

Judicial decision-making and civic education

JEREMY FOGEL: This panel will look at the individual judges making decisions in individual cases: What we deal with in that process, what are some of the pressures we face, what are some of the values we try to model and apply in making the decisions we make and in doing the work that we do. We also will talk about how we can do a better job of getting the message out about those values, about what really makes the judiciary work, and why judicial independence is so important.

There are three values that are the bedrock of understanding an independent judiciary. First, we are evidence-based. When we decide cases, we decide them based on evidence, and we hear evidence to decide what the

facts are to make the necessary findings. And it's not true in every system. There are systems where the identity of the party is what matters. If the party is the government, then that's the end of the story, and you don't rule against the government.

Second, we believe in procedural due process. It's important that people have a right to be heard, that before you decide a case, the various interests in the case are brought to light and the parties have a chance to make their view of the evidence and law known to the people who will be making the decisions. Again, if you look around the world, not every system has that value.

Third, we believe in the rule of law. Judges have an ethical responsibility to decide cases based on the evidence and the law. Of course, judges can see facts differently and have different interpretations of the law, and they do so all the time. Both of those areas of variability account for the variability in the kinds of decisions that we get.

The fact that we get widely disparate decisions doesn't mean that those decisions aren't honest and made with integrity, nor does the reality of philosophical divisions mean that judges are just making decisions based on their political views. You still have to base it on the evidence, you still have to base it on the law, and you still have to adhere to the process of deciding cases.

Chief Judge Smith, the Third Circuit ended up being ground zero for some fairly significant challenges around the 2020 election. Several cases came to the Third Circuit and its trial courts. What was that experience like?

D. BROOKS SMITH: Well, we don't of course feel much drama ordinarily in chambers, at least not in the usual sense of the concept. But deciding cases that may have a significant — even decisive — effect on the outcome of an individual state's election required an all-hands-on-deck approach in chambers. It was an intensive period of time, and you've made reference to really what were two very important cases. I presided over both of those panels, but wrote only one of the opinions. Judge Bibas wrote the other. Both of these cases were decided within a short period of time, within a week or ten days of one another post-election.

It was certainly a pressure cooker in terms of time, and the filings were coming in with a rapidity that almost defied the ability to count them. There was pressure to hear oral argument, to extend periods of time, all with the eventual drop-dead date by which the election needed to be certified. So time and the need to produce as respectable a work product as possible were the greatest pressures — not the exogenous pressures of the importance ►

The pressures that we felt were that it is our job to get it right. That may result in a different ruling for one panel as opposed to another, one judge as opposed to another. **We absorb as much as possible of the applicable jurisprudence, get an entire understanding of the record that's applicable, and we make our best call.**

of this case nationally. I'm certainly not suggesting that this was just any other case. But the pressures that we felt were that it is our job to get it right. That may result in a different ruling for one panel as opposed to another, one judge as opposed to another. We absorb as much as possible of the applicable jurisprudence, get an entire understanding of the record that's applicable, and we make our best call.

FOGEL: But when you think about the way the story was covered in the mainstream media, the idea that this was really a big case, and it could literally change the outcome of the election, what you just described was a very ordinary businesslike approach to doing your job.

SMITH: The general public does not fully appreciate the process. In a process sense, we went about this in precisely the way we would have gone about any case that came to us, except that both decision timelines were expedited.

FOGEL: What resulted were some pretty remarkable opinions. Judge Stephanos Bibas wrote a short and

pithy opinion that no matter how important or consequential the case is, you still have to have evidence to support your claims. And Judge Matthew Brann wrote a longer opinion, but he made the same ultimate point — that you can't simply say the sky is falling, there has to be some evidence that the sky is falling before you come before a court and seek relief.

When I read those opinions, I thought, "These are two very conservative judges, both applying the rule of law as straight as it can be applied." That is the essence of judicial independence.

SMITH: It is. And I certainly was very proud of our court. Judge Bibas said it so beautifully in the first few sentences of his opinion: "Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here." Judge Brann similarly wrote, in great detail and with enormous patience, in the District Court for the Middle District of Pennsylvania.

I have never made it my practice to speak *dehors* the record or to in

any way talk about a written opinion, which speaks for itself. But I will say, because it's in the public record, that the opinions by Judge Bibas and Judge Brann made clear that what was not at issue was massive fraud. Judge Bibas says, "To start, note what it does not allege — fraud." That's not, however, what was said publicly about the case. Impeaching the decisional process by public statements of that kind certainly is unworthy of advocates who are members of the bar. They don't contribute to public confidence. Public confidence is much of what we are talking about here today as an overarching area of concern, and it's the basis to support what we do every day.

FOGEL: These cases really reflected a commitment to a certain process, a certain set of values the judges involved all made a tremendous effort to adhere to. Brooks, you commented to me earlier that "the center held. The courts did their job." And that's really an excellent description of what happened.

Thelton, you were one of the first African American judges in the country. You had the same commitment to the same values as we've been talking about, but you had a different life story.

How have those things inflected? Everybody's trying to apply the same principles and values, but you get very different results sometimes because of the different life stories that people have.

THELTON HENDERSON: Being one of the first Blacks on the court, one of the first things I noticed was that there were some different expectations for me than the attorneys had for my colleagues. I would get motions for my recusal from counsel, and the argument would be that, "This is a discrimination case. All due respect, your honor. You're Black, and we very gently want to say we don't think you can be fair in this kind of a ruling."

I'd say, "Well, if I recuse myself, I'm the only Black on this court — what will happen to the case?" "It'll go to one of your colleagues, your honor." And they're white. And I would say, "Tell me why you think they can be fairer in a discrimination case than I can."

It was a challenge. On more than one occasion, an attorney would walk into my chambers, and I'm sitting there at the table, and then I'll look up and say, "Yes, what's going on?" And the attorney would say, "Well, where's Judge Henderson?"

FOGEL: One of the more notable cases you had was the Proposition 209 case, an initiative passed by the voters of California to abolish affirmative action. Talk to us about how your life experience and the rule of law intersected for you in that case.

HENDERSON: It was a very controversial case. I was getting calls from attorneys and from reporters. Actually I had two law clerks at the time, and it was very rare that I would call both law clerks to work on a case, and push everything else aside, but I did that

here. Prop 209 was an anti-affirmative action initiative that California voters passed. The main issue I saw is whether the burden imposed by Prop 209 necessarily falls unfairly on minorities and women. We did as much research as we could. We looked at everything. I found a 1981 Washington Supreme Court case that said an initiative in Washington prohibiting school boards from ordering busing to solve desegregation was unconstitutional. I used that as the main precedent.

Once I did that and looked at all of the other cases, I decided that Prop 209 had a likelihood of being found unconstitutional. I look on that case with a lot of hindsight, a lot of regrets with the way it went, because it didn't take the usual path of an appeal up to a three-judge panel. It went to a motions panel on the Ninth Circuit. My long-term intention was to have a hearing on all of this, and have some testimony before I proceeded. But we never got to that point, because this panel essentially killed the case there.

FOGEL: What was their rationale for doing that?

HENDERSON: They thought I had ignored the main public presentation of what the case was about. The state claimed this was an anti-discrimination case, that affirmative action itself discriminates against non-minorities, and that this was a statute to prevent discrimination.

FOGEL: We certainly see echoes of these arguments today, but it's also the case that, based on evidence, you're inevitably going to have situations where judges will look at the same case, the same exact proposition, and they'll see it quite differently. They'll have different starting points. Their

life experience will give them different perspectives. And that's how we get the variety that we get.

HENDERSON: It is. Shortly after I was confirmed, one of our senior judges in an employment discrimination trial came down for lunch. I said, "How's the trial going?" He said, "It's very interesting. The plaintiffs testify today. They were saying that in the locker room [where employees changed clothes] that some of the workers were painting the n-word on their lockers and around the locker room, and they were hanging baboons over the pipes."

This was a good friend of mine and a fine man, a fair man. And he said, "You know, I don't know why they feel they have to exaggerate like that. They've got a good case." All I could think of was that I grew up hearing my father and my uncles tell those very kinds of stories about the workplace.

The difference between this man and me is our experience. We bring something different to the bench. And I readily recognize that kind of discrimination, whereas another party would have a hard time getting this particular judge to recognize it.

FOGEL: Dahlia, you used to work in the courts, and you're now a journalist who covers the courts. This idea of what judicial independence is and how we talk about it — how do you see this?

DAHLIA LITHWICK: I'm really struck by one amazing tension between what we just heard from Chief Judge Smith and from Judge Henderson, and that is this amazing quality of the judge doesn't matter, the identity of the judge doesn't matter, the system is the system, and the rules are the rules — and, at the same time, as you just heard so eloquently from Judge Henderson, of ►

course who the judge is, the judge's experience, matter immensely. So what do you do about the fact that in some sense, we want to tell one story about the judiciary, which is these are umpires, to use Chief Justice Roberts's construction, and at the same time, as you just heard from Judge Henderson, who you are and how you think matters?

It's really, really hard to hold both ideas in your head at the same time, and I say this as somebody who covered the Supreme Court for 20 years. Every time I wrote an article my editor would say, "Put in who appointed the judge. That's essential information." And I would always have this fight because I know that who appointed you tells something about who you are as a jurist, but it actually tells much less than my readers think.

Keith Bybee wrote a book called *All Judges Are Political, Except When They Are Not: Acceptable Hypocrisies and the Rule of Law*. That is the best encapsulation of how you tell this story, that simultaneously the judiciary is an independent branch, but at the same time, there are personal and political and biographical valences. We have to figure that out, particularly in the press, where there is such a strong impulse to just tell the political story. We have to do very — if we're doing our jobs correctly — complicated work very fast. But how do we help the public understand that both things can be true, and also that the judiciary is just not going to be subject to the same metrics of a purely political story? How do you convey that something is something and also its opposite at the same time? And how do you do that, at worst, in a tweet?

FOGEL: I don't think it is something you can do in a tweet. We have these three core values: evidence-based procedural due process, adherence to the

rule of law, and ethical consequences. But you still have to talk about the particulars, and each one of those particulars has nuances to it. Thelton just shared with us exactly how fraught fact-finding can be, because we're bringing our life experience to the process of fact-finding. What we are willing to believe, what significance we attach to things, all of that is affected by who we are. The same goes for how much procedural process we give people. Everybody has a basic right to be heard, but what does that extend to? Does that extend to listening skills, how much time do you give people, how much allowance you make for people who, for instance, are unrepresented? Where are the lines? When has a judge simply gone too far and become unhinged from the core values?

None of those things are tweetable. And yet, it's not like the other branches. A book I really like about this is *Courting Peril* by Professor Charlie Geyh from Indiana University. He essentially says the same thing, that we're not going to convince anybody by calling it an impartial umpire calling balls and strikes, because nobody believes that. But it's equally untrue that judges just do whatever they want. And even the chief has said that umpires have different strike zones.

LITHWICK: There's such a tendency to blame the media, and part of that is right. In the two decades I have covered the courts, we've gone from having eight hours to read and digest an opinion, four hours to write about it, three layers of editors to read it, somebody to fact check it, and time to post it, to quite literally having no time. The media doesn't work as it worked before. You might want that long, reflective piece about what the second Affordable Care Act [ruling] held, and

how it changes things, only to have your editor say, "That was so four days ago, we've moved on."

But the courts were being misunderstood and misrepresented by the press since the founding. And it's really easy to say the press now is spectacularly apt to get it wrong, but the press was always spectacularly apt to get it wrong, to misrepresent, to sensationalize, and to distort.

What worries me is that the press has lost the ability to do something that takes an immense amount of time to do well. I think the Supreme Court press corps continues to be the most sober, thoughtful, reflective press corps I've ever seen. But the vast bulk of Americans don't read from Adam Liptak and from Marcia Coyle and from David Savage anymore. They read third-hand sources on Facebook, TikTok, and Instagram. And the extreme specialization around court journalism has almost completely become irrelevant.

FOGEL: What can the judiciary do to begin getting a better understanding of this judicial culture out to the world?

HENDERSON: One thing is that we can get a better view of who we are. I was always a bit distraught when a colleague would say, "Oh, we have this kind of a case," or, "We have a pro per case. I gave that to one of my law school interns to handle, and I have a big case here, and my clerks and I are going to work on it."

I tried to make certain that everyone who came into my court felt that they had a fair day in court. I would call them; I would listen. Very often, these pro pers just want a fair hearing. You can explain to them, "Well, you don't really have a cause of action, and I'm going to dismiss this, but let me tell

you why, and let me spend some time with you.” I can’t tell you how many thank-you notes over the years I’ve gotten from the losers saying, “Thank you so much for hearing my case.”

That puts the word out that we’re not robots. I mentioned a robot because that’s the only way, to stay with the umpire analogy, you’re going to get a true calling of whether a ball is a strike — is to have a robot. But we’re humans, we’re doing our very best, and over the long haul, this system works. I probably have been seen over the years as a critic of a lot of things in our country, especially as they pertain to race and class. But we really do have a good system, and we need to let that be known. We are really doing our best. It is fair. It’s not corrupt. You may not agree that that ball on the outside corner was a strike, but it was the best call that that guy could give, and he wasn’t cheating.

FOGEL: You’re really talking about each judge educating in the courtroom. In addition to being a good legal analyst and a good writer and the obvious things that judges have always been expected to do, you need

to be a good listener, and you need to be a good communicator.

HENDERSON: Absolutely.

FOGEL: You need people to feel that, in that moment, you care about them, and you’re trying to understand what’s bringing them to court. Judges have an opportunity to do that every day, through their demeanor and the procedural process that they observe.

SMITH: We do have, for lack of a better characterization, a product to sell, a story to tell. The federal judiciary is a system almost devoid of corruption. I’m very proud of that as an American and as a federal judge. I think too many critics of the judiciary tend to overlook one thing, and that is that whatever justice is — whatever it is we are doing that we call judging — has a huge aspirational component to it.

Do we have these biases? Hell yes. Can we rid ourselves of all of them? Absolutely not. But we can aspire to. When I was a state trial judge, I heard a murder case, and it was being tried by someone who had been an assistant of

mine when I was the district attorney. We were at sidebar after some dispute. And there was passionate argument on both sides, and my former assistant said to me, “Well, that’s not what your view was when you were in this office.”

I said, “You’re damn right it isn’t, because I’m not in that office anymore.” Sometimes you can learn from experiences that will necessarily dictate a different result than what some might intuitively expect is going to be your result. It’s not a deterministic process, necessarily, based on what your experiences are.

FOGEL: Both Thelton and Brooks have talked about doing the job in a way that conveys fidelity to these values and conveys respect for people who are appearing before you. But is there some value in taking it further, being more proactive, being more public? You have the code of conduct, of course. You can’t talk about cases. But you [can] educate the public about the legal system. In fact there’s an affirmative endorsement of that in the code of conduct.

But in my experience, judges are reluctant to talk to the media. Even ►

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when I was sitting, I talked to reporters about process and what was going on in the courts — off the record, not for attribution, but by way of background, and a way of educating and building up some kind of relationship. Given where we're at right now, and given the limitations of the media that Dahlia was discussing earlier, should the judiciary be doing more?

LITHWICK: When I talk to judges, almost unerringly now they say some version of, "When I first came to the bench, there was one dedicated court reporter, and she'd been on the beat for years, and she knew the marshals, and she knew the bailiffs, and she understood the difference between an arraignment and a sentencing. And now what I have is the guy who read the weather last week, and next week he's going to be hosting the baking segment of the show and make cupcakes. They don't understand the system. I have no relationship with them."

All of that is true. The era of the dedicated court reporter is over. It's not coming back. But judges can find a way to open that channel, and to be resources, to help some reporter who's got a filing deadline in two hours and quite literally doesn't understand the difference between a civil trial and a criminal trial. I realize that's completely unreasonable to burden the judiciary with this obligation. But barring that, what rushes into the vacuum is politics.

The journalistic credo here is "show, don't tell." By simply showing, we are doing excellent, nonideological, non-partisan work that speaks for itself within the four corners of the opinion. That goes a long way to achieving the outcome you're asking about. I guess I'm saying kill them with boringness. It sounds like an incredibly unsatisfying

solution, but I think it gets you part of the way there.

FOGEL: I had a number of very controversial cases when I was on the district court. I was getting the pre- and post-decision emails and phone calls and everything else. When I wrote those opinions, I usually would start with a paragraph or two just saying I understand that this is a huge deal in the court of public opinion. Here's my job. My job is not to resolve those kinds of moral and political conflicts, my job is to figure out what the facts in this case are and figure out how the law applies to them and here's what that process gets me.

So starting right out, it was a way to own the fact that someone was going to write about the case and say, "Well, he is a Clinton appointee, and therefore he did X."

So I would recognize the context in which the case is arising, but clarify that the case is about this much narrower, discrete legal issue. People are going to think that I'm commenting on this other stuff, so I'm going to make very clear right now, I'm not commenting on this other stuff.

Judge Bibas actually took that on in his opinion. The first paragraph that you read earlier, Brooks, that's essentially what he was doing: Here's how we got here, now here's what the record shows, and here's where the law takes us. What do you think about judges doing this more consciously?

HENDERSON: I think it's well advised to do so, and I do it often. I will explain: Here's what I'm doing, here's what I'm trying to achieve, and here's the way I'm going about it. And also, here's what I'm not doing. Here's what I'm not considering, although I understand it has a place in here somewhere, but I'm

shoving it aside because it doesn't go into the merits of the ultimate ruling.

Judges are often too distant. I can't talk about this, I can't talk about that, and not humanizing themselves, even to the press. I got along well with the press, and I enjoyed it. Be aware of the ethical guidelines, and don't talk about confidential things. But there are ways to relate to the press that would benefit our image in many ways.

SMITH: I agree wholeheartedly with Thelton that we need to do more. Numerous courts have had programs called "Judges and Journalists" programs. They need to be interactive, and they need to allow journalists and judges to share with each other the challenges they face. I'm confident that doesn't compromise any of our ethical proscriptions, and I think it can result in some ongoing relationships that can be mutually helpful.

LITHWICK: One of the themes really being reinforced is that journalists and judges have incredibly congruent interests. And that there is a way for this to be Pareto optimal, or there is a way for this to be adversarial. A lot of the anxieties surrounding judicial independence are the same anxieties we in the press have about failing trust in institutions and destabilized notions of truth and truth finding. Rather than starting from this oppositional view, we need to understand we're almost completely aligned and work from there.

FOGEL: There's a truth-gap problem. We're in a society where a significant number of people don't read newspapers. They don't believe that the courts are worthwhile. They believe a lot of stuff that's very antithetical to what we're talking about. Is there anything we can do about that? This whole con-

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versation that we're having is great if you're already part of the group of people who believes in evidence and so forth, but one of the real structural problems we're facing in the country right now is that a lot of people do not live in that world.

The other side of that same coin is another question about whether there's a role for judges to talk about some of the inequalities in society, to talk about racism, to talk about sexism and gender bias, to talk about bias against LGBTQ people, and so forth. That's a tough one, given the ethical canons. But it's one that came up with the Floyd murder, and actually some courts did speak out. It's two different questions, but they seem to me related to each other.

Let's start with the first one: What do you do with the fact that there's a significant percentage of our body politic that's just hostile to institutions, period? Is there anything we can do about it?

SMITH: Outlive it. I don't know. I don't want to get partisan, but there is all too much evidence out there that suggests

there's still an election campaign going on. This is disturbing. The denial of some things that we all know to be fact, hard-bound fact, is very troublesome. And I'm not sure that we as lawyers and judges are professionally equipped to deal with the underlying — I'd go so far as to say in some cases — pathology that leads to that sort of denial. I truly don't know what to do about it. On the other hand, I certainly don't want to give up on it. And I think we need to continue to do as much civics education as we can participate in. Maybe we need to be very careful about our terminology: Instead of talking so much about the concept of judicial independence, which may be misleading, let's talk about the rule of law and what that means.

FOGEL: There is a culture, there is a code of conduct — not just the ethical code of conduct, but a code of how judges make decisions and how judges analyze things — that judges have aspired to follow for 200-plus years, and we need to make that point better.

LITHWICK: I hate to be the bearer of bad news, but it's going to get worse. I've

heard it said that in the next two, three years, any news that you're not paying for will be fake. We're going to have deep fakes, we are going to have the ability in a very short amount of time to have videos that we cannot discern whether those are true and not true.

Jeremy has heard me tell this story of how we were living in Charlottesville in 2017 when the Nazis marched, and my then 11-year-old son said to me, "What do you do? If you go out and you fight them on the streets, you lose. If you stay home and ignore them, you lose." Any engagement or lack of engagement seems to get you to the same place.

What do you do? Do you tell people who are lying about the outcome of the elections cases that they're lying? No, you can't engage with it. But ignoring them also allows it to live in the world. And I think the paradox is that people are starved for adults. They are starved for institutions. They are starved for norms. Part of the solution is to bolster norms, to bolster basic adult civic behavior, to understand that there's something being modeled here that people are absolutely starved for. ►

FOGEL: I can feel the discouragement and the concern people have, and it's totally justified. Things have been pretty awful in this context. I can say that doing something to push back against it in the way that you described, Dahlia, has helped me deal with that in my own life. Is it going to be effective in changing things? I don't know. But if you're putting good energy back into the world, if you're putting truth back into the world, if you're supporting institutions that you care about, it doesn't hurt to do that. And I think it's better than being completely passive.

When the events occurred in Minneapolis and in Louisville last year, I felt it was important to say something, and there were about half a dozen state courts chief justices who made statements. There were three state Supreme Courts that made formal statements, saying we're not talking about individual racism or individual anything, we're talking about our history. That our country was founded on inequality, and there are still ways in which inequality persists. And we as courts and judges need to recognize that those structural factors are present. We still have to decide cases exactly the way we've been talking about. You determine facts, you give people due process, and you apply the law. That doesn't change. But the lens through which you look at it has to change. I mean, people of color could not serve on juries, women could not serve on juries, well into the 20th century.

HENDERSON: I have always taken great comfort in the fact that there's a Ninth Circuit appellate court to review my mistakes. And I make mistakes, and I've never met a judge who was on the court for any length of time who didn't. And you get reversed. I don't

think the public understands this. If Thelton Henderson does something that they think is stupid and unfair and biased, that's not the end of the world. There's another court that will review it, that will have more time than I had, and will get it right. And if they don't get it right, there's yet another court. The public needs to know that there's a process. It really is inherently built for fairness and correcting along the way.

One of the first things I tell my clerks is that we should all take great comfort in that. The public needs to know these kinds of things, and I'll repeat myself by saying that I think that all of us, given the state of conditions now, should think about spending a little more time talking to civic groups and humanizing ourselves, and leaving that group saying, "God, that guy or that woman really represents fairness there, and I need to look at this differently."

SMITH: We need to spread our message, and our message is that we are about law. As Justice Scalia has said, "The rule of law is the law of rules." It struck me when I read just a week-end or so ago the recent book that John Boehner has published. One sentence really caught my attention: He writes, "Anybody who says there are rules to the political game is probably not very good at playing it. Rules can hem you in." That's the political game. That's not what we're about.

LITHWICK: In the weeks after Justice Scalia died and then again in the weeks after Justice Ginsburg died, the thing I was asked most frequently in media appearances was about the nature of that friendship. Everybody thought it was pretend, that it was put on for optics. I will for the rest of my life say that was an authentic friendship, in no small part because these two people,

who could not have been more different, really took each other as being first and foremost in good faith.

If you assume that you're starting with facts and law and evidence, all the disagreements in the world are orthogonal to that. Law really is one of the very few places we can say that. It's tethered first and foremost to the presumption of truth and the presumption of good faith. And then we can fight about everything else.

There are very, very, very few professions that model that better than the American justice system, and I think at this moment, people are starved to see that model. We have to let it shine. And if that means talking to civics groups, if it means taking calls from annoying baby reporters and explaining for the 400th time, all of that I think matters now more than ever.

FOGEL: There's a kind of cynicism, or sense of desperation or sense of despair, that we feel at times. Last year was a tough year, with the virus and with the political environment and everything else. But to be able to tell the good story that we have to tell is a really, really powerful tool and should not be underestimated.

