be defined in two different contexts. The first context is based upon the concept of separation of powers required by the United States Constitution: the judicial branch must be kept separate from the legislative and the executive branches of government. A similar concept applies under most state constitutions. While separation of powers is a peculiarity of the United States and does not strictly apply in Great Britain or in 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.

The second context is that the judge must be an independent decision maker. This is also a universal concern. It is this context that is addressed in the ABA Model Code of Judicial Conduct, which defines “independent” as: “a judge’s freedom from influence or controls other than those established by law.”¹⁷ In the United States, this concern is closely associated with the concept of due process.¹⁸

¹⁶ 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. 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.

<http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202464122301>.

¹⁷ ABA Model Code of Judicial Conduct, Canon (2007), Terminology.

¹⁸ The Supreme Court has recognized the right to an independent decision maker in administrative hearings as a component of due process of law in such cases as *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). It has recognized this in the judicial context in *Caperton v.*

I. The doctrine of separation of powers requires judicial independence.

A. Federal judges cannot be required to perform non-judicial duties.

Advisory opinions.

In the United States, the Third Article of the Constitution forbids federal judges from performing non-judicial duties. The issue arose early in our history when President George Washington asked the United States Supreme Court to advise him about the legality of certain foreign affairs questions.¹⁹ The Justices responded that the courts as an institution cannot give advisory opinions on the law outside of a formal legal case brought by adversaries in a proper legal dispute. The Justices felt that to give legal advice to the Congress or the President about the legality of executive actions or laws would compromise the Court's impartiality when it was asked to decide concrete cases between parties with adverse interests.

Judges should not decide until they have heard both sides of an argument by the people most affected by the legal issue. 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.²⁰ 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. As a result, they may not present the argument from the most compelling perspective.

A.T. Massey Coal Co., 129 U.S. 2252 (2009), and Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

¹⁹ 37 Correspondence and Public Papers of John Jay 486-89 (Johnston ed. 1891), reprinted in Hart & Wechsler's *The Federal Courts and The Federal System* 49-52 (6th Ed. 2009).

²⁰ Warth v. Seldin, 422 U.S. 490, 498 (1975).

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.²¹ So long as the judiciary gives their 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. 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.

There are several instances in United States history in which individual judges have given legal advice to presidents. In the first three decades of the Twentieth Century, Justice Brandeis gave advice to President Woodrow Wilson and later to President Franklin D. Roosevelt.²² In 1952, Justice Vinson wrongly advised President Truman when the president seized private steel mills to avert a strike.²³ The Court ultimately later ruled the seizure unconstitutional.²⁴ Justice Fortas served as a confidential advisor to his friend, President Lyndon B. Johnson.²⁵ 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, both of which are equally important.

Legislative and executive activities.

²¹ See, e.g., Constitution of Massachusetts, part 2, ch. 3, art. 2 (1780).

²² Urofsky, Louis D. Brandeis – A Life (2009), pp. 495-502, 692-694.

²³ Donovan, Tumultuous Years: The Presidency of Harry S. Truman 1949-1953 (1982), p. 386.

²⁴ Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

²⁵ Murphy, Fortas: The Rise and Fall of a Supreme Court Justice (1988) at 200-7, 234-68; Kalman, Abe Fortas (1990) at 293-318.

Judges may not be required to perform legislative or executive activities. The distinction between a legislative or executive activity and a judicial activity is not always distinct.

In a recent example, the United States Supreme Court upheld a federal law setting up a sentencing commission and placing it in the judicial branch of the government.²⁶ Defining sentences for crimes, as opposed to imposing sentences, is strictly a legislative function. 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. As a result, it set up a sentencing commission composed both of judges and non-judges to create mandatory sentencing guidelines so that there would be more uniformity. It was argued that this commission violated separation of powers.

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.

The Court in *Mistretta* cited examples where judges in the United States also served in other positions.²⁷ John Jay was dually the first chief justice and ambassador to England. Oliver Ellsworth was the second chief justice and ambassador to France. The third chief justice, John Marshall, served briefly in the dual role of chief justice and Secretary of State. However, these appointments occurred before the workload of the Court was fully developed. It is implausible that these dual roles of chief justice and executive officer would be allowed today.

²⁶ *Mistretta v. United States*, 488 U.S. 361 (1989).

²⁷ 488 U.S. at 398-400.

United States justices have also served in dual capacities in exigent circumstances. In 1876, five justices sat on a special commission to judge disputed presidential election results. Justice Roberts served on a commission to investigate the attack on Pearl Harbour that ultimately caused the United States to enter World War II. After the war, Justice Jackson served as a prosecutor at the Nuremburg trials. Two decades later, Justice Warren presided over the commission that bears his name in investigating the assassination of President John F. Kennedy.

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. 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.²⁸

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 judges 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.²⁹ Nonetheless, judges do perform many supervisory and executive duties within the judiciary. These duties are proper and

²⁸ 488 U.S. at 406-407.

²⁹ ABA Model Code of Judicial Conduct, Canon 3, Rule 3.4 (2007).

are addressed in the ABA Model Code, which requires judges to act fairly and impartially in fulfilling these necessary responsibilities of the judicial office.³⁰

B. Federal 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 United States Supreme Court justices ruled that it was unconstitutional for Congress to have the courts determine monthly pensions for disabled Revolutionary War Veterans and then to allow the ruling to be reviewed by the Secretary of War.³¹ A higher court can only review the exercise of judicial power. An executive or legislative official cannot.

Two case law examples 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. Gold was subsequently discovered in the Black Hills. As a result, the United States repudiated the treaty and divested the Indians of their land. The Indians sued the government in the Court of Claims., but this case was dismissed without the Court reaching the merits. The Indians later filed a second suit in the Court of Claims. This second suit was dismissed on *res judicata* grounds. The case was barred by the prior judgement and could not be re-litigated.

Congress finally passed legislation telling the courts to review the claim without regard to the government's defence of *res judicata*. The United States Supreme Court 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

³⁰ ABA Model Code of Judicial Conduct, Canon 2, Rules 2.12 & 2.13 (2007).

³¹ Hayburn's Case, 2 Dall. 409 (1792).

merits.³² The Sioux ended up receiving the largest damage award ever entered against the United States. However, many Sioux objected to the award of money because they simply wanted their land back.

In 1995, the United States Supreme Court invalidated a law passed by Congress that opened certain securities fraud cases. In an earlier case, the Supreme Court had made a surprise ruling that injured parties must file their claims within one year after they had been injured. Prior to that time, everyone had assumed that the claimants had three years to file. 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. In *Plaut v. Spendthrift Farms, Inc.*,³³ the Supreme Court ruled that this law was unconstitutional because it required the courts to reverse a decision already made in violation of the separation of powers principle.

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. In this instance, Congress was reopening a final judgement between private parties. One can question the correctness of the *Plaut* holding because the courts had never adjudicated the merits of the lawsuit. 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. Ostensibly, Congress can change the law prospectively for future claimants.

³² *United States v. Sioux Nation*, 448 U.S. 371 (1980).

³³ 115 S. Ct. 1447 (1995).

Congress and individual states can create a statutory right where the United States Supreme Court has held that a right does not exist under the Constitution. For instance, the United States 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,³⁴ but Congress has provided extensive rights to persons with disabilities through legislation.³⁵

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.³⁶

The Supreme Court held parts of the Religious Freedom Restoration Act (RFRA) unconstitutional because it was beyond Congress' power under Section 5 of the Fourteenth Amendment.³⁷ 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.³⁸ But that case largely turned on federalism grounds.

Subsequently, in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*,³⁹ the Supreme Court applied RFRA when reviewing federal legislation. Justice Roberts for a unanimous Court stated:

³⁴ *Cleburne v. Cleburne Living Center*, 473 U.S. (1985); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

³⁵ See, i.e., *Tennessee v. Lane*, 541 U.S. 509 (2004).

³⁶ *Michigan v. Long*, 463 U.S. 1032 (1983).

³⁷ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

³⁸ *Employment Division v. Smith*, 494 U.S. 872 (1990).

³⁹ 546 U.S. 418, 439 (2006).

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. See *Smith*, 494 U.S., at 885-590, 110 S.Ct. 1595. 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.

C. Federal judges shall not render political opinions.

In *Marbury v. Madison*,⁴⁰ Justice John Marshall stated that federal courts are prohibited from issuing political opinions. 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. Issues of law are what the courts can properly resolve.

Justice Brennan emphasized in *Baker v Carr*⁴¹ 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.⁴² The Court concluded that a challenge under the equal protection clause of the Fourteenth Amendment to a state's apportionment scheme is a question of law for the courts to decide.

⁴⁰ 5 U.S. 137 (1803).

⁴¹ 369 U.S. 186 (1962).

⁴² 369 U.S. at 217.

In more recent cases, the United States Supreme Court has held that questions of political gerrymandering⁴³ and how impeachment cases are to be tried by the Senate⁴⁴ are political questions. Legal questions are how a state counts electoral votes in a presidential election,⁴⁵ whether the House of Representatives can refuse to seat a member beyond the terms proscribed in the Constitution,⁴⁶ or whether Congress violated the Origination Clause in enacting a revenue bill.⁴⁷

The question of how active the judiciary should be in reviewing acts of the legislature is an issue that is decided by the courts. However, it has not been free from controversy. 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.⁴⁸

D. Rules of Decision

After the United States Civil War, Congress disapproved President Andrew Johnson's pardoning large numbers of Southerners who served on the Confederate side during the War. After being pardoned, these Southerners were allowed to go to the federal courts to seek compensation for property destroyed during the War. Congress passed a law that if a Southerner applied for

⁴³ *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

⁴⁴ *Nixon v. United States*, 506 U.S. 224 (1993).

⁴⁵ *Bush v. Gore*, 531 U.S. 70; 531 U.S. 98 (2000).

⁴⁶ *Powell v. McCormack*, 395 U.S. 486 (1969).

⁴⁷ *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

⁴⁸ The issue comes up under the Commerce Clause, *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *United States v. Lopez*, 514 U.S. 549 (1995), the First Amendment, *Citizens United v. Federal Elections Commission*, 130 S.Ct. 876 (2010), the Fourteenth Amendment, *Oregon v. Mitchell*, 400 U.S. 112 (1970); *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), and many other provisions of the Constitution.

compensation to the courts and he had received a pardon, the court should dismiss the case for "lack of jurisdiction."

In a somewhat confusing opinion in *United States v. Klein*,⁴⁹ the United States Supreme Court ruled the law unconstitutional because it interfered with the independence of the courts. It forced them to rule in a certain way in individual cases. The substance of the holding seems to be that once Congress confers jurisdiction on the courts, it must leave them free to perform the process of adjudication free from outside control.

Even in cases that do not strictly involve a "rule of decision" imposed by Congress, the United States 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*,⁵⁰ 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.

Congress cannot completely oust the courts "of 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."⁵¹

⁴⁹ 80 U.S. 128 (1871).

⁵⁰ 285 U.S. 22 (1932).

⁵¹ 285 U.S. at 57.

More recently in *Boumediene v. Bush*,⁵² the Supreme Court reviewed the Detainee Treatment Act of 2005. The Act allowed the Court of Appeals to review the factual determinations made by Combatant Status Review Tribunals (CSRT). The CSRTs were established by Congress to determine whether individuals detained at Guantanamo were “enemy combatants.”

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

State courts have confronted similar issues. In *McAlister v. Schick*⁵³ and *DeLuna v. St. Elizabeth's Hospital*,⁵⁴ the Illinois Supreme Court considered whether the legislature could limit medical malpractice cases by 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” to institute the action. One argument against this requirement was that it delegated the decision on whether the lawsuit had merit to a non-judicial officer and made that decision binding on the court.

The Illinois Supreme Court rejected this argument. It found that the health professional did not decide any legal question, but merely provided certification declaring the meritorious basis for the lawsuit. The majority distinguished an earlier case, *Wright v. Central Du Page Hospital*

⁵² 128 S.Ct. 2229, 2272, 2273 (2008).

⁵³ 147 Ill. 2d 84, 588 N.E.2d 1151 (1992).

⁵⁴ 147 Ill.2d 57, 588 N.E.2d 1139 (1992).

Association,⁵⁵ where the Court had held unconstitutional a legislative requirement that medical malpractice cases be referred to a review panel prior to filing in courts. The findings of the review panel, which consisted of one judge, a doctor and a lawyer, were not binding on the court. Nonetheless, the Supreme Court had held that the panel was performing a judicial function. 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.

In contrast to the majority, the dissenters pointed out that the health care professional effectively decides the merit of the case.⁵⁶ They rejected the analogy that supplying the certificate was no different from calling an expert to testify at trial. To complete the certificate, they argued, the health care professional does more than merely provide evidence as to standard of care. The professional actually decides the standard of care.

E. Stripping the Courts of Jurisdiction.

Congress controls the jurisdiction of the federal courts. It creates the lower federal courts and can consequently limit their jurisdiction.⁵⁷ Article III provides that Congress can make exceptions in the Supreme Court's appellate jurisdiction.⁵⁸ In appropriate cases, Congress can remove federal issues from the jurisdiction of the state courts.⁵⁹ However, can Congress totally isolate the deprivation of constitutional rights from judicial review or completely transgress limitations

⁵⁵ 63 Ill.2d 313, 347 N.E.2d 736 (1976).

⁵⁶ 147 Ill.2d at 80, 588 N.E.2d at 1149.

⁵⁷ *Sheldon v. Sill*, 8 How. 441 (U.S. 1850).

⁵⁸ U.S. Const., Art. III, Sec. 2, cl. 2.

⁵⁹ *Tennessee v. Davis*, 100 U.S. 257 (1880).

imposed by separation of powers and remove the jurisdiction of the courts to decide the constitutionality of congressional or executive action?

In *Ex parte McCordle*,⁶⁰ Congress passed legislation stripping the Supreme Court of review in a habeas action after the Court had heard oral argument but before it had rendered its decision in the case. Even though it was clear that Congress had 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. However, the Court commented that the petitioner still had other forms of redress available to him.

The Supreme Court has never directly addressed the issue 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*,⁶¹ 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 (CIA) as not to preclude the courts from hearing constitutional claims involved in the discharge.

Justice Scalia dissented and read the statute to deprive the Court of jurisdiction to review all claims, whether statutory or constitutional. He did not see any constitutional impediment to Congress precluding judicial review of a constitutional claim. Scalia's assertion would turn our constitutional system on its head. Judicial practice to date leads to the conclusion that the Court

⁶⁰ 7 Wall. 506 (U.S. 1868).

⁶¹ 486 U.S. 592 (1988),

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.⁶²

In *Boumediene v. Bush*,⁶³ 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. 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.⁶⁴

II. Judges must be neutral and independent decision-makers.

In addition to institutional independence, judges must be independent decision makers. Judges must be both neutral and appear to be neutral.⁶⁵ A clear cut example is “telephone justice” in the old Soviet Union. Communist party members would telephone the judge to direct him how to rule in a case.

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. They gave them life appointments and

⁶² See *Johnson v. Robinson*, 415 U.S. 361 (1974).

⁶³ 128 S.Ct. 2229 (2008).

⁶⁴ 128 S.Ct. at 2247.

⁶⁵ See *Caperton v. Massey*, 129 S.Ct. 2252 (2009).

provided that their salaries could not be diminished.⁶⁶ Most state judges serve limited terms and face periodic elections. They are more vulnerable. Nonetheless, concerns of self-interest can arise in any system.

Bribery.

The clearest threat to judicial independence is a corrupt judge. Judges who accept bribes in return for favourable 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 vulnerable to a charge of being "soft on crime."⁶⁷ 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.

In addition, bribery and corruption undermine public confidence in the judiciary, which affects the entire public psyche and morale. If the judiciary cannot be trusted to uphold and apply the law, who can?

What constitutes bribery can be the subject of differing definitions. Clearly the judge must accept something of value. This may be money, but it may also be something more intangible. For example, a judge who imposes a death sentence primarily because it will please his or her superiors,

⁶⁶ United States Constitution, Art. III, Sec. 1.

⁶⁷ See generally, Tuohy and Warden, Greylord (1989).

and result in his or her advancement, is as corrupt as the judge who has accepted a monetary gift from the victim's family. But the former may be harder to detect and even harder to discipline than the latter.

Judge John Noonan wrote the definitive treatise on bribery.⁶⁸ He traced bribery throughout history and discussed 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;
4. Bribery violates the divine paradigm.⁶⁹

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.

Gifts and Other Benefits.

In *Citizens United v. Federal Elections Commission*⁷⁰ the United States 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. Justice Kennedy suggested that “few, if any

⁶⁸ Noonan, *Bribes* (1984).

⁶⁹ Noonan at 702-705.

⁷⁰ 130 S.Ct. 876 (2010).

contributions to candidates will involve *quid pro quo* arguments.”⁷¹ He also stated that “The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”⁷²

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. Corruption can take many forms and operates along a spectrum.⁷³

Justice Stevens’ observations about the elections process apply to the judicial system. Justice Stevens may well have been influenced by the controversy that first brought him to national attention. When he was still in private practice, Justice Stevens participated in a Commission that investigated two Illinois Supreme Court justices who had received gifts of stock from a defendant in a case pending in that court. The Commission found that the decision of the Supreme Court was untainted by the impropriety. Nonetheless, the Commission recommended that the judges resign, and they did.⁷⁴

Just before the Illinois Supreme Court scandal, two United States Supreme Court justices were accused of improperly receiving gifts from potential litigants. Justice Fortas was accused of

⁷¹ 130 S. Ct. at 908.

⁷² 130 S.Ct. at 910.

⁷³ 130 S.Ct. at 961.

⁷⁴ Manaster, *Illinois Justice* (2001). Early in the history of the United States 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. (1Wheat.) 304 (1816). He was not so scrupulous and 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 v. Madison*, 5 U.S. (1Cranch) 137 (1803).

accepting a \$20,000 fee from a foundation that had ties to a respondent in a pending SEC investigation. It later was disclosed that it was a fee that was to be paid to him annually and, after his death, to his wife. Justice Fortas resigned from the Court.⁷⁵ Justice Douglas was similarly accused of accepting a \$12,000 annual fee from a foundation. He refused to resign, was threatened with impeachment, but weathered the storm.⁷⁶ 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.⁷⁷

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 from the case. 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 \$29.⁷⁸ Based on this standard, in 2010 when a case involving the Pfizer Pharmaceutical Company was before the Court, Justice Roberts sold stock he owned in the company worth \$15,000 so that he would not be required to recuse himself.⁷⁹

⁷⁵ Woodward & Armstrong, *The Brethren* (1979) at 18 – 20; Murphy, *Fortas: The Rose and Ruin of a Supreme Court Justice* (1988) at 545 - 577.

⁷⁶ Woodward & Armstrong, *The Brethren* (1979) at 20. Douglas, *The Court Years: The Autobiography of William O. Douglas* (1980) at 359-375.

⁷⁷ Schwartz, *Super Chief – Earl Warren and his Supreme Court – A Judicial Biography* (1983) at 760-762.

⁷⁸ *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1313 (9th Cir. 1982), *aff'd mem.*, 459 U.S. 1191 (1983).

⁷⁹ *New York Times*, Sept. 29, 2010, at A21, c. 6.

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.⁸⁰ Judges are generally forbidden from engaging in outside employment that would interfere with their judicial duties. 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. The receipt of honoraria is limited. A judge may receive a total honorarium of more than \$5,000 in a six month period.⁸¹

One would expect the same strictness when it comes to gifts to judges. However, the Model Code of Judicial Conduct of the American Bar Association is surprisingly flexible on what should be considered an improper "gift" to a judge. It opts more toward disclosure than prohibition.⁸²

For instance, it can be argued that educational seminars that are provided free to judges by private not-for-profit companies are helpful in improving the competence of judges. But if the company is promoting a particular agenda, it clearly can compromise the independence of the judges in making decisions and create an appearance of impropriety. The new ABA Model Code of Judicial Conduct⁸³ requires that such remuneration be reported. However, many would argue that the Code should go further in restricting such "gifts."

A more flagrant example involved a power company based in the State of Ohio flying Chief Justice Rehnquist of the United States Supreme Court to Columbus, Ohio to deliver a speech

⁸⁰ Illinois Code of Judicial Conduct, Rule 68. And see ABA Model Code of Judicial Conduct, Canon 3, Rule 3.5 (2007).

⁸¹ Illinois Code of Judicial Conduct, Canon 6, Rule 66A.

⁸² ABA Model Code of Judicial Conduct, Canon 3, Rule 3.13 (2007).

⁸³ Canon 3, Rule 3.14 (2007)

dedicating a judicial center. The company had over a dozen environmental cases in the federal courts. The company flew the chief justice in its corporate jet paid for by money raised from a \$75-a-plate dinner after the dedication.⁸⁴ The company argued that it was not bearing the cost of the trip. A Supreme Court spokeswoman stated that Supreme Court rules allowed hosting organizations to pay for the travel and accommodations of justices. At that time the Chief Justice was feeble. Travel by private jet may have eased his travel and security precautions. Nonetheless, there was certainly an appearance of impropriety that the Chief Justice should have avoided. Critics of the judge pointed out that the cost for the private jet was over \$3,800, while the judge could have flown first class on a commercial airliner for no more than \$1,100.⁸⁵

The ABA Model Code allows a judge to accept reimbursement for travel and lodging expenses for extrajudicial activities permitted by the Code. The act of dedicating a judicial center would appear to be such an activity.⁸⁶ 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. This would seem to be the case involving the chief justice's travel.⁸⁷

Campaign contributions.

In many jurisdictions judges are required to be elected. The question of campaign contributions obviously becomes an important issue. Money is required for a judge to conduct an election campaign. Recent candidates for the judicial office sometimes spend over \$1 million in their

⁸⁴ New York Times, May 15, 2004, at A9.

⁸⁵ *Ibid.*

⁸⁶ ABA Model Code of Judicial Conduct, Canon 3, Rule 3.14 (2007).

⁸⁷ ABA Model Code of Judicial Conduct. Canon 3, Rule 3.1(C) (2007).

election campaigns. Additionally, judicial elections have become more contentious. Special interest groups spend money to insure that the judges who are elected share their priorities.⁸⁸

Consequently, the Model Code of Judicial Conduct prohibits judges from personally soliciting and accepting campaign contributions.⁸⁹ In most jurisdictions, candidates for judicial office are required to form election committees to raise money.⁹⁰ Nonetheless, a candidate has knowledge of who made contributions. This knowledge in itself is problematical.

Several courts of appeal have addressed whether the ban on judges and judicial candidates soliciting campaign contributions itself violates the First Amendment. The United States Court of Appeals for the Eight Circuit reviewed a State of Minnesota rule that prohibited a judicial candidate from personally signing letters asking for campaign contributions. It also prohibited judicial candidates from addressing appeals for money to large audiences. The Court held that the rule violated the First Amendment because it was not narrowly tailored to prevent bias. The contribution was made to the candidate's *committee* and the committee did not disclose to the candidate those who either contributed or rebuffed a solicitation.⁹¹

⁸⁸ For example, 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. Chicago Tribune, August 24, 2010, at sec. 1, p. 17, c. 1.

⁸⁹ ABA Model Code of Judicial conduct, Canon 4, Rule 4.1(A)(8) (2007).

⁹⁰ ABA Model Code of Judicial Conduct, Canon 4 Rule 4.4 (2007), Illinois Code of Judicial Conduct, Canon 7, Rule 67B(2).

⁹¹ Republican Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005), cert. denied, 546 U.S. 1157 (2006). Also see, Carey v. Wolnitzek, 2010 WL 2771866 (6th Cir. 2010); Wersal v. Sexton, 2010 WL 2945171 (8th Cir. 2010); Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002); Stretton v. Disciplinary Board, 944 F.2d 137 (3d Cir. 1991).

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.⁹²

The United States Supreme Court has recognized the corrupting influence of campaign contributions in judicial elections. It has held that due process of law may require judges to recuse themselves because of the appearance of impropriety created by a large campaign contribution.⁹³ Following a judicial election, the West Virginia Supreme Court had reversed a \$50 million judgment against a coal company by a 5 to 3 vote of the judges. One of the newly elected judges on the West Virginia Supreme Court was in the majority. He had 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.

The United States Supreme Court held that due process required the recusal of the state court judge. The Court did not question the judge's subjective motives nor did it determine that there was actual bias. 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 substantial 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

⁹² *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010); *Bauer v. Shepard*, 2010 WL 3271960 (7th Cir. 2010). See also, *Simes v. Arkansas Judicial Discipline and Disability Commission*, 368 Ark. 577 (2007).

⁹³ *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009).

the case was pending or imminent. The inquiry centers on the 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.⁹⁴

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 she does not recuse herself.

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 favourite 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 don't interfere with the judge's performance of his or her official duties.⁹⁵ However, Illinois takes a strict approach and prohibits judges from directly assisting in fund-raising activities for those organizations.⁹⁶

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.⁹⁷ These rules are self-evident.

⁹⁴ 129 S.Ct. at 2263-4.

⁹⁵ ABA Model Code of Judicial Conduct, Canon 3, Rule 3.7 (2007).

⁹⁶ Illinois Code of Judicial Conduct, Canon 5, Rule 65B(2).

⁹⁷ ABA Model Code of Judicial Conduct, Canon 2, Rule 2.11(2) (2007).

Judicial independence can also be compromised because of friendship. Friendship is, of course, an 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 impact on the independence of a judge. Even if friendship has had no real impact on the decision that a judge makes, judicial independence may be compromised by the public perception. Who is a friend and who is a mere acquaintance may be difficult to differentiate in individual cases. Foremost in answering this concern should be the perception of third parties.

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 law judge. The federal judge and the prosecutor were friends. They planned to vacation together with their families immediately after the federal bribery trial was concluded. The judge and prosecutor never told the defendant or his counsel of their plans. The appellate court had no doubts that the trial judge was impartial. The court criticized the judge for his non-disclosure because the defendant and the public might perceive partiality on learning of such close ties between the prosecutor and the judge.⁹⁸

A similar controversy arose in 2004. 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. Justice Scalia refused to recuse himself from the case on the ground that the case did not involve Mr. Cheney personally but

⁹⁸ United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985).

only involved him in his official position.⁹⁹ Presumably Justice Scalia assumed that the public will likewise divide a person into two personalities. He thought he was hunting with Chaney the man, not Chaney the Vice President.

After the Court stepped into the question of independent campaign spending by corporations and unions in 2010,¹⁰⁰ questions of judicial independence have focused on the activities of the wife of Justice Clarence Thomas.¹⁰¹ Virginia Thomas is the founder and head of a non-profit group that is spending money to support conservative causes. These activities are very much related to campaign finance restrictions which have been attacked in the courts as violating the First Amendment. Her activities may or may not be protected by the First Amendment, but it is certainly doubtful that Justice Thomas should participate in cases that decide that question.

United States Supreme Court Justices decide for themselves whether they can be impartial. There is no review of their decision. This practice has been severely criticized and is not the practice in the lower federal and in most state courts. The problem is handled differently in the lower federal courts.¹⁰² 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.¹⁰³ This is an especially desirable provision because the attorney does not run the risk of offending anyone.

⁹⁹ *Cheney v. United States District Court*, 124 S.Ct. 1391 (2004).

¹⁰⁰ *Citizens United v. Federal Elections Commission*, 130 S.Ct. 876 (2010).

¹⁰¹ *New York Times*, Oct. 9, 2010, at A1, c. 1.

¹⁰² 28 U.S.C. §§ 535ff.

¹⁰³ 735 ILCS 5/2-1001(a)(2).

A judge's use of her position to assist a family member to advance in the legal profession can compromise judicial independence. 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.¹⁰⁴ However, it would not be permissible for a judge to rely on information available only through the course of performing judicial duties to assist the family member in representing a client.¹⁰⁵ A judge may serve as a reference for an individual based upon the judge's personal knowledge.¹⁰⁶ However, it crosses the line for a judge to urge clients or employers to hire family members.¹⁰⁷ 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.¹⁰⁸

C. Judges may 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. When reviewed by a higher court, they follow that court's orders on remand. However, judges alone are accountable for reaching the correct decision in every individual case that comes before them. Thus, 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.

¹⁰⁴ ABA Model Code of Judicial Conduct, Canon 3, Rule 3.10 (2007).

¹⁰⁵ ABA Model Code of Judicial Conduct, Canon 3, Rule 3.5 (2007).

¹⁰⁶ ABA Model Code of Judicial Conduct, Canon 2, Rule 1.3, comment 2 (2007).

¹⁰⁷ ABA Model Code of Judicial Conduct, Canon 3, Rule 3.10, comment (2007).

¹⁰⁸ *Ibid.*

Separation of powers means that a judge is to be independent of legislative and executive officers. Judicial independence in the sense of impartiality also means that a judge should not be improperly influenced by other judges. 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. But the judge hearing the case must take reasonable efforts to avoid receiving factual information that is not part of the record.¹⁰⁹ A judge must make up his or her own mind and decide the case based on his or her own analysis and considered opinion. To do otherwise is an abrogation of judicial independence.

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 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. But an appellate court should never go so far as to dictate a decision outside the proper course of judicial review.

¹⁰⁹ ABA Model Code of Judicial Conduct, Canon 2, Rule 2.9 (A)(3) (2007).

A case that comes dangerously close to such a transgression is the order of the Court of Appeals for the Seventh Circuit in *United States v. Holderman*.¹¹⁰ The opinion can be justified as an effort to see that the orders of the appellate court are effectuated. 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.

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. The Court of Appeals reversed on the ground that exclusion of the government's fingerprint evidence was too drastic a remedy.¹¹¹ On remand, the judge excluded expert testimony about the recovery of latent fingerprints because he suspected the government of tampering with the evidence. The government filed a petition for a writ of mandamus in the Court of Appeals. 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.

The Court of Appeals justified its extraordinary order on the ground that it feared that 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. In either case, double jeopardy would bar an appeal.¹¹² The Appellate Court commented that "The 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."

¹¹⁰ *United States v. Holderman*, 2010 WL 2977455 (7th Cir. 2010).

¹¹¹ *United States v. Herrera*, 366 Fed. App. 674 (7th Cir. 2010).

¹¹² *United States v. Holderman*, 2010 WL 2977455 (7th Cir. 2010).

The action of the Appellate Court in removing a 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 indicate bias or prejudice. They must proceed impartially without regard to the popularity of the particular laws or litigants and inappropriate outside influences.¹¹³ Nor may judges belong to organizations that practice invidious discrimination.¹¹⁴ If judges have a personal bias against a party or lawyer or have personal knowledge of the facts of a case, they should disqualify themselves from hearing the matter.¹¹⁵

Previous work.

Judges must recuse themselves if they have worked on a case prior to being appointed as a judge. In a famous case in 1972 involving the U.S. Army's spying on American civilians, the parties moved to disqualify Justice Rehnquist because of statements he had made before a Senate committee. As an "expert for the Justice Department," he made statements on the subject of statutory and constitutional law dealing with the authority of the executive department to gather information. Justice Rehnquist had made these statements prior to becoming a judge. He refused to recuse himself because he had not worked directly on the case under consideration.¹¹⁶ Justice Rehnquist stated that most judges in the United States come to the court with prior experience

¹¹³ ABA Model Code of Judicial Conduct, Canon 2, Rules 2.3 & 2.4 (2007).

¹¹⁴ ABA Model Code of Judicial Conduct, Canon 3, Rule 3.6 (2007).

¹¹⁵ ABA Model Rule of Judicial Conduct, Canon 2, Rule 2.11A(2) (2007).

¹¹⁶ Laird v. Tatum, 409 U.S. 824 (1972).

which touches on their judicial work. Justice Rehnquist further commented that past practice support him.

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. 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. A more famous example is Justice John Marshall, who as Secretary of State failed to deliver the commissions that were the subject of Marshall's famous opinion in *Marbury v. Madison*.¹¹⁷

Justice Clarence Thomas similarly raised questions among legal experts when he wrote an opinion involving whether a law requiring employers to contribute to pension plans of older workers should be applied retroactively.¹¹⁸ As chairman of the Equal Employment Opportunity Commission, Thomas had argued that the law should not be applied retroactively, but the Internal Revenue Service had disagreed with him. Thomas refused to recuse himself on the ground that the arguments were made in different cases involving different companies. Whether these are practices that should be emulated is doubtful. Many judges would 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 United States Supreme Court accepted for the 2010 term.¹¹⁹ Justice Kagan came to the Court after serving as the Solicitor General of the United States, where

¹¹⁷ 5 U.S. 137 (1803).

¹¹⁸ *Lockheed Corp.v. Spink*, 517 U.S. 882 (1996).

¹¹⁹ *New York Times*, October 3, 2010, at A1, c. 1.

she was the government's chief legal representative before the Supreme Court. She either participated in drafting the briefs in these matters or was otherwise actively involved in them.

Her action could leave the Court deadlocked in a number of important decisions. 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.¹²⁰ This bill differs from President Roosevelt's so-called Court Packing Plan of 1937. The Court Packing Plan would have allowed the President to appoint an additional Justice once a sitting Justice reached the age of seventy. It was blatantly proposed to allow the President to appoint judges that would be favourable to the New Deal legislation. The Leahy proposal is more limited. It would not increase the size of the Court and would be used only to prevent the Court from splitting four-to-four in a case where a sitting judge was not able to take part in the deliberations.

No personal interest in the case.

Clearly judges should sit on cases where they have acted as counsel or served as a material witness to the facts in question.

In *United States v. Alabama*,¹²¹ a federal appeals court disqualified a trial judge from presiding over a school desegregation case. The fact that the judge was African American, had children in school, was a civil rights lawyer prior to coming to the bench, or had spoken out against segregation as a member of the state senate did not disqualify him. The judge had played a critical role in confirming nominees to the school boards, and he had participated as a lawyer in developing some

¹²⁰ Id. S. 3871, 111th Congress (Sept. 29, 2010). The bill would amend 28 U.S.C. ch. 13.

¹²¹ 828 F.2d 1532 (11th Cir. 1987).

of the facts that were at issue in the lawsuit. The court felt that he should step down from hearing the case because he had extra-judicial, personal knowledge of disputed facts.

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. The judge had no financial interest in the litigation and did not live in an area of the city that would be affected by the litigation. 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.¹²²

The most famous case concerning a question of recusal of an African American judge in a civil rights case involved Judge Leon Higginbotham. He sat as a trial judge in an employment discrimination case filed in the federal court in Pennsylvania. It was argued by the defendant, who was accused of racial discrimination, 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. 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.¹²³ Indeed, carried to its logical end, white judges would similarly be required to disqualify themselves from cases involving racial discrimination.

¹²² *In re City of Houston*, 745 F.2d 925 (5th Cir. 1984).

¹²³ *Commonwealth of Pennsylvania v. Local*, 542, 388 F. Supp. 155 (E.D. Pa. 1974).

The issue has arisen more recently in the gay marriage context. 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.

Impartiality of the judge.

Judges must conduct themselves in an impartial manner on the bench. Each party has the right to be heard either in person or through a lawyer. A judge should preside over a trial with dignity and courtesy.¹²⁴ The Model Code requires that a judge promote public confidence in the “integrity” of the judiciary. “Integrity” is defined as: “probity, fairness, honesty, uprightness, and soundness of character.”¹²⁵

A judge may encourage parties to settle a matter before the court but may not unduly coerce a party into a settlement. There is a debate in the United States as to how far a judge may proceed in effectuating a settlement between the parties. 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. 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.

Ex parte communications.

¹²⁴ ABA Model Code of Judicial Conduct, Canon 2, Rule 2.8(B) (2007).

¹²⁵ ABA Model Code of Judicial Conduct, Terminology.

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.¹²⁶

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.¹²⁷ In the United States, the parties control the question of expert testimony. 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 the decision what expert to use. 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.

A judge may discuss a legal matter with court staff and other judges sitting on the same court. 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.¹²⁸

Judges may not conduct their own investigations of a case outside the courtroom. Nor may they solicit the advice of experts on technical matters that come before the court. The new model rules explicitly state that a judge shall not attempt to check facts involved in a case on the Internet.¹²⁹ Clearly, a judge may not prejudge a case by trying to learn facts that are not in evidence through the

¹²⁶ ABA Model Code of Judicial Conduct, Canon 2, Rule 2.9A(3) (2007).

¹²⁷ ABA Model Code of Judicial Conduct, Canon 2, Rule 2.9A(2) (2007).

¹²⁸ ABA Model Code of Judicial Conduct, Canon 2, Rule 2.9 (A)(3) (2007).

¹²⁹ ABA Model Code of Judicial Conduct, Canon 2, Rule 2.9C (2007).

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. The judge must be open about the source of the information with all the parties in the case. Additionally, the accuracy of the Internet must be unquestioned.¹³⁰

The rules requiring a judge to be impartial require that a judge be especially cognizant of avoiding any appearance of impropriety.¹³¹ 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 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. For 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.

¹³⁰ Fed. R. Evid 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 reasonable be questioned.” In *Scanlan v. Texas A&M*, 343 F.3d 533, 536-37 (5th Cir. 2003), the Court of Appeals held 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.”

¹³¹ ABA Model Code of Judicial Conduct, Canon 1, Rule 1.2 (2007).

E. Judges should normally refrain from extra-judicial 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.¹³² The Code also forbids judges from making any statements that manifest bias or prejudice, especially based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.¹³³

However, judges may still maintain their basic constitutional right to free speech under the First Amendment to the United States Constitution.¹³⁴ The question of whether First Amendment rights can be squared with a judge's duty not to manifest any prejudgment or prejudice has been a subject of recent litigation and debate in the United States. Nonetheless, 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.¹³⁵

During the same year that Justice Scalia went duck hunting with the then-Vice President, Justice Scalia had 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. Justice Scalia had given a public speech where he stated his views of the lower court decision

¹³² ABA Model Code of Judicial Conduct, Canon 2, Rule 2.10 (2007).

¹³³ ABA Model Rule of Judicial Conduct, Canon 2, Rule 2.3 (2007).

¹³⁴ See *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

¹³⁵ Cf., *Bauer v. Shepard*, 2010 WL 3271960 (7th Cir. 2007); *Carey v. Wolnitzek*, 2010 WL 2771866 (6th Cir. 2010).

in that matter.¹³⁶ In this case, 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.

Comments on matters of public interest.

The issue 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. The Senate holds hearings where the candidate is questioned about his or her views on important public issues. Many candidates have refused to answer these questions. Clearly the confirmation process is compromised when candidates refuse to answer questions that probe the candidate's prejudices and biases. Most commentators would agree that stating one's views about general political and legal matters in a confirmation hearing is not a breach of the professional standards. Recent court decisions on the free speech rights of judges during an election campaign would seem to support this view.¹³⁷

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. The judge was charged with making improper comments.¹³⁸ While intemperate, the remarks did not reflect on any issue

¹³⁶ See, *Elk Grove Unified School District v. Newdow*, 124 S.Ct. 2301 (2004).

¹³⁷ *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

¹³⁸ See, *Pincham v. Illinois Judicial Inquiry Board*, 681 F. Supp. 1309 (1988), *aff'd*, 872 F.2d 1341 (7th Cir. 1989).n

that would have reasonably been before the judge, and should fall within the protections of the First Amendment.¹³⁹

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. The Mississippi Supreme Court held that the judge's comments were protected by the First Amendment.¹⁴⁰ 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.

This latter reason accords with the Supreme Court's analysis in *Republican Party of Minnesota v. White*.¹⁴¹ 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 acting as a leader in or holding an office in a political organization, making speeches on behalf of a political organization, or publicly endorsing or opposing a candidate for any public office.¹⁴² These provisions are vulnerable on First Amendment grounds as a result of *Republican Party of*

¹³⁹ Cf., *Bauer v. Shepard*, 2010 WL 3271960 (7th Cir. 2007); *Carey v. Wolnitzek*, 2010 WL 2771866 (6th Cir. 2010). See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

¹⁴⁰ *Mississippi Commission on Judicial Performance v. Welkerson*, 876 S.2d 1006 (Miss. 2004).

¹⁴¹ 536 U.S. 765 (2002).

¹⁴² ABA Model Code of Judicial conduct, Canon 4, Rule 4 (A) (2007).

Minnesota v. White.¹⁴³ Several courts of appeal have held broad restrictions on the political activities of judges to be unconstitutional. They argue that there is no real distinction judges who participate in political party activities and judges who state their views on disputed legal and political issues.¹⁴⁴

The Court of Appeals for the Seventh Circuit has drawn a distinction between stating one's affiliation in a political party and a sitting judge's endorsement of a political candidate, holding the former unconstitutional but upholding the latter. In *Siefert v. Alexander*,¹⁴⁵ the Seventh Circuit held that a Wisconsin rule that prohibited judges from announcing their affiliation with a political party violated the First Amendment, but held that endorsement is given less legal protection under the First Amendment. The Wisconsin rule prohibiting a sitting judge from endorsing partisan candidates was justifiable to preserve the impartiality of a judge. Endorsement, the Court stated, quoting the ABA comments, involves "abusing the prestige of judicial office to advance the interests of others."¹⁴⁶ The Court also cited the Supreme Court cases that allowed the government to regulate the speech of public employees when it directly related to their employment duties.¹⁴⁷ The Court did not decide whether the rule would be unconstitutional as applied to judicial candidates.

Campaign promises or commitments.

¹⁴³ 536 U.S. 765 (2002).

¹⁴⁴ *Carey v. Wolnitzek*, 2010 WL 2771866 (6th Cir. 2010); *Wersal v. Sexton*, 2010 WL 2945171 (8th Cir. 2010).

¹⁴⁵ 608 F.3d 974 (7th Cir. 2010). And see, *Bauer v. Shepard*, 2010 WL 3271960 (7th Cir. 2010).

¹⁴⁶ 608 F.3d at 983.

¹⁴⁷ *United States Civil Service Commission v. Letter Carriers* 413 U.S. 548 (1973); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

Judges are elected in the State of Illinois and in many other states. They campaign for the office. 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. It forbade judicial candidates from making pledges or promises of conduct in office other than the faithful and impartial performance of the office. Candidates could not announce their views on disputed legal or political issues, provided the candidates could announce their views on measures to improve the law, the legal system, or the administration of justice.

This rule was struck down by the Seventh Circuit Court of Appeals because it unduly restricted First Amendment rights.¹⁴⁸ The Court noted that judges could not discuss their judicial philosophies, due process of law, economic rights, criminal procedure or prison conditions. Nor could they talk about economics, race relations, health care, or foreign policy -- all of which involve disputed legal or political issues. The Court found the restriction to be overbroad.

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

¹⁴⁸ Buckley v. Illinois Judicial Inquiry Board, 997 F.2d 224 (7th Cir. 1993).

the court.¹⁴⁹ Judges or judicial candidates obviously should not announce their views about cases that are pending or are likely to be filed with the court.¹⁵⁰

In *Republican Party of Minnesota v. White*,¹⁵¹ the United States Supreme Court interpreted the First Amendment similarly to the way the Court of Appeals came down in *Buckley*. The Court held that a Minnesota rule prohibiting judicial candidates from announcing their views on disputed legal and political issues violated the First Amendment. The State had argued that the law was necessary to insure that judges remained “impartial.”

The Court discussed Minnesota’s meaning of “impartial.” 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.¹⁵²

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.¹⁵³ 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,

¹⁴⁹ Illinois Code of Judicial Conduct, Canon 7, Rule 67A(3)(d)(1).

¹⁵⁰ Cf. *Bauer v. Shepard*, 2010 WL 3271960 (7th Cir. 2007); *Carey v. Wolnitzek*, 2010 WL 2771866 (6th Cir. 2010).

¹⁵¹ 536 U.S. 765 (2002).

¹⁵² 536 U.S. at 775.

¹⁵³ 536 U.S. at 777.

even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so.¹⁵⁴

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. The Supreme Court commented that a candidate’s whole life record, including prior writings and speeches, were available to the public. 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.¹⁵⁵

On remand, the Court of Appeals held, based on the reasoning of the Supreme Court, that Minnesota rules that prohibited judicial candidates from identifying themselves as members of a political party or from attending political gatherings or seeking, accepting, or using endorsements from political organizations and that prohibited judicial candidates from signing letters for political donations or asking for funds before large groups of persons violated the First Amendment because they were not narrowly tailored to prevent bias. The donations were made to the candidate’s *committee* and the committee did not disclose to the candidate those who either contributed or rebuffed a solicitation.¹⁵⁶

¹⁵⁴ *Id.*

¹⁵⁵ 536 U.S. at 778.

¹⁵⁶ *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005), cert. denied, 546 U.S. 1157 (2006). And see, *Carey v. Wolnitzek*, 2010 WL 2771866 (6th Cir. 2010); *Wersal v. Sexton*, 2010 WL 2945171 (8th Cir. 2010); *Seifert v. Alexander*, 608 F.3d 974 (7th Cir. 2010).

Similarly, the United States Court of Appeals for the Eleventh Circuit has held that a state rule that prohibits judicial candidates from negligently making false statements and true statements that are misleading or deceptive did not leave enough “breathing space” to protect the candidate’s speech during a campaign.¹⁵⁷

The Supreme Court’s opinion in *White* was distinguished by a subsequent District Court decision in Wisconsin. The Wisconsin Code of Judicial Conduct prohibited judges from making “pledges, promises, or commitments” on how they would rule in specific situations. This rule was found not to be overbroad and did not facially violate the First Amendment.¹⁵⁸ The District Court held that the rule furthered the state’s legitimate goal of “open-mindedness” in its judges. 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.¹⁵⁹

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.

¹⁵⁷ *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

¹⁵⁹ *Id.*

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.”¹⁶⁰ 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 (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.”

The Seventh Circuit distinguished the Sixth Circuit’s opinion in *Carey v. Wolnitzek*,¹⁶¹ which invalidated Kentucky’s “commit” provision as overbroad. Kentucky more broadly prohibited judges or judicial candidates from “intentionally or recklessly mak[ing] a statement that a reasonable person would perceive as committing a judge or candidate to rule a certain way in a case,

¹⁶⁰ *Bauer v. Shepard*, 2010 WL 3271960 (7th Cir. 2010).

¹⁶¹ 2010 WL 2771866 (6th Cir. 2010).

controversy, or issue that is likely to come before the court.” The Seventh Circuit distinguished the Kentucky rule from the Indiana rule. 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.” The Seventh Circuit also rejected the argument that this clause was itself too vague to provide guidance to a judge or judicial candidate.¹⁶²

Comments to press about pending case.

In *United States v. Microsoft Corp.*,¹⁶³ the Court of Appeals chastised and removed a federal District Court judge from the Microsoft anti-trust case because the judge had made ex parte comments to the press about the case and the defendant while the pending case. The problem was exasperated by the fact that the conversations were secret and the press was told to keep silent about the conversations. 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. It was especially bad because the parties to the litigation had no knowledge that it was going on or to counter its effects. The Court properly removed the judge from future participation in the case.

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.

¹⁶² The Court of Appeals also upheld the Indiana rule that required judges who violate the commits clause to recuse themselves. The Court stated that this clause did not present a constitutional argument at all.

¹⁶³ 253 F.3d 34 (D.C. Cir. 2001).

Justice Thurgood Marshall was the first African American justice on the Supreme Court. He had been general counsel for the NAACP Legal Defence Fund. He had litigated most of the major civil rights cases in the United States before his appointment to the Supreme Court. He brought a wealth of practical insights to the Court, which unfortunately are missing today because no justice has the array of experiences he had. Sandra Day O'Connor was the first woman on the Supreme Court. She brought her experiences with her not only in cases involving sex discrimination but in other issues where women may have unique perspectives, such as abortion-related cases.¹⁶⁴

Also, it is important that judges do not become 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.

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."¹⁶⁵ Justice Thomas' opinions to date indicate that he is not following Judge Higginbotham's advice.

¹⁶⁴ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹⁶⁵ "An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague," 140 U. of Penn. L. Rev. 1005, 1027-28 (1992).

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. When he was assigned to hear the Watergate break-in cases, he pursued them until he brought down a fellow Republican, President Richard Nixon.

IV. Disciplining Judges.

A serious question is what can be done when judges fail to perform their duties properly. The United States Constitution provides that federal judges shall be removed by impeachment. These proceedings are cumbersome and rarely undertaken.

Procedures for discipline.

State proceedings to remove judges vary. In Illinois, judges can be disciplined or removed through the Illinois Courts Commission.¹⁶⁶ The Commission consists of five judges and two citizens.

Complaints against judges are filed by the Judicial Inquiry Board, which is located in the Office of the Courts Commission.¹⁶⁷ The Board is composed of four public members, three lawyers, and two judges. The Board conducts a preliminary investigation to determine whether a complaint should be prosecuted before the Court's Commission.

¹⁶⁶ Illinois Constitution (1970), Art. VI, Sec. 15.

¹⁶⁷ Illinois Constitution (1970), Art. VI, Sec. 15(c).

Once the Board files a complaint, the Commission schedules a public hearing.¹⁶⁸ The rules of procedure and evidence applicable in civil cases in Illinois govern the proceedings. The Commission has authority to enforce a number of measures. It can remove the judge, suspend the judge without pay, censure the judge, or issue a reprimand. Decisions are final.

Rarely will a disciplinary commission actually inquire into the decision-making process in a particular case. 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. However, such an inquiry did take place in Illinois when a special commission was appointed to investigate two Illinois Supreme Court Justices accused of accepting gifts of stock during a pending criminal case. The problem was especially sensitive when it was revealed that a decision that would have gone against the defendant was withdrawn. One of the judges who had received the stock had written the opinion favouring the defendant. All the Justices on the Court submitted to having their depositions taken.¹⁶⁹ After a thorough inquiry, the Commission found that the decision was untainted by the misconduct of the Justices.

Duty to Report Violations.

A serious and probing question is how cases can come to the attention of the Illinois Courts Commission. Any litigant or member of the general public can file a complaint in writing against a judge with the Judicial Inquiry Board. It is analysed. If the complaint appears to be well grounded,

¹⁶⁸ Illinois Constitution (1970), Art. VI, Sec. 15 (e).

¹⁶⁹ Manaster, Illinois Justice (2001) at 72.

it will be investigated. If the complaint is found to have merit, the Commission issues a formal charge against the judge.¹⁷⁰

However, many violations by judges are not easily observed by the general public or even by lawyers litigating cases before those judges.

The ABA Model Code of Judicial Conduct requires that a judge having knowledge or who receives information indicating a substantial likelihood of specified ethical violations by another judge to report the judge to the Commission.¹⁷¹ This requirement raises serious concerns that are as yet unaddressed.

In 1988, the Illinois Supreme Court decided a case involving an attorney that may be relevant to this concern. *In re Himmel*,¹⁷² an attorney had knowledge that another lawyer had converted his client's funds and failed to inform the disciplinary commission in violation of a state rule that required lawyers to report such misconduct. The Illinois Supreme Court held that the lawyer was guilty of violating the code of conduct because he did not report the attorney even though he had been instructed not to do so by the client and had sued the attorney to get the client's money back.

Under this ruling, attorneys may not simply ignore misconduct by another attorney. However, the scope of the ruling is uncertain. It may be questioned when an attorney has sufficient knowledge that another lawyer has committed a violation that must be reported to the Courts

¹⁷⁰ <http://www.illinois.gov/jib>: The Complaint Process.

¹⁷¹ ABA Model Code of Judicial Conduct, Canon 2, Rule 2.15 (2007).

¹⁷² 125 Ill.2d 531 (1988).

Commission. Nonetheless, the objective of the decision is sound and it is doubtful that judges should be held to a lesser standard of conduct.

Criminal prosecutions.

In addition to disciplinary actions, judges who commit criminal acts can be prosecuted in regular courts.¹⁷³ In *United States v. Lanier*,¹⁷⁴ a state judge was prosecuted for sexual assaults in his chambers against five women who were present for official business. 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.¹⁷⁵

Damages actions.

Judges in the United States cannot be sued for damages by private parties for the performance of their official duties.¹⁷⁶ This is to ensure that judges are not constrained in their judicial conduct out of fear that they will be sued personally for damages. However, a judge does not enjoy absolute immunity when he or she is performing non-“judicial” duties. For instance, a judge may be sued for discriminating against employees of the court.¹⁷⁷

In a New York case, a law clerk refused to prepare a brief as ordered by the state judge. The clerk claimed that his failure was unrelated to the merits of the case and was the result of the judge's corruption. The judge fired the clerk. The clerk subsequently sued the judge for damages in federal

¹⁷³ *Ex parte Virginia*, 100 U.S. 39 (1880); *O’Shea v. Littleton*, 414 U.S. 488, 503 (1974).

¹⁷⁴ 520 U.S. 259 (1997).

¹⁷⁵ *Tuohy & Warden, Greylord* (1989).

¹⁷⁶ *Pierson v. Ray*, 386 U.S. 547 (1967); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Mireles v. Waco*, 112 S. Ct. 286 (1991).

¹⁷⁷ *Forrester v. White*, 484 U.S. 219 (1988).

court under the First Amendment. 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. 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. The judge was not motivated by an intention to prevent disclosure of alleged corruption.¹⁷⁸

Mandamus and Injunctions.

Judges can be sued for mandamus. This is an order requiring them to perform duties imposed by the law.¹⁷⁹ In appropriate cases, a judge can be sued for an injunction,¹⁸⁰ and a prevailing party may collect attorney's fees against the judge.¹⁸¹

However, in a 1974 case, African Americans had sued state judges in federal court for an injunction to order them to stop engaging in racial discrimination in the conduct of the administration of the criminal justice system in Cairo, Illinois. The United States Supreme Court held that a federal court injunction against the state court judges would be too intrusive and unworkable.¹⁸² The Court said that intrusion into the state criminal process would result in continuous or piecemeal interruptions of the state proceedings. This would disrupt the delicate balance between federal equitable power and state administration of its own law.

¹⁷⁸ Sheppard v. Beerman, 190 F. Supp.2d 361 (E.D.N.Y. 2002). Cf., Garcetti v. Ceballos, 547 U.S. 410 (2006).

¹⁷⁹ See, Cheney v. United States District Court, 124 S.Ct. 2570 (2004), upholding a writ of mandamus against a trial judge who for abuse of discovery orders against the Vice-President of the United States.

¹⁸⁰ Supreme Court of Virginia, v. Consumers Union, 446 U.S. 719 (1984).

¹⁸¹ Pulliam v. Allen, 466 U.S. 522 (1984).

¹⁸² O'Shea v. Littleton, 414 U.S. 488 (1974).

Independence of the Judiciary.

Of course, judicial discipline can intrude into judicial independence. But there is really no alternative. Many judges in post-Communist countries are sensitive about this issue. They have only recently emerged from a totalitarian system where judges were evaluated on whether their opinions fostered Communism and furthered state policies. They were subject to “correction” if they reached the wrong conclusion.

It is understandable that these transitional judges would be very cautious about any attempt by the ministry of justice or any group even within the judiciary to oversee how a judge performed his or her functions. The problem is that many citizens in post-Communist regimes still maintain the perception that judges are corrupt. Whether or not this perception is true or false, it cannot be ignored. This public reaction, of course, cannot serve as an excuse to try to cover up any corruption that exists. Rather cases of corruption must be aired and punished expeditiously.

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.”¹⁸³ The

¹⁸³ ABA Model Code of Judicial Conduct, Canon 2, Rule 2.5, Comment [3] (2007).

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.”¹⁸⁴

Thus, there is no alternative to an effective mechanism to deal with violations of the judicial code. There is a danger 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. Formerly, judicial discipline in Illinois was administered solely by judges. However, a number of scandals showed that the public had no faith in such a system. After the 1980s Greylord crisis in Chicago, where so many judges were convicted of bribery, the Illinois Constitution was amended to allow representatives of the public to serve on the Court’s Commission.¹⁸⁵ 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 agents were equipped with devices that recorded the conversations of judges.¹⁸⁶ 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

¹⁸⁴ ABA Model Code of Judicial Conduct, Canon 2, Rule 2.5, Comment [4] (2007).

¹⁸⁵ Tuohey & Warden, Greylord, (1989).

¹⁸⁶ Id. at 44, 71-74.

measures. There was certainly no public outcry against the government except for the criticism of some lawyers.¹⁸⁷ Nonetheless, in less clear circumstances one can easily see abuses of process occurring.

Just as a competent and 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 essential in society in order to insure that the independence of the judiciary is not compromised and that justice is accomplished. Allowing attorneys and laypersons to sit on judicial disciplinary tribunals has done much in the United States to ensure public confidence that judicial misbehaviour will not be simply 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 its respect among the general public.

V. Helping judges who have impairment problems.

Many judges get into professional trouble because of problems with alcohol and drugs. This behaviour can affect their private lives and carry over into the performance of their duties on the court. It has been stated that while 10 per cent of the population in the United States suffer from some type of alcohol or drug abuse, 15 to 20 per cent of judges and lawyers do. Some 50 per cent of all disciplinary actions against judges and lawyers involve alcohol or drug abuse.¹⁸⁸

The American Bar Association and many states are now establishing Lawyer (and Judicial) Assistance Programs where judges and lawyers can seek help and the matter will be handled

¹⁸⁷ Id.

¹⁸⁸ http://www.Illinois/Ab.org/alcohol_and_drug_abuse.

confidentially.¹⁸⁹ Also, the identity of attorneys and judges who refer their colleagues for assistance will be kept confidential.¹⁹⁰

VI. 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. But their decisions could not be justified according to any objective standard of justice. The problem also existed in Communist and other authoritarian regimes. Ingo Muller argued that not only did German judges enforce the Nazi laws as written, but they helped the Nazis to power by bending German law. They actively interpreted the laws and facts of cases to provide support to the Nazi regime.¹⁹¹

Even today the Germans have failed to come to terms with this breach. They have glossed over and covered up the truth in protecting former judges. For instance, in 1922 Germans refused to vacate the conviction and grant posthumous rehabilitation to Carl von Ossietzky.¹⁹² Ossietzky won the 1935 Nobel Peace Prize. He subsequently died in a concentration camp in 1938 after he was convicted for his pacifism and opposition to German rearmament.

Judges in Latin America have actively aided authoritarian regimes by turning their back on victims of torture and oppression. Despite having a strong tradition of using the writ of habeas

¹⁸⁹ Id.

¹⁹⁰ Id.

¹⁹¹ Muller, *Hitler's Justice – The Courts of the Third Reich* (1991).

¹⁹² *New York Times*, Jan. 13, 1996, at A2, c. 3.

corpus, judges installed after the Argentine military coup in 1976, turned down over 5,000 petitions for the writ in Buenos Aires alone during of 1976 to 1979. During the entire period the military was in power in Argentina (1976-1983), only two persons were released because of habeas corpus. One was the journalist, Jacobo Timmerman.

Similar stories can be recounted about judges in the Antebellum United States and Apartheid South African. 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. 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 has meant the loss of their jobs.

Admittedly it is difficult to determine what constitutes a violation of human rights. The German judge, Oswald Rothaug, was convicted by the Nuremburg 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. Judge Rothaug claimed he was only following German law and criminal procedure.¹⁹³ But when is simply following the law an excuse? The Nuremburg judges who convicted Judge Rothaug of a crime against humanity themselves relied upon an *ex post facto*

¹⁹³ Muller, *Hitler's Justice – The Courts of the Third Reich* (1991), pp. 113-115, 271-273.

application of the criminal law. 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. As a result, are United States judges vulnerable to being charged with committing a crime against humanity for their death penalty decisions?

Conclusion

The question of judicial independence is multidimensional. It has aspects grounded in the American separation of powers doctrine. It has other aspects grounded in judicial ethics and the requirement that judges be impartial in their decision-making. There is no one panacea that will insure an independent judiciary.

The inquiry begins with how judges are selected. 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.

The question of judicial independence is a subject that requires constant re-examination in light of new and developing issues and problems. The question needs to be debated among lawyers,

politicians and in academic conferences -- not just among the judges themselves. Everyone has a stake in the answer.