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Michael P. Seng
John Marshall Law School

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What Do We Mean by an Independent Judiciary?

MICHAEL P. SENG

ABSTRACT

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

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* Professor of Law, The John Marshall Law School, Chicago, Illinois. Parts of this article have been presented at conferences and published at the Faculty of Law, Masaryk University; Brno, Czech Republic; and the Judicial Yuan, Taipei, Taiwan. The author would like to thank Ryne DeGrave and Alex Ghantous, students at The John Marshall Law School, for their research and editorial assistance.
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Recently, Supreme Court Justice Anton Scalia provided lectures to the Tea Party members of Congress about the meaning of the Constitution, an action that will certainly be raised to question the Justice’s impartiality when new federal legislation comes before the Court. Justice Clarence Thomas’ wife has been an outspoken advocate of the Tea Party and has been involved in foundations that may have benefited by the Supreme Court’s decision on campaign financing by corporations in which Justice Thomas cast a crucial vote. Retired Supreme Court Justice Sandra Day O’Connor has been criticized for engaging in public advocacy while continuing to hear cases on the United States courts of appeal. The administrative law judges for the United States Department of Housing and Urban Development have accused their director of the Office of Hearings and Appeals of improperly assigning cases based on his assessment of the outcome reached by an individual judge and other actions that significantly encroach on judicial independence. United States Senators frequently contend in judicial confirmation hearings that judges should “follow the law” and not get involved in political disputes. What this means to each individual Senator is unclear, but given the context of the questions one can speculate that what it really means is that the Senator hopes the judge will rule on issues in conformity with the Senator’s own views.

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


6. Despite the deserved reputation of confirmed federal judges as apolitical, it is interesting that in the first four cases decided in the United States district courts concerning the Obama Health Care Act, two judges appointed by Republicans found the Act to be unconstitutional. Florida v. U.S. Dep’t of Health & Human Serv.’s, 780 F. Supp. 2d 1256, 1305-06 (N.D. Fla. 2011); Virginia v. Sebelius, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010); see also Kevin Sack, Federal Judge Rules That Health Law Violates Constitution, N.Y. TIMES, Jan. 31, 2011, at A1 (noting that Judge Vinson was appointed by President Reagan); Rosalind S. Helderman, Conservative Judge Considers Va. Attorney General’s suit Against Health-Care Reform, WASH. POST, Dec. 7, 2010 (noting that Judge Hudson has “received all of his
State court justices have been targeted for non-retention by conservative
groups who are opposed to their decisions on individual issues.7 We have
witnessed the polarized race for the Wisconsin Supreme Court, where the
election turned less on the qualifications of the candidates than a
referendum on the governor’s proposal to strip collective bargaining rights
from most public workers.8 A state judge was prosecuted by federal
authorities for racketeering, bribery, and extortion for sending thousands of
juveniles to privately run prisons based on his own self-interest.9 Each of
these situations raises complicated questions about judicial independence.

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

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

appointments . . . from Republicans”). In the same manner, two judges appointed by Democrats found
the Act to be constitutional. Liberty Univ. v. Geithner, 753 F. Supp. 2d 611, 649 (E.D. Va. 2010); Tho-
Cir. 2011); see also Kevin Sack, Judge Rejects Health Law Challenge, N.Y. TIMES, Nov. 30, 2010, at
A24 (noting that Judge Moon was appointed by Bill Clinton, a Democrat); Biography of the Honorable
lines/topic.cfm?topic_id=240 (last visited Oct. 31, 2011) (explaining that Judge Steeh was appointed
by President Clinton). This cycle was fortunately broken by the first decision in the court of appeals where
the court held that the Commerce Clause did give Congress the power to pass the minimum health insur-
ance coverage provisions of the Patient Protection and Affordable Health Care Act. Thomas Moore Law
Ctr., 651 F.3d 534. The opinion was written by a Democratic appointee and a concurring opinion was
filed by a Republican appointee. See id. at 533-67; Carl Weiser, 6th Circuit Skirmish Part of Larger
Fight over Judicial Independence, ENQUIRER WASH. BUREAU, Sept. 3, 2003 (explaining judge Martin is
a Democrat); see also Kate Pickert, What the Sixth Circuit Ruling Means for the Future of Health
means-for-the-future-of-health-reform/ (noting that Judge Sutton “was appointed by George W. Bush.”).
The dissenter was a Republican appointee. See id. (noting that Judge Graham “was appointed by Ronald
Reagan.”).

7. See, e.g., A.G. Sulzberger, Ouster of Iowa Judges Sends Signal to Bench, N.Y. TIMES, Nov.
8. Rick Pearson, Wisconsin recall elections carry implication for 2012, CHI. TRIB., Aug. 6,
D1%26FPC%3D100%26DSB%3Drank%2523desc%26DFQ%3DuserId%253A7%26DL%253A0%26DPL%3D3.
9. Jon Hurdle & Sabrina Tavernise, Former Judge Is on Trial in ‘Cash for Kids’ Scheme, N.Y.
dynamic between and among the branches is not the only object of the constitution's concern. The structural principles secured by the separation of powers protect the individual as well."

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

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

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

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

12. Stern, 131 S. Ct. at 2609 (quoting Bond v. United States, 131 S. Ct. 2355, 2365 (2011)).
13. Id. (quoting THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776)).
14. See U.S. CONST. art. III.
controls other than those established by law.” From a constitutional perspective, this concern is closely associated with the concept of due process.

I. SEPARATION OF POWERS REQUIRES JUDICIAL INDEPENDENCE

A. Selection, training, and discipline of judges

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

1. Selection of Judges

Federal judges are governed by Article III of the United States Constitution and by the United States Code. To assure their independence, they are appointed for life by the President and confirmed by the Senate. Federal judges are appointed because of their political connections. However, because of the rigorous selection process, only those members of the profession who are truly distinguished are normally appointed and confirmed. Once judges are appointed and confirmed, they are expected to leave when their political prejudices arise. Federal judges can be removed only by impeachment. Impeachment has been rarely used. See id.; see, e.g., Jennifer Steinhauer, Senate, for Just the 8th Time, Votes to Oust a Federal Judge, N.Y. Times, Dec. 8, 2010, at A27. Thus, the perennial question is how to deal with judges who have lifetime appointments and are unable to serve but have committed no impeachable offense.
hundred twenty years. There has been no major scandal that has rocked the federal judiciary, although individual courts and judges have been criticized for their decisions and judges have been removed for improprieties.

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

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 follow federal law when applicable and accord all persons due process and equal protection of law. State laws provide a


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


32. U.S. CONST. amend. XIV.
variety of mechanisms for selecting judges, including election by the voters. 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. Most early state constitutions provided for a process of impeachment to remove judges who committed transgressions; however, many states have moved away from this model. Judicial election and retention systems have inherent flaws when it comes to the question of judicial independence. Judges and judicial candidates cannot offend those who determine and control their status.

While the popular election of judges faces the most criticism, appointment systems—whether the appointments are made by politicians or by blue-ribbon panels—are not immune from improper influences either.

Even judges appointed under the famous Missouri Plan have been targeted by special interest groups in ways that undermine their independence. The Missouri Plan is supposed to insulate judges from the political process. Under the 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, judges who make unpopular decisions about same-sex marriage, the death penalty, or even medical malpractice liability have been targeted by special interest groups in retention elections. This targeting has proved to be successful. Three judges in Iowa, which follows a modified Missouri Plan, were not retained by the voters in the November

33. The Difference Between Federal and State Courts, supra note 30.
34. See ARIZ. REV. STAT. ANN. § 12-120.02(A) (West 2011); UTAH CODE ANN. § 20A-7-702(2)(b)(ii) (West 2011).
35. See, e.g., ARIZ. REV. STAT. ANN. § 12-120.02(A); UTAH CODE ANN. § 20A-7-702(2)(b)(iii).
40. Id.
41. Id.
42. Id.
43. Sulzberger, supra note 37.
2010 elections because they had participated in a unanimous Iowa Supreme Court decision to legalize same-sex marriage.45

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

2. Training of Judges

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

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

47. Id.
48. See id.
49. Id.
50. Ústavní soud České 18.6.2002 [Decision of the Constitutional Court of June 18, 2002], sp.zn. US 7/02 (Czech).
51. For instance, a proposal was made to the American Bar Association at its summer 2010 meeting asking it to encourage the training of United States judges in financial products and practices as a way of ensuring the groundwork for financial reform. Petra Pasternak, ABA Delegates to Weigh Judicial Finance Training, Same-Sex Marriage, LAW.COM (Aug. 2, 2010), http://www.law.com/jsp/article.jsp?id=1202464122301&ABA_Degemates_to_Weigh_Judicial_Finance_Training_SameSex_Marriage&slreturn=1. However, the downside of such a proposal, as suggested by San Francisco Superior Court Judge Richard Kramer, is how one decides what the judge ought to know—would the training cover rudimentary terms and rules that are not the subject of opinion, or would it cover how the markets operate, which is a subject of controversy and opinion? Id.
3. **Discipline of Judges**

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

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53. One of the few court cases involving the impeachment of a federal judge is *Nixon v. United States*, where a federal district judge was convicted of the criminal offense of making false statements before a federal grand jury and then removed from office by the Senate. 506 U.S. 224, 226-28 (1993). On December 8, 2010, the Senate found federal Judge G. Thomas Porteous, Jr. guilty in an impeachment proceeding. Patricia Murphy, *Senate Removes Judge Thomas Porteous Jr. Following Impeachment Trial*, POLITICS DAILY (Dec. 8, 2010), http://www.politicsdaily.com/2010/12/08/senate-impeaches-judge-thomas-porteous-removes-him-from-office/. Among the charges was the allegation that Judge Porteous had received cash and favors from attorneys who appeared in his court. Judge Porteous was only the eighth judge in American history to be removed by impeachment and the first since 1989. *Id.*
55. *See id.* §§ 352(d), 354.
56. *Id.* § 352(a), (c).
57. *Id.* § 354 (2)(A).
60. 5 U.S.C.A. § 556 (West 2011).
individually whether they can be impartial in hearing a particular matter before them. The first Model Code of Judicial Conduct was not promulgated by the American Bar Association ("ABA") until 1924. 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 Code will be the primary focus of analysis, with the understanding that it is not binding and may vary slightly from state to state.

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

63. Id. § 455(a).
64. See MODEL CODE OF JUDICIAL ETHICS Canons (1924).
67. The American Bar Association last revised its Model Code of Judicial Conduct in 2007. See generally MODEL CODE OF JUDICIAL CONDUCT, supra note 18. The Code expressly states that it "should not be interpreted to infringe on the essential independence of judges in making decisions." Id. at Scope 5. The new formulation is much more detailed than the older codes and offers much more guidance to judges on what they should avoid. Compare id., with MODEL CODE OF JUDICIAL ETHICS supra note 64. These new changes will now have to be considered by the individual states. State Adoption of the ABA Model Rules of Professional Conduct and Comments, AMERICAN BAR ASSOCIATION (May 23, 2011), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf. The ABA Model Code is advisory only and each state adopts its own standards of judicial conduct. Id. Therefore, whether a state adopts the new version or continues to follow its earlier enacted code will be up to the individual jurisdiction. Id. Some states and the Federal Judicial Conference have adopted procedures for judges who are not sure of their ethical or professional responsibilities to request an advisory opinion. See, e.g., The Advisory Opinion Process, THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM, http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/Advisory_process.asp (last visited Nov. 4, 2011); The Formal Advisory Opinion Board, STATE BAR OF GEORGIA, http://gabar.org/handbook/rule_4-402_formal_advisory_opinion_board/ (last visited Nov. 9, 2011); Advisory Opinion-DS 6001, U.S. DEP’T. OF STATE, http://pmddtc.state.gov/licensing/advisory_opinion.html (last visited Nov. 9, 2011). In some states these opinions are given by the disciplinary commissions and in other states by special committees set up by the state or the bar association. See, e.g., The Advisory Opinion Process, supra; The Formal Advisory Opinion Board, supra; Advisory Opinion-DS 6001, supra. Jurisdictions differ on the extent that these advisory opinions are binding or may provide a defense to a judge that relies upon them. See e.g., The Advisory Opinion Process, supra; The Formal Advisory Opinion Board, supra; Advisory Opinion, supra. State laws also differ on the confidentiality of these opinions. The advantage of these advisory opinions is that they give judges guidance on uncertain matters and thereby promote ethical conduct. The disadvantage is that they are rendered in a non-advisory context where the facts and differing viewpoints may not be fully developed.
68. See, e.g., MISS. CODE OF JUDICIAL CONDUCT Preamble 5 (2002); ILL. CONST. art. VI, § 5, cl. b.
69. ILL. CONST. art. VI, § 15, cl. b.
misconduct or individual issues of physical or mental suitability.\textsuperscript{70} The JIB may file a complaint against a judge before the Courts Commission, which also consists of judges, lawyers, and members of the public.\textsuperscript{71} The commission is mandated to conduct hearings and decides upon removal or discipline of judges in appropriate situations.\textsuperscript{72}

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

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

Justices on the Supreme Court of the United States, unless they have committed an impeachable offense, are left to decide for themselves whether they may have a conflict that breaches their obligation to be
independent in a particular case. Virtually everyone, except perhaps the Supreme Court Justices themselves, would agree that this system does not work.

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

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

80. 28 U.S.C.A. § 455(a).
84. See Methods of Removing State Judges, AMERICAN JUDICATURE SOCIETY (2009), http://www.ajs.org/ethics/etc_impeachment.asp.
86. See, e.g., TEX. CONST. art. 5, § 1-a, cl. 2.
88. Id. at 540 (Duggan, J., concurring).
89. ILL. CONST. art. VI, § 15, cl. b.
91. JAMES TUOHY & ROB WARDEN, GREYLORD JUSTICE, CHICAGO STYLE 258-60 (G.P. Putnam’s Sons 1989).
representatives of the public to serve on the Courts Commission. This has been in effect for several years and appears to be working well.

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

Just as a competent, independent, and fair judiciary is essential to all societies, a parallel mechanism must be put into place to punish judges who engage in illegal and unethical conduct. Separating such a mechanism from the regular political and judicial institutions is societally necessary to ensure that judicial independence is not compromised and that justice is accomplished. Allowing attorneys and laypersons to sit on judicial disciplinary tribunals has helped assure the public that judicial misbehaviour will not be covered up by the judge’s own colleagues. The failure to provide such a mechanism will itself undermine the independence of the judiciary by diminishing the general public’s respect for it. Judges can be held accountable in other ways. In addition to disciplinary actions, judges who commit criminal acts can be prosecuted in regular courts. In United States v. Lanier, 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. There is a danger that the prosecution of a judge will be politically motivated. But the check on this is the check in every criminal prosecution—indictment by a grand jury.

92. Id. at 258; see ILL. CONST. art. VI, §15, cl. e.
93. TUOHY & WARDEN, supra note 91, at 44, 71-74.
94. Id. at 71-74, 259-71.
95. Id. at 245.
98. Id. at 261.
99. TUOHY & WARDEN, supra note 91, at 258.
jury and conviction only upon proof beyond a reasonable doubt that the accused has violated a valid criminal statute. 100

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

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

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

102. Pierson, 386 U.S. at 566.
103. Id. at n.6.
106. Id. at 364.
107. Id. at 368.
108. Id. at 362.
109. Id. at 384.
111. Id. at 384. But cf. Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding that public employee statements made in one’s official capacity is not speech for First Amendment purposes and such statements are not insulated from employer discipline).
113. BLACK’S LAW DICTIONARY 980 (8th ed. 2004); see Cheney, 542 U.S. at 391 (upholding a writ of mandamus against a trial judge who for abuse of discovery orders against the Vice-President of the United States).
collect attorney’s fees against the judge.\textsuperscript{115} Independence is not in jeopardy as a judge must be shown to have violated a clear legal duty and the action only requires the judge to do what he or she was legally required to do initially.\textsuperscript{116}

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

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

1. Advisory opinions

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

\begin{itemize}
  \item \textsuperscript{116}. \textit{Id.} at 551 (Powell, J., dissenting).
  \item \textsuperscript{117}. O’Shea v. Littleton, 414 U.S. 488, 490 (1974).
  \item \textsuperscript{118}. \textit{Id.} at 499-501; see Michael P. Seng, \textit{The Cairo Experience: Civil Rights Litigation in a Racial Powder Keg}, 61 OR. L. REV. 285 (1982).
  \item \textsuperscript{119}. O’Shea, 414 U.S. at 500.
  \item \textsuperscript{120}. \textit{Id.}
  \item \textsuperscript{121}. \textit{Id.} at 503.
  \item \textsuperscript{125}. 3 \textit{THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY} 486-89 (Henry P. Johnston ed. 1891).
\end{itemize}
as institutions, cannot give advisory opinions on the law outside of a formal case brought by adversaries to a proper legal dispute. Giving legal advice to Congress or the President would compromise the Court’s impartiality if those issues later came before the Court in a real controversy between adverse parties.

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. 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, the litigant may not present the argument from the most compelling perspective.

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. So long as the judiciary gives its advisory opinions in formal proceedings under established rules where the arguments are fully presented, it cannot be argued that this practice violates principles of natural law. 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 have been several instances in United States history when individual judges have given legal advice to presidents. In the first three

126. Id.
127. Id.
129. Warth v. Seldin, 422 U.S. 490, 498 (1975); Camreta v. Greene, 131 S. Ct. 2020, 2027, 2028-30 (2011) (the Supreme Court upheld the right to appeal by a government official who had been found by the Court of Appeals for the Ninth Circuit to have violated the Fourth Amendment rights of an elementary school girl but not to be liable because of qualified immunity. Even though the officer had prevailed in the court of appeals on the immunity issue, the officer still had standing to appeal because he was injured by the Constitutional ruling if he chose to engage in that conduct in the future. The Court found that he could demonstrate “injury, causation, and redressability.”).
131. See id.
132. See, e.g., MASS. CONST. art. II, pt. II, ch. 3; GRUNDEGESETZ FUR DIE BUNDESREpublik Deutschland [GRUNDEGESETZ] [GG] [BASIC LAW], art. 93(2), May 23, 1949, BGBl. I (Ger.) (The German Constitutional Court allows a federal or state or a third of the members of the federal parliament to petition the court to decide the constitutionality of a law).
decades of the 20th Century, Justice Brandeis gave advice to President Woodrow Wilson and later to President Franklin D. Roosevelt. In 1952, Justice Vinson wrongly advised President Truman about the law when the president seized private steel mills to avert a strike. The Court ultimately ruled the seizure unconstitutional. Justice Fortas served as a confidential advisor to his friend, President Lyndon B. Johnson. These actions should be condemned under any legal system. A judge as an advisor to a political office holder compromises judicial impartiality or at least the appearance of judicial impartiality, which is equally important.

Questionable conduct continues to take new forms. Justice Antonin Scalia conducted a seminar for conservative members of Congress on the Bill of Rights and the role of government in January 2011. There is no general prohibition on judges participating in seminars or teaching courses. However, this seminar was sponsored by one faction in Congress, although it was open to all members. Justice Scalia addressed issues of federalism that were near and dear to the hearts of conservatives in Congress and it is hard to imagine that what he said will not form part of a legislative agenda for those Congressmen. For a Supreme Court Justice to step into the role of legal consultant to Congress breaches separation of powers. Even if Justice Scalia’s comments are entirely neutral and do not address any issue that is likely to come before the Court (which is almost impossible) his participation in the seminar creates an appearance of impropriety that, at the very least, requires Justice Scalia to recuse himself in any case where legislation comes before the Supreme Court which could have been influenced by his counsel in the seminar.

142. Savage, supra note 140.
143. Id.
144. Frankfurter, supra note 133, at 1002.
2. Legislative and executive activities

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 clear. In a recent example, *Mistretta v. United States*, the Supreme Court of the United States upheld a federal law establishing a sentencing commission and placing it in the judicial branch of the government. 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 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. John Jay was both 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.

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

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148. *Id.* at 361 (1989).
149. *Id.* at 412.
150. *Id.* at 374, 384, 412.
151. *Id.* at 364-67.
152. *Id.* at 365.
154. *Id.* at 412.
155. *Id.* at 398-400 n.21.
156. *Id.* at 398.
157. *Id.* at 398-99.
disputed presidential election results. Justice Roberts served on a commission to investigate the attack on Pearl Harbor 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.

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

C. Judicial opinions must be accorded finality

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

160. Mistretta, 488 U.S. at 400.
161. Id.
162. Id.
163. Id.
164. Id. at 400-01.
166. MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at Canon 3, R 3.4.
167. Id. at Canon 2, R 2.12, 2.13.
168. Id.
169. Hayburn’s Case, 2 U.S. (2 Dall.) 409 (1792).
only review the exercise of judicial power.\textsuperscript{170} An executive or legislative official cannot.\textsuperscript{171}

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

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

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

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171. U.S. CONST. art. I, II.
173. \textit{Id.} at 378-79.
174. \textit{Id.}
175. \textit{Id.} at 384-86.
176. \textit{Id.} at 385-86.
178. \textit{Id.} 390-91.
179. \textit{Id.} at 407.
180. \textit{Id.} at 390, 424.
184. \textit{Id.} at 214.
186. \textit{Id.} at 211.
\end{flushright}
unconstitutional because it required the courts to reverse a decision already made, violating the separation of powers principle.187

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

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

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

187. Plaut, 514 U.S. at 240.
188. Id. at 230-31 (citing Sioux Nation, 448 U.S. 371).
189. Id. at 233-34.
190. See id.
191. Id. at 240.
192. Plaut, 514 U.S. at 240; U.S. CONST. art. I.
197. Id. at 512-13 (citing Emp't Div. v. Smith, 494 U.S. 872 (1990)).
198. Id.
Vegetal, the Supreme Court applied RFRA when reviewing federal legislation. Justice Roberts for a unanimous Court stated:

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

D. Judges should not render political opinions

In Marbury v. Madison, 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 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. The Court concluded that a challenge under the Equal Protection Clause of the 14th Amendment to a state’s apportionment scheme is a question of law for the courts to decide.

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

200. Id. at 439.
201. Id.
202. 5 U.S. 137 (1803).
203. Id. at 166.
204. Id. at 137.
205. See id. at 177.
207. Id. at 217.
208. Id. at 204.
electoral votes in a presidential election,\textsuperscript{211} whether the House of Representatives can refuse to seat a member beyond the terms proscribed in the Constitution,\textsuperscript{212} and whether Congress violated the Origination Clause in enacting a revenue bill.\textsuperscript{213}

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

\textit{E. Legislators may not impose rules of decision on the courts}

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

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

\textsuperscript{214}. See Morse v. Frederick, 551 U.S. 393 (2007).
\textsuperscript{215}. See, e.g., Skelly Wright, \textit{The Role Of The Supreme Court In A Democratic Society}, 54 \textsc{Cornell L. Rev.} 1 (1968).
\textsuperscript{217}. See United States v. Klein, 80 U.S. 128, 139-42 (1871).
\textsuperscript{218}. \textit{Id.} at 139-43.
\textsuperscript{219}. \textit{Id.} at 144.
\textsuperscript{220}. See generally id.
\textsuperscript{221}. \textit{Id.} at 147.
\textsuperscript{222}. \textit{Klein}, 80 U.S. at 145-46.
Even in cases that do not strictly involve a “rule of decision” imposed by Congress, the Supreme Court has struck down attempts by Congress to interfere with the ability of the courts to perform the process of adjudication. In *Crowell v. Benson*, 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:

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

More recently in *Boumediene v. Bush*, the Supreme Court reviewed the Detainee Treatment Act of 2005. The Act allowed the courts of appeal 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* and *DeLuna v. St. Elizabeth’s Hospital*, the Supreme Court of Illinois considered whether the legislature could limit medical malpractice cases by

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224. *Id.*
225. *Id.* at 57.
227. *Id.* at 787-90.
228. *Id.* at 789-90.
229. *Id.* at 790.
230. *Id.*
232. *See id.*
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 of whether the lawsuit had merit to a non-judicial officer and made that decision binding on the court.

The Supreme Court of Illinois 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 Ass'n*, 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 a 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. 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.

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236. *DeLuna*, 588 N.E.2d at 1141.
238. Id.
239. Id.
242. Id.
243. Id.
244. Id. at 1154, 1157-58.
245. *DeLuna*, 588 N.E.2d at 1149 (Clark, J., dissenting).
246. Id.
247. Id. at 1149-50.
248. Id.
F. Legislators may not strip the courts of jurisdiction so as to destroy their core function

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

In Ex parte McCordle, Congress passed legislation stripping the Supreme Court of review in a habeas action after the Court heard oral argument but before it rendered its decision in the case. Even though it was clear that Congress stripped the Court of jurisdiction to prevent it from declaring part of its Reconstruction legislation unconstitutional, the Court deferred to Congress and dismissed the appeal. 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 of whether Congress, consistent with the Constitution, could take away all judicial review. In most cases, the Court has avoided the question by reading the law narrowly so that some form of judicial redress will still be available. For instance, in Webster v. Doe, the Supreme Court read a statute that deprived the courts of jurisdiction to hear civil service appeals when employees claim that they are unlawfully discharged by the Central Intelligence Agency as not to preclude the courts from hearing constitutional claims involved in the discharge.

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

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249. See U.S. CONST. art. III.
253. 74 U.S. 506, 514 (1869).
254. Id. at 514-15.
255. Id. at 513-15.
256. Id. at 515.
258. Id. at 603.
259. Id. at 611-614.
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 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.

In *Boumediene v. Bush*, 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.

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

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

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260. *Id.* at 615.
261. *Compare id.* at 611-14, with *id.* at 603.
264. *Id.* at 745.
265. *Id.*
267. *Id.* That practice may not be completely dead, at least within the Russian judicial system. A court employee has claimed that the Russian judge who presided over the trial of Mikhail B. Khodorkovsky, a billionaire oil tycoon, was monitored by senior judicial officials who dictated the major rulings in the case. Clifford J. Levy, *Russian Court Pressed Judge in Tycoon’s Trial, Assistant Says,* N.Y. TIMES, Feb. 15, 2011, at A4.
judges be neutral. Neutrality is also the minimum required by any reasonable system of judicial ethics.

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. The framers gave judges life appointments and provided that their salaries could not be diminished. Most state judges serve limited terms and face periodic elections. Nonetheless, both types of judges are vulnerable, like all of us, to putting their self-interest first.

1. Bribery

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

In addition, bribery and corruption undermine public confidence in the

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

269. See Model Code of Judicial Conduct, supra note 18, at R. 2.2.

270. See The Federalist No. 78 (Alexander Hamilton).


273. See generally Tuohy & Warden, supra note 91.

274. See generally id.

judiciary, which affects 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 could be money or it could be something less tangible. For example, a judge who imposes a death sentence primarily because it will please his or her superiors and result in his or her advancement is as corrupt as the judge who has accepted a monetary gift from the victim’s family. But the former may be harder to detect and even harder to discipline than the latter. So long as we have judges, we will have men and women who succumb to bribery and corruption. The challenge is to define bribery in a manner in which it can be identified, punished, and ultimately deterred.

2. Gifts and Other Benefits

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

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.

Justice Stevens’ observations about the election process apply to the judicial system. Justice Stevens may well have been influenced by the
controversy that first brought him to national attention.\footnote{287} When he was still in private practice, Justice Stevens participated in a commission that investigated two justices on the Supreme Court of Illinois who had received gifts of stock from a defendant in a case pending in that court.\footnote{288} The commission found that the decision of the supreme court was untainted by the impropriety.\footnote{289} Nonetheless, the commission recommended that the judges resign, and they did.\footnote{290}

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

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

\footnote{287. See generally MANASTER, supra note 75.}
\footnote{288. Id. at 37-40.}
\footnote{289. See id. at 220-21.}
\footnote{290. See id. at 238-39. Early in the history of the Supreme Court, Chief Justice John Marshall recused himself in a case involving land titles in the State of Virginia when he stood to benefit financially because of land that he owned. See \textit{Martin v. Hunter's Lessee}, 14 U.S. (1 Wheat.) 304 (1816). He was not so scrupulous when he presided over a case in which he had no financial interest but which was the direct result of his failure to perform a duty required under the law when he was Secretary of State. See \textit{Marbury}, 5 U.S. 137.}
\footnote{292. WOODWARD & ARMSTRONG, supra note 291; MURPHY, supra note 291.}
\footnote{293. WOODWARD & ARMSTRONG, supra note 291; MURPHY, supra note 291.}
\footnote{294. WOODWARD & ARMSTRONG, supra note 291; MURPHY, supra note 291.}
\footnote{296. BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT – A JUDICIAL BIOGRAPHY 760-62 (N.Y. Univ. Press 1983).}
\footnote{297. See \textit{Citizens United}, 130 S. Ct. at 965 (Stevens, J., concurring in part and dissenting in part); Eric Lichtblau, \textit{Court Is Asked to Clarify Thomas's Ties to a Retreat}, N.Y. TIMES, Feb. 15, 2011, at A17.}
\footnote{298. Lichtblau, supra note 297.}
received a “four-day, all-expenses paid trip in sunny Palm Springs,” which he did not adequately disclose on his financial disclosure report for that year.299

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

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

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

299. Id. Thomas’s wife worked for a foundation that may have benefited from the decision.
300. MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 2.11(A)(3).
303. See ILL. CODE OF JUDICIAL CONDUCT R. 68 (1986); MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 3.5.
304. See MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 3.1.
305. Id. at R. 3.1 cmt. 1.
306. See id.
307. See id. at R. 66(A).
308. See MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 3.13.
309. Id.
310. MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 3.14 cmt. 1, 2, 3.
impropriety. The new ABA Model Code of Judicial Conduct 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 an Ohio-based power company flying Chief Justice Rehnquist of the Supreme Court to Columbus, Ohio to deliver a speech 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. 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 Chief Justice pointed out that the cost for the private jet was over $3,800, while he could have flown first class on a commercial airliner for no more than $1,100.

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. 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.

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311. See id.
312. Id. at R. 3.14(C).
314. Id.
315. Id.
316. Id.
317. Id.
318. See Janofsky, supra note 313.
319. See id.
320. See id.
321. See id.
323. See id.
324. Id. at R. 3.1(C).
325. See id.
3. Campaign contributions

In many jurisdictions judges are required to be elected. 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 one million dollars in their 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.

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

Several courts of appeal have addressed whether the ban on judges and judicial candidates soliciting campaign contributions violates the First Amendment. The United States Court of Appeals for the Eighth Circuit reviewed a State of Minnesota rule that prohibited a judicial candidate from personally signing letters asking for campaign contributions. The rule 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. 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.

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

The Supreme Court of the United States held that due process required the recusal of the state court justice. The Court did not question the justice’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 serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the

337. Id. at 765.
344. Id. at 2267.
345. Id. at 2263.
contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.\textsuperscript{346}

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

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

4. Charitable solicitation

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

B. Judges cannot be influenced by their family and friends

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

\textsuperscript{346} Id. at 2263-64.
\textsuperscript{347} See id. at 2252.
\textsuperscript{349} MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 3.7, R. 3.7 cmt. 2.
\textsuperscript{350} ILL. CODE OF JUDICIAL CONDUCT R. 65(B)(2) (2006).
\textsuperscript{351} MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 2.11(A).
\textsuperscript{352} Id. at (A)(1).
admirable quality, and persons are expected to take care of their friends. But this is not the case with judges. Friendship should not be allowed to have any impact on the independence of a judge. Even if a friendship has no real impact on the decision that a judge makes, judicial independence may be compromised in the public’s perception. 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 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. However, the court criticized the judge for his non-disclosure because the defendant and the public might perceive partiality upon learning of such close ties between the prosecutor and the judge.

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 only involved him in his official position. Presumably Justice Scalia assumed that the public

353. See id.; see Charles A. Boyle, Personal, professional ties compromise judges, CHI. SUN TIMES, Dec. 14, 2008, at A27.
354. Id.
356. See id.
357. United States v. Murphy, 768 F.2d 1518, 1537-38 (7th Cir. 1985).
358. Id. at 1536.
359. Id.
360. Id. at 1537.
361. Id.
362. Murphy, 768 F.2d at 1538.
364. Id.
365. See id. at 916.
would likewise divide a person into two personalities. He thought he was hunting with Cheney the man, not Cheney the Vice President.

After the Court stepped into the question of independent campaign spending by corporations and unions in 2010, questions of judicial independence have focused on the activities of the wife of Justice Clarence Thomas. Virginia Thomas is the founder and head of a non-profit group that funds 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 questionable whether Justice Thomas should participate in cases that decide the issue.

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. 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. This is an especially desirable provision because the attorney does not run the risk of offending anyone.

A judge’s use of his or her position to assist a family member to advance in the legal profession can compromise judicial independence. 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. However, it would not be permissible for a judge to use information available only through the course of performing judicial duties to assist the family member in representing a

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366. Id.
367. Id.
368. See Citizens United, 130 S. Ct. 876.
370. Id.
371. Id.
372. See id.
374. Id.
376. Id.
378. See MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 3.10.
379. See id.
A judge may serve as a reference "for an individual based upon
the judge’s personal knowledge." However, a judge crosses the line
when he or she urges potential clients or employers to hire family
members. 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.

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

A feature of the common law is that judges follow the law laid down by
higher courts. 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.
Therefore, judges must be careful that they are not influenced in their
decision-making by any other judge, whether their equal or a superior. This
means that a judge should not fear the loss of collegiality or, worse, the loss
of advancement in the system, depending upon how the judge rules in a
particular case.

Separation of powers means that a judge is to be independent of
legislative and executive officers. 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. A judge must make up his or her own mind
and decide the case based on personal analysis and considered opinion.
To do otherwise is a violation of judicial independence.

380. See id. at R. 3.5.
381. Id. at R. 1.3, cmt. n.2.
382. See id. at R. 3.10, cmt. n.1.
383. MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 3.10, cmt. n.1.
385. See id.
386. See id.
387. See Bond, 131 S. Ct. at 2365 (stating that "[s]eparation-of-powers principles are intended . . .
to protect each branch of government from incursion by the others.").
388. See MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 2.4(B).
389. Id. at R. 2.9(A)(3), cmt. n.5.
390. Id. at R. 2.9(A)(3).
391. Id. at R. 2.9(A).
392. Levy, supra note 267, at A4 (an egregious example, if true, occurred recently in Russia. A
court employee has claimed that the Russian judge who presided over the trial of Mikhail B. Khodor-
Not surprisingly, this is not an issue that is likely to be litigated. The parties will never know what subtle pressures may have been exerted on a judge by his judicial colleagues. Nonetheless, an examination of human nature makes this more than a hypothetical concern. If a judge wants to advance in a system where promotion is determined by the vote of colleagues or superiors, the judge may be tempted to please in order to advance.

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

A case that comes dangerously close to such a transgression is the order of the Court of Appeals for the Seventh Circuit in In re United States. 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 his decision on the ground that “[e]xclusion of the government’s fingerprint evidence was too drastic a remedy.” On remand, the judge excluded expert testimony about the recovery of latent fingerprints because he suspected the government tampered 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.

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

393. 2A FED. PROC., L. ED. § 3:789.
394. See id.
395. 614 F.3d 661 (7th Cir. 2010).
396. See id.
397. See id.
398. Id. at 664.
400. Id. at 662.
401. Id.
402. Id.
The court of appeals justified its extraordinary order on the ground that it feared that the judge would declare a mistrial occasioned by government misconduct or would exclude the evidence, which would result in an acquittal of the defendant. In either case, double jeopardy would bar an appeal. The appellate court commented that “[t]he transcript of the district judge’s remarks concerning the evidentiary issue reveals a degree of anger and hostility toward the government that is in excess of any provocation that we can find in the record.” Appellate removal of a lower judge in a pending case assumes that the judge will not follow the law. It comes dangerously close to impairing judicial independence by sending a message that the next trial judge should show more deference to the prosecutor.

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

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

1. 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 which involved the U.S. Army spying on American civilians, the parties moved to disqualify Justice Rehnquist because of statements he had made before a Senate committee. “[A]s an ‘expert witness for the Justice Department,’” he

403. Id. at 662, 664.
404. In re United States, 614 F.3d at 662, 664.
405. Id. at 665.
406. See 28 U.S.C.A. § 455(b)(1) (West 2011); MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at Canon 1; see, e.g., Lim, supra note 4 (explaining that the appearance of impropriety is not applied so strictly against administrative law judges who are employed directly by the agency that appears before them and actual prejudice must be shown in that instance. However, where an administrative law judge is personally involved in litigation against the agency, the presumption of impartiality would appear to be breached.); Secretary v. Corey, Notice of Disqualification and Order to Transfer, HUDALJ 10-M-207-FH-27 (Apr. 15, 2011).
407. See MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 2.3(A), 2.4(A), cmt. n.1.
408. Id. at R. 3.6(A).
409. Id. at R. 2.11(A)(1).
411. Id. at 824-25.
made statements "‘on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information.’"412 Justice Rehnquist made these statements prior to becoming a judge.413 He refused to recuse himself because he had not worked directly on the case under consideration.414 Justice Rehnquist stated that most judges in the United States come to the court with prior experience which touches on their judicial work.415 Justice Rehnquist further commented that past practice supports him.416

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

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

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

412. Id. at 825-26 (quoting Respondents’ motion for Justice Rehnquist’s recusal).
413. Id. at 839.
414. Id. at 828, 830.
415. Laird, 409 U.S. at 835.
416. Id. at 831, 833.
417. Id. at 831 (citing United States v. Darby, 312 U.S. 100 (1941)).
418. Id. at 832 (citing United States v. Hutcheson, 312 U.S. 219 (1942)).
419. 5 U.S. 137 (1803).
422. Id.
serving as the Solicitor General of the United States, where 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. 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 favorable to the New Deal legislation. The Leahy proposal is more limited. It would not increase the size of the Court and could be used only to prevent the Court from splitting four-to-four in a case where a sitting Justice was not able to take part in the deliberations.

2. No personal interest in the case

Clearly, judges should not sit on cases if they have previously acted as counsel for any of the parties in the matter or served as a material witness to the facts in question. In United States v. Alabama, 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, and had spoken out against segregation as a member of the state senate did not disqualify him. Before becoming a judge, he had played a critical role in confirming nominees to the school boards and he had participated as a lawyer in developing some of the facts that were at issue in the lawsuit.

424. Id.
425. Id.
426. See id.
429. Id. at 134.
430. See id. at 95 ("Clearly, it is running in the President's mind that substantially all of the New Deal bills will be declared unconstitutional by the Supreme Court. This will mean that everything that this Administration has done of any moment will be nullified.").
431. S. 3871, 111th Cong. § 1 (2010).
433. 828 F.2d 1532 (11th Cir. 1987).
434. Id. at 1545-46.
435. Id. at 1541-43.
436. Id. at 1544.
The court felt that he should step down from hearing the case because “he had extrajudicial, personal knowledge of disputed facts . . .”

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. 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.

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 a federal court in Pennsylvania. The defendant, who was accused of racial discrimination, argued that the judge should recuse himself because he was African-American, a civil rights leader, and gave a speech before a meeting of African-American historians where he discussed injustices to African-Americans. 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. Indeed, carried to its logical end, white judges would similarly be required to disqualify themselves from cases involving racial discrimination.

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

437. Id. at 1545-46.
438. In re City of Houston, 745 F.2d 925, 926-30 (5th Cir. 1984).
439. Id. at 928.
440. Id. at 930.
442. Id. at 156-57.
443. Id. at 157.
444. Id. at 163, 181-82.
445. Ian Lovett, California Judge Upholds a Ruling on Gay Marriage, N.Y. TIMES, June 15, 2011, at A18. A challenge was made to a ruling that struck down California’s ban on gay marriage on the ground that the judge who ruled on the matter had a ten-year relationship with another man. However, there was no evidence that the judge intended to marry the other man and the district court ruled that the single characteristic that the judge was gay did not bar him from ruling on a case involving same-sex marriage.
3. Impartiality of the judge

Judges must conduct themselves in an impartial manner on the bench. 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. 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.”

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.

4. Ex parte communications

Ex parte communications with parties or their lawyers concerning pending or impending matters is generally impermissible unless there is full disclosure and consent of all the parties. 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. 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

446. MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 2.2.
448. MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 2.8(B).
449. Id. at R. 1.2.
450. Id. at Terminology.
451. Id. at R. 2.6(B).
452. See, e.g., United States v. Bruce, 976 F.2d 552, 555-58 (9th Cir. 1992) (holding that it is improper for a court to be involved in the plea bargaining process).
453. MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 2.6, cmt.3.
455. See MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 2.9(A).
456. Id.
the decision on 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.

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 Code explicitly states that a judge shall not attempt to check facts involved in a case on the Internet. Clearly, a judge may not prejudge a case by trying to learn facts that are not in evidence through the Internet, just as it would not have been proper for the judge to consult newspapers or journals to resolve a fact in dispute in a case.

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

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

459. See, e.g., Civil Procedure Rules, 2010, R. 35.3(1)-(2); 35.4(1) (U.K.).
460. MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 2.9(A)(3).
461. Id. at R. 2.9(A)(3), cmt. n.5.
462. Id. at R. 29(C), cmt. n.6.
463. Id. at R. 2.9(A)(2).
464. Id. at R. 2.9 cmt. n.6.
465. See FED. R. EVID. 201.
466. Id.
467. See id. at 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned."); see also Scanlan v. Texas A&M, 343 F.3d 533, 536-37 (5th Cir. 2003) (holding that the trial court was correct in not taking judicial notice of a fact accessed through the internet on the ground that it was not "capable of accurate and ready determination.").
468. MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 1.2.
building and only had one bank of elevators that was used by everyone. The judge always had me check to see if any litigants or attorneys were waiting for the elevator before he took it. If the elevator stopped and a litigant or attorney got on the elevator, he would get off. The judge stated that he did not want the elevator doors to open and for someone to see him alone with a litigant or their attorney. To an outsider looking in, this might appear excessive. Nonetheless, it explicitly upholds the principle of impartiality—judges should always be concerned about how third parties perceive their impartiality and independence.

E. Judges should normally refrain from extrajudicial comment

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

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

469. *Id.* at R. 2.10(A).
470. *Id.* at R. 2.3(B).
472. *Id.* at 2346, 2349.
473. *Id.* at 2346-47.
474. *Id.* at 2348-49.
476. *Cf. Bauer*, 620 F.3d at 710-11, 713; *Carey*, 614 F.3d at 200-01.
During the same year that Justice Scalia went duck hunting with then-Vice President Cheney, Justice Scalia recused himself from deciding a case involving whether the Pledge of Allegiance to the United States Flag, recited in most schools, violated the First Amendment because it referenced God. Justice Scalia had given a public speech where he stated his views of the lower court decision in that matter. In this instance, Justice Scalia’s comments directly related to a pending case. His action in recusing himself from participation in the case because of his earlier comments was in accord with the standards of the Model Code of Judicial Conduct.

1. Comments on matters of public interest

Whether judges can comment on a matter of public interest often arises in the judicial selection process. In the federal system, judges are appointed by the President but confirmed by the Senate. 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 likely agree that stating one’s views about general political and legal matters in a confirmation hearing is not a breach of the professional standards. Recent court decisions on the free speech rights of judges during an election campaign would seem to support this view.

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. While intemperate, the

479. Greenhouse, supra note 478.
480. See MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 2.10(A).
481. U.S. CONST. art. II, § 2, cl. 2.
484. See id. at 38, 47-48.
485. See Republican Party of Minn., 536 U.S. at 788.
487. See id.
remarks did not reflect on any issue that would have reasonably been before the judge and should fall within the protections of the First Amendment.488

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

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

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

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

490. Id. at 1016.
491. Id. at 1015-16.
492. 536 U.S. at 781-82.
493. MODEL CODE OF JUDICIAL CONDUCT, supra note 18, at R. 4.1(A)(1)-(3).
494. 536 U.S. at 781-82.
495. See, e.g., Carey, 614 F.3d at 204, 207; Wersal, 613 F.3d at 833-34, 838-39, 841-42.
496. Carey, 614 F.3d at 197, 201-02; see Wersal, 821 F.3d at 828-29, 831-34, 838-39, 841-42.
497. Siefert, 608 F.3d at 981-83, 988.
498. 608 F.3d 974.
a political party violated the First Amendment, but held that endorsement is given less legal protection under the First Amendment.\textsuperscript{499} The Wisconsin rule that prohibited a sitting judge from endorsing partisan candidates was necessary to preserve the impartiality of a judge.\textsuperscript{500} Endorsement, the court stated (quoting the ABA comments) involves "'abusing the prestige of judicial office to advance the interests of others.'"\textsuperscript{501} The court also cited Supreme Court cases that allowed the government to regulate the speech of public employees when it directly related to their employment duties.\textsuperscript{502} The court did not decide whether the rule would be unconstitutional as applied to judicial candidates.\textsuperscript{503}

2. Campaign promises or commitments

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

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

\begin{itemize}
\item \textsuperscript{499} \textit{Id.} at 981-83, 988.
\item \textsuperscript{500} \textit{Id.} at 983-86, 988.
\item \textsuperscript{501} \textit{Id.} at 983-84 (quoting \textsc{Model Code of Judicial Conduct}, supra note 18, at R. 4.1 cmt. n.4).
\item \textsuperscript{503} Siefert, 608 F.3d at 991 (Rovner, J., dissenting).
\item \textsuperscript{505} See, e.g., \textit{Buckley}, 997 F.2d at 226 (citing Ill. S. Ct. R. 67(B)(1)(c)); Judicial Selection in the States: Alabama, supra note 504; Judicial Selection in the States: Ohio, supra note 504.
\item \textsuperscript{506} \textit{Buckley}, 997 F.2d at 225.
\item \textsuperscript{507} \textit{Id.}
\item \textsuperscript{508} \textit{Id.}
\end{itemize}
This rule was struck down by the Seventh Circuit Court of Appeals because it unduly restricted First Amendment rights. 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 the court.” Judges or judicial candidates obviously should not announce their views about cases that are pending or are likely to be filed with the court.

In Republican Party of Minnesota, the Supreme Court of the United States interpreted the First Amendment similarly to the way the court of appeals did in Buckley. 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 ensure 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.

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. The Supreme Court observed that:

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

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509. Id. at 227-31.
510. Id. at 230.
511. Buckley, 997 F.2d 224 at 230.
512. Id.
513. ILL. CODE OF JUDICIAL CONDUCT Canon 7, R. 67A(3)(d)(i).
516. Id. at 788.
517. Id. at 775-79.
518. Id. at 771-78.
519. Id. at 775.
520. White, 536 U.S. at 777.
did not have preconceived views on legal issues, it would hardly be desirable to do so.\textsuperscript{521}

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

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

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

\textsuperscript{521} Id. at 777-78.
\textsuperscript{522} Id. at 778-79.
\textsuperscript{523} Id. at 779.
\textsuperscript{524} Id. at 778.
\textsuperscript{525} Republican Party of Minn. v. White 361 F.3d 1035 (8th Cir. 2004).
\textsuperscript{526} Id. at 1043.
\textsuperscript{527} \textit{Republican Party of Minn.}, 416 F.3d at 765 (8th Cir. 2005); \textit{see} \textit{Carey}, 614 F.3d 189; \textit{Wersal}, 613 F.3d 821; \textit{Seifert}, 608 F.3d 974.
\textsuperscript{528} Weaver v. Bonner, 309 F.3d 1312, 1319 (11th Cir. 2002).
\textsuperscript{530} Wis. Sup. Ct. R. 60.06(3)(b).
Amendment.\textsuperscript{531} The district court held that the rule furthered the state's legitimate goal of "open-mindedness" in its judges.\textsuperscript{532} The court stated:

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

Another part of the Wisconsin rule that required recusal of a judge if he or she made a campaign statement that "appears to commit" him or her on an issue in a case was held to be unconstitutionally vague and overbroad.\textsuperscript{534} The Court of Appeals for the Seventh Circuit has upheld an Indiana rule prohibiting judges and judicial candidates, in connection with cases, controversies, or issues that are likely to come before the court, from making "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."\textsuperscript{535} The Court stated:

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

\textsuperscript{531} Duwe, 490 F. Supp. 2d at 975.  
\textsuperscript{532} Id.  
\textsuperscript{533} Id. (citing White, 536 U.S. at 779).  
\textsuperscript{534} Id. at 976-77.  
\textsuperscript{535} Bauer, 620 F.3d at 714-15.
(or his constituents’) ideas about wise policy is problematic in a way that a judge who has announced considered views on legal subjects is not. The commits clauses condemn the former and allow the latter.\footnote{Id. at 715-16.}

The Seventh Circuit distinguished the Sixth Circuit’s opinion in \textit{Carey v. Wolnitzek},\footnote{614 F.3d 189.} which invalidated Kentucky’s “commit” provision as overbroad.\footnote{Id. at 193-94.} Kentucky more broadly prohibited judges or judicial candidates from “‘intentionally or recklessly mak[ing] a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way in a case, controversy, or issue that is likely to come before the court . . . .’”\footnote{Id. at 195 (quoting KY. SUP. CT. Canon 5B(1)(c)).} The Seventh Circuit distinguished the Kentucky rule from the Indiana rule.\footnote{Bauer, 620 F.3d at 710.} 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.”\footnote{Carey, 614 F.3d at 209 (Appendix C) (quoting IND. CODE OF JUDICIAL CONDUCT Canon 4, R. 4.1(A)(13)).} The Seventh Circuit also rejected the argument that this clause was itself too vague to provide guidance to a judge or judicial candidate.\footnote{Bauer, 620 F.3d at 716-18.}

All of these rules and rulings have been severely tested in the 2011 race for the Wisconsin Supreme Court which focused on whether voters favored Governor Walker’s attempts to limit collective bargaining rights of public employees.\footnote{Nicholas Riccardi, \textit{Wisconsin High Court Election Turned on It’s Head}, CHI. TRIB., Apr. 8, 2011.} The incumbent justice stated that “he would ‘complement’ Walker and the new Republican-controlled Legislature” and outside groups had spent $3.5 million dollars on the election.\footnote{Nicholas Riccardi, \textit{14,300 Votes Discovered in Wisconsin County}, CHI. TRIB. Apr. 8, 2011, § A, at 14.} Regardless of the First Amendment and a technical breach of any rules, thoughtful observers have to question whether this is the way to select justices and, when selected, whether these justices are fit to sit on a case that involves any issue of public policy.
3. Comments to press about pending case

In United States v. Microsoft Corp., the court of appeals chastised and removed a federal district court judge from the Microsoft anti-trust case because the judge made ex parte comments to the press about the case and the defendant while the case was pending. The problem was exacerbated 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.

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 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 current Justice has the array of experiences he had.

Sandra Day O'Connor was the first woman on the Supreme Court. She brought her experiences to not only cases involving sex discrimination, but also to other issues where women may have unique perspectives, such as abortion-related cases. Also, it is important that judges do not become

545. 253 F.3d 34 (D.C. Cir. 2001).
546. Id. at 46.
547. Id. at 112.
548. Id.
549. Id. at 112-13.
552. Id.
553. Id.
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." 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.”

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. HELPING JUDGES WHO HAVE IMPAIRMENTS

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

557. Id. at 1027-28.
559. Id. at 344-45.
561. Id.
562. Id.
563. Id.
V. JUDGING IN AN UNJUST ENVIRONMENT

Judicial independence can be impaired by an unjust legal system. What happens when a formal legal system exists but it is subverted so that judges cannot reach just results? How must judges confront an unjust legal system? The problem is presented in stark relief by Nazi Germany, where judges continued to dispense formal justice. 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 Müller argued that not only did German judges enforce the Nazi laws as written, but they helped the Nazis to power by bending German law. They actively interpreted the laws and facts of cases to provide support to the Nazi regime.

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, Germans refused to vacate the conviction and grant posthumous rehabilitation to Carl von Ossietzky. 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 a strong tradition of using the writ of habeas corpus, judges installed after the Argentine military coup in 1976 turned down over five thousand petitions for the writ in Buenos Aires alone during the years of 1976 to 1979. 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.

565. Id. at 48.
566. Id. at 72-73.
567. Id.
568. Id. at 72-75.
570. Id.
571. Id.
572. Id.
573. Id.
575. Id. at 396.
576. Id. at 397.
577. Id.
Similar stories can be recounted about judges in the antebellum United States and apartheid South Africa. 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 would mean the loss of their jobs. What is even more disturbing is that judges rarely do come forward, even after the fact, and admit that they may have been complicit in an unjust regime. Dean Martha Minow observes in her comprehensive study, Between Vengeance and Forgiveness, that members of the South African Truth and Reconciliation Commission invited judges to offer submissions on their complicity with apartheid, but no judges sought amnesty for their individual contributions to the injustices perpetrated by the apartheid regime.  

Admittedly, it is difficult to determine what constitutes a violation of human rights. The German judge, Oswald Rothaug, was convicted by the Nuremberg court of committing a crime against humanity for sentencing an elderly Jewish man to death for allegedly having sexual relations with a young German woman. Judge Rothaug claimed he was only following German law and criminal procedure. But when is simply following the law an excuse? The Nuremberg judges who convicted Judge Rothaug of a crime against humanity themselves relied upon an ex post facto application of the criminal law. 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. 


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

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

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

583. Id. at 271-72.

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

VI. CONCLUSION

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

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

Public confidence in the judiciary is crucial to an independent judiciary. It is perfectly understandable that many judges in post-Communist or post-totalitarian countries are very cautious about any attempt by ministries of justice or any group even within the judiciary to oversee how a judge performs his or her functions.\footnote{588. Supra Part V.} However, in many of these post-authoritarian societies, citizens believe that judges are corrupt. Whether or not this perception is true, it cannot be ignored. Cases of corruption must be aired and punished expeditiously in order to preserve judicial independence.\footnote{589. Ranking next to corruption in the public’s perception of the judiciary is delay. A judicial system that cannot decide cases expeditiously will be perceived as corrupt and broken. These problems must be dealt with forthrightly if public confidence in the judiciary is to be maintained. The ABA Model Code addresses the question of delay by stating that “prompt disposition of the court’s business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.” Model Code of Judicial Conduct, supra note 18, at Canon 2, R. 2.5, cmt. 3. The comment also states that “in disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.” Id. at Canon 2, R. 2.5, cmt. 4.}
The question of judicial independence is a subject that requires constant re-examination in light of new and developing issues and problems. Lawyers, politicians, and citizens all have a stake in the debate—not just judges themselves—and need to be involved in the on-going discussion. As in all matters public, revising the rules on professionalism when necessary to meet new challenges and to provide transparency in operations will better preserve judicial independence than introverted appeals to self-regulation and professional privilege.

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

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