



Protecting Fair and Impartial Courts

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Reflections on Judicial Independence

BY DAVID F. LEVI

ABOVE: A ROAD SIGN IN DECATUR, ILL., DEMANDS THE IMPEACHMENT OF U.S. CHIEF JUSTICE EARL WARREN, WHO SUPPORTED DESEGREGATION IN PUBLIC SCHOOLS (JUNE 25, 1963; ASSOCIATED PRESS). SYMPOSIUM PHOTOS ON FOLLOWING PAGES BY SAMEER A. KAHN, PROVIDED BY THE RENDELL CENTER.

I speak today about the importance of fair and impartial courts and the role of judicial independence in achieving that goal. I begin with two stories. Some years ago, my wife, Nancy, and I took a river kayaking course on the American River in Sacramento. The course turned out to be nothing short of terrifying, and I have tried to forget most of that experience, especially the part where the novice kayaker hangs upside down about to drown or sustain a concussion. But I did learn one thing that I have remembered to this day: If there is a large boulder that you must avoid, never look at it. If you do, your body will turn and you will collide with the very thing you wish to avoid.

In this conversation, there is one boulder I particularly wish to avoid, at least as we begin our trip down river: That boulder, if you will, is the United States Supreme Court. If we even start to discuss the Court, the justices, and the confirmation process, it will attract all or most of our attention and we may flip or at least lose the possibility of a larger view. After all, the Court decides fewer than 75 cases a year out of the nearly 360,000 federal criminal and civil cases, and nearly half of the Court's cases are decided unanimously or nearly so and with little controversy. And, if we consider that more than 100 million cases are filed in the state courts each year, a different focus for our inquiry starts to take shape. This is a staggering number of interactions between our fellow Americans and their judges and court systems, interactions that dwarf — in

number and sometimes personal consequences — the public's experience of the Supreme Court and the entire federal court system.

I acknowledge that the Court is important to this discussion because of its leadership role, because of the enduring salience of certain questions that appear on the Court's docket, and because it is easy to forget that the Supreme Court is unique in many ways and is not characteristic of most judging in this country.

Here is my second story. I had a debate with Judge Richard Posner a few years ago at Northwestern Law School. I had reviewed his book *How Judges Think* somewhat critically. At the end of our debate, he turned to me and asked: "Does Dean Levi seriously think that it would make any difference if Republican-appointed judges wore red robes and Democratic-appointed judges wore blue robes?" I said: "It would make a huge difference. And it would be terrible." He responded: "That just doesn't cut it."

He got the last word, but I don't think he was right. Judge Posner was probably thinking of the Supreme Court, possibly of the federal appellate courts; I think

his point may have been that everyone already knows the party of the president who appointed the judge, so the color of the robe would not add any information or have any additional effect. My point was that if judges were to consider or present themselves as of different political teams by wearing the team's jerseys, and if parties and lawyers were to see

IF JUDGES WERE TO CONSIDER OR PRESENT THEMSELVES AS OF DIFFERENT POLITICAL TEAMS BY WEARING THE TEAM'S JERSEYS, AND IF PARTIES AND LAWYERS WERE TO SEE JUDGES SO ARRAYED, *the* EXPERIENCE WOULD DESTROY BOTH THE REALITY *and the* APPEARANCE OF FAIR, IMPARTIAL, NONPARTISAN COURTS.



David F. Levi

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judges so arrayed, the experience would destroy both the reality and the appearance of fair, impartial, nonpartisan courts. The reality and the appearance are in a constant feedback loop, and we need to consider both in any discussion of independent and fair courts.

Here is how I have organized my talk: I begin by addressing why fair and impartial courts are important. I look back at the Framers and distill certain postulates about what makes for fair and impartial courts. (Spoiler alert: the Framers were right.) I then explore three related topics that bear on the discussion: judicial discretion and judgment, the assertion that judges are no better than politicians in black robes, and the complexity added to the discussion of judicial decision-making by judicial analytics and legal realism. I then turn to three threats to judicial independence and to fair and impartial judging. Each of these threats is mainly to the independence of our state courts and state judges. Each of these threats runs directly counter to the vision of the Framers as they structured the federal courts.

Why are fair and impartial courts and judges important?

Why are fair and impartial courts important? And how does judicial independence preserve fairness and impartiality in our courts?" Perhaps the questions are too obvious. If you are an ►

IT IS NOT POSSIBLE TO HAVE A SUCCESSFUL DEMOCRACY WITHOUT A FAIR AND IMPARTIAL JUDICIARY, *and* IT IS NOT POSSIBLE TO HAVE A FAIR AND IMPARTIAL JUDICIARY THAT LACKS INDEPENDENCE IN BOTH *of its* ASPECTS.

originalist, the answers are easy. The Framers and the ratifiers considered that a fair and impartial judiciary — one that followed the law and was not biased, partisan, intimidated, or seeking preferment — was central to a republican form of government. They believed that judicial independence was critical to fairness and impartiality. They thought of judicial independence in its two facets: the decisional independence of the judge from outside pressures or inducements when deciding a case, and the independence of the judicial branch as a whole, as a separate branch of three.

The Declaration of Independence prominently featured King George III's attacks on both the judicial branch and the individual judge in its bill of particulars: "He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers." And: "He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries." The founders were steeped in Montesquieu and other thinkers of the late 17th and early 18th century, and they came to believe that a "fair and impartial" judiciary was only possible were it embodied in a separate judicial branch and were the judges protected in their tenure and compensation.

Article III of the Constitution reflects this view: It provides for a separate branch of judges who themselves are insulated from pressure by lifetime tenure during good behavior and by a guaranteed livelihood. The Framers did not provide that the judges would be entirely divorced from the ebb and flow of political life. Their initial appointment was through the political branches, and they could be impeached.

Nor were they autonomous. They were confined by law and by the assent of the other branches. Moreover, for much of their activity, they would be

sharing the judicial power with citizens through the jury trial, which has such a prominent place in the Bill of Rights and our traditions.

Federalist 78 celebrated the separation of powers and the independent judiciary in often quoted language. Alexander Hamilton famously said: "The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." And, he said: "[A]s liberty can have nothing to fear from the judiciary alone, [it] would have every thing to fear from its union with either of the other departments" — which is why separation and independence were so important.

Hamilton's comments speak to us even now. Judges should not by party or for any other reason be united to the other branches. Nor should they be involved on their own initiative and authority in the redirection of the wealth of the society. Hamilton understood that the judicial spirit of independence, the judicial culture, would be essential to the arduous task of resisting encroachments by the other branches. He also understood that judges would exercise discretion, but that there was a distinction between the exercise of judgment and the guided exercise of discretion on the one hand and the imposition of

personal will and preference on the other. He saw the importance of courageous judges to the preservation of individual liberty and to the amelioration of oppressive legislation. Judges in this Republic, protected by life tenure, would unite integrity and fortitude to wisdom and knowledge of the law. And this knowledge of and fealty to the law, gained through practice and study, would be the bulwark against judicial overreaching.

Even if the authority of the founding generation were not enough, it seems that, in fact and over time, their beliefs have proven themselves: Indeed, it is not possible to have a successful democracy without a fair and impartial judiciary, and it is not possible to have a fair and impartial judiciary that lacks independence in both of its aspects. Are there examples of successful democracies where the judicial function is dependent or subsumed in the other branches such that the judicial branch lacks institutional independence? Are there successful democracies where the judges lack decisional independence but are routinely subject to pressure or external command or inducement? The answer is "no."

Americans need to have faith in the independence, fairness, and impartiality of our judges because they look to our courts as the place where they can get a fair shake whether their complaint is with the government or a business or a neighbor. That is a huge entrustment.

I draw the following principles or assertions from what I have covered so far:

- First, fair and impartial courts are essential to a successful democracy;
- Second, judicial independence is not for the personal benefit of the judicial officer but so that the judiciary may be fair and impartial;

- Third, there are two primary aspects to judicial independence: decisional and institutional;
- Fourth, the selection, compensation and tenure of judicial officers is important to their independence;
- Fifth, the judicial culture, the independent spirit of the judiciary, is critical. Judges must be careful to guard the culture and be true to it;
- Sixth, the judiciary must not be in league with either of the other branches and must not supplant the role of those branches or be supplanted by them;
- Seventh, while there must be separation, there must also be collaboration. The judiciary depends heavily on the other branches for its support, the execution of its orders, and the substance and procedures of the law itself. We consider that judicial independence serves the rule of law, but this is only the case if the judiciaries' rulings command assent and respect and if the substance of the law and the prescribed procedures are consistent with our common sense of justice and fair play. In other words, the ecology of judging is important and depends mostly on the other branches;
- And finally, we acknowledge that the appearance of fairness and impartiality is almost as important as the reality, and the two are not easily separated.

When we depart from these principles, we put ourselves at risk.

Judicial Discretion, Politicians in Robes, and Legal Realism

There are three further aspects to this discussion that deserve elaboration — judicial discretion and judgment, ►

Civic education: *The key to preserving judicial independence*

At a time when the branches of government are making daily headlines, how do we educate the public about a fair and impartial judiciary and its vital role in our democracy? The Rendell Center for Civics and Civic Engagement, in partnership with the Annenberg Public Policy Center, brought hundreds of lawyers, scholars, judges, and thought leaders to Penn Law School last October to address such questions in a series of panels, including a keynote session with retired Associate Justice Anthony Kennedy of the U.S. Supreme Court.

In introductory remarks, Judge Marjorie Rendell, senior judge of the U.S. Court of Appeals for Third Circuit and co-founder of the Rendell Center, highlighted the urgency of the discussion.

"The Annenberg Public Policy Center recently conducted a survey to coincide with this very program in order to gauge understanding about our government and the courts," she said. "Twenty-two percent of those surveyed could not name a single branch of government, and only 39 percent could name all three. Civics education is being pushed aside in favor of subjects that are on standardized tests. Increasingly our citizenry doesn't know how our government works, let alone the responsibilities they have to keep our representative democracy vital. At the Rendell Center, we're trying to reverse this trend.

"Today we come together to consider an important topic, the fair and impartial judiciary," Rendell continued. "Eighty-seven percent of those surveyed in the recent Annenberg Public Policy Center survey believe that these qualities were very important. Yet 57 percent were of the view that the Supreme Court, 'gets too mixed up in politics.' Although two-thirds believe that the Supreme Court operates in the best interest of the American people, nearly half believe that it should be less independent and should, 'Listen a lot more to what the people want.' Regrettably, it is the job of the legislature to do the will of the



Judge Marjorie Rendell
CO-FOUNDER, RENDELL CENTER FOR
CIVICS AND CIVIC ENGAGEMENT

people, not the role of the courts. Our founding fathers believed it was essential that the judiciary be independent."

Educating the public on what a fair and independent judiciary is and why it's important is central to the Rendell Center's mission, Rendell added. "We believe that if we teach our children the importance of our democracy when they're young, we'll not have to convince them later on of the importance of participating in their government through voting and jury service."

During the daylong symposium, panelists discussed the meaning of a fair and independent judiciary; how judicial independence plays out in the federal and state courts; challenges to judicial independence; judicial decision-making; the importance of civic education; and how to make civics more interesting to young people. The program concluded with remarks by Justice Kennedy, who offered his view of the very nature of judicial independence. "Appreciate how rare and precious is the way that, in America, the bench, the bar, and the academy work together to make sure the legal system works," he said. "This is the structure that undergirds judicial independence." Find Justice Kennedy's address and full video of the symposium at www.rendellcenter.org/fair-and-impartial-judiciary.

A small portion of some speakers' remarks are excerpted on the following pages; for a complete list of speakers and full video of the symposium, visit www.rendellcenter.org/fair-and-impartial-judiciary/.

JUDGE BOUDIN CALLS UPON US ALL TO BE MORE CAREFUL IN HOW WE DESCRIBE WHAT JUDGES DO *and* HOW WE USE THE TERM "POLITICAL." THE CHALLENGE IS TO MAKE CLEAR THE DISTINCTION *between* THE PROPER AND IMPROPER EXERCISE OF DISCRETION AND JUDGMENT, *between* APPROPRIATE POLICY CONSIDERATIONS AND INAPPROPRIATE PARTISANSHIP.

the distinction between policy-making and partisanship, and the impact of legal realism and academic studies of judicial decision-making on the perception of judging. I begin with judicial discretion and judgment. I use the terms together to encompass the kind of judicial decision, such as the imposition of a sentence, where the law

gives the judge a range of options and choices, or relies on the judge's assessment of the circumstances in drawing further conclusions. As well, the terms "discretion and judgment" encompass the law-making and law-clarification that occurs when judges apply existing rules and precedents to new fact situations or reevaluate and refine precedents in light of subsequent cases and circumstances.

If judges had no discretion and no call for the exercise of judgment, then much of this discussion would be unnecessary. If the law were so specific and determinate that any of us would quickly reach the same conclusions, on any point of law or exercise of judicial power, then a computer could now do the job of the judge even without further advancements in artificial intelligence. We would not need judges who are learned or courageous or blessed with powerful intellect or common sense or humility or integrity or a deep commitment to equal justice. None of that would be relevant. Nor would judges be criticized or find themselves under attack were they merely applying matrices and highly specific rules and codes.

But that is not our system nor our aspiration: Our judges, state and federal, trial and appellate, exercise

discretion and judgment, and the American people know it, and, let us hope, appreciate it, at least some of the time.

The exercise of some degree of discretion and judgment inevitably opens up the judiciary to the criticism that judges are partisans or politicians in black robes. Some critics of the courts conflate the

kind of restrained policy-making that judges must do with partisanship or the practice of politics. This criticism fundamentally misunderstands what it is that judges do.

When judges exercise discretion and judgment, they often will find it necessary to consider practical consequences and the overall context of a matter. These considerations may affect any number of decisions, from case management to specific fact-findings to development of the law through its application. But the consideration of practical consequences and policies inherent to the law or a situation is not the same as partisanship or the practice of politics. As our distinguished colleague Judge Michael Boudin, of the U.S. Court of Appeals for the First Circuit, has explained so well:

Leeway is often present in cases in which public policy issues are at stake Judges ought to put aside personal preferences, but they can hardly avoid bringing a worldview to the choices that many such cases present.

[T]o call judges' subsequent choices in public policy cases "political" is mere provocation. One can reply blandly that these decisions are political in the sense

that they relate to public policy, but few lay readers (or judges) will take it that way. Policy often matters in deciding cases, but it is usually policy attributable to Congress or to public policy reflected in case law, common sense, and the values of the community.¹

Judge Boudin calls upon us all to be more careful in how we describe what judges do and how we use the term "political." The challenge is to make clear the distinction between the proper and improper exercise of discretion and judgment, between appropriate policy considerations and inappropriate partisanship.

Explaining these distinctions will be somewhat complicated by the new era of judicial analytics in which there is such a focus on the tendencies and track records of individual judges or of groups of judges, grouped by some characteristic of the judge, such as age, race, education, or the political party of the appointing president or governor. How do we explain that judges are fair, impartial, and open-minded when, for example, the academic study of judicial decision-making has found persuasive correlations between the political party of the appointing authority and the judge's decisions on certain issues?

Of course we should not find such correlations surprising. Presidents and governors often openly look for lawyers to appoint as judges who have had certain kinds of experiences, for example as prosecutors, or who have expressed certain views on matters of legal policy. Voters in judicial elections will sometimes choose a judicial candidate who presents as "tough on crime." But then why would we expect that judges chosen for those reasons, once in office, would be identical in judicial philosophy or outlook to other judges,

who were chosen for different reasons? There will be other factors that academic studies will show to be significant in some context or another — perhaps the gender, or the age, or the education of the judge. The hard part is to explain why judges may be considered fair and impartial even though in some cases they will decide differently than other judges according to criteria, like appointing authority, or gender, that we can track and which are immutable.

In the new era of judicial analytics which has dawned, all of us, including judges, will be painfully aware of every statistic for every judicial officer, from how long the judge takes to resolve a certain type of motion to how different law firms seem to fare before the judge, from how the judge sentences for particular crimes to whether the judge sentences men more severely than women. The list goes on and on. One may hope that this kind of data will assist judges, but it is not hard to see pitfalls. For example, will judges start to curate their data and be influenced in the decision of future cases? Perhaps for this reason, earlier this year France made it a felony to publish judge-specific analytics for “the purpose or result of evaluating, analyzing or predicting their actual or supposed professional practices.” This law is shocking, but the underlying problem is real enough and has been of concern to others, including the United States Sentencing Commission.

While we must defend our judges against the charge that they are nothing but “politicians in robes,” we must and should acknowledge that judges are human beings in robes, selected by political actors, and they will exercise discretion and judgment in different ways. Perhaps this may seem “unfair” to particular litigants in particular

cases, even though the different judicial perspectives benefit the system as a whole. We should not shy away from addressing this topic which must cause some uneasiness.

Threats to Judicial Independence

I turn now to what I identify as the three most pressing threats to judicial independence and to fair and impartial judging: first, the commandeering of our local courts by local police and revenue authorities; second, the possibility that judges will get drawn into partisan battles, thereby losing their detachment and the appearance of impartiality; and third, the election of state court judges in so many of our states.

We begin where the rubber meets the road, at the lowest levels of our

state courts, in the local and municipal courts. This is where most of our fellow citizens experience their justice system. The riveting and appalling Department of Justice report on the police department of Ferguson, Missouri, highlighted that in Ferguson the municipal court had been commandeered by the city and the police and turned into a vehicle of oppression.

According to the report, the municipal court’s primary purpose was to generate revenue for the city. It did so by adopting procedures that made it difficult for the defendant to pay a fine or traffic offense, requiring personal appearances during the work day, prolonging the cases, and stacking additional fines and fees for failure to meet these unduly oppressive pro- ▶

How can people believe the judiciary is fair and impartial, if access to courts has been and still is inequitable? Consider the state civil courts that handle the vast majority of the country’s caseload each year: Roughly 75 percent of those cases involve at least one party without a lawyer, because legal counsel in civil cases is not a guaranteed right. In order for a democratic nation of laws to move forward, the judiciary needs to be fair, but people also need to believe it to be fair, and to understand how important it is — to know and see its fairness at all levels. ★



Dr. Amy Gutmann
PRESIDENT, UNIVERSITY OF PENNSYLVANIA



Judge Anthony Scirica
U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

Diversity is absolutely important on the bench. People with different life experiences are able to express views in a way that may not be understood immediately by others who have not had those experiences. The more diversity the better. I’ve seen it in any number of ways. It’s part of our deliberative process and we educate one another either through the force of logic or through our experiences that we’ve had in the law as lawyers and also as judges in many different kinds of cases. ★

cedural requirements. Arrest warrants and drivers' license suspensions automatically followed upon the failure to pay enhanced fees and fines, leading to yet additional fees, fines, missed days at work, and violations of court orders. By these means, the courts colluded in the creation of a destitution pipeline for many people, many of whom are poor and minority. Ultimately, the court system entirely lost

the confidence of the people it served, forfeiting its role as an administer of justice for that of a revenue collector.

Many of our states have this same problem. In Texas, \$1 billion in revenue is raised by lower courts in this regressive fashion. In California, the figure is \$2 billion. Recall that Hamilton explained that it is not the business of the courts to redirect the wealth of the community. It is not the job of the courts to balance city budgets on the backs of the poor. Surely all government bounty systems, by which government agencies fund themselves through fees, fines, and forfeitures, ultimately lead to overreaching and due process violations, whatever the level of government. But I highlight this issue today not as a problem of good government or of particular penalties gone awry or of mandatory penalties causing injustice in particular circumstances. I highlight it because our municipal officials, by depriving our local court systems of their independence and separateness, have created the very unfairness that Hamilton warned about so long ago. This estrangement of whole commu-

RECALL THAT HAMILTON EXPLAINED THAT IT IS *not* THE BUSINESS OF THE COURTS TO REDIRECT THE WEALTH OF THE COMMUNITY. IT IS *not* THE JOB OF THE COURTS TO BALANCE CITY BUDGETS ON THE BACKS OF THE POOR. SURELY ALL GOVERNMENT BOUNTY SYSTEMS, BY WHICH GOVERNMENT AGENCIES FUND THEMSELVES THROUGH FEES, FINES, AND FORFEITURES, ULTIMATELY LEAD *to* OVERREACHING AND DUE PROCESS VIOLATIONS, WHATEVER THE LEVEL OF GOVERNMENT.

nities from their courts is happening across the country.

I would be remiss if I did not mention that the response of the state chief justices to this problem, once visible, has been extraordinary and a powerful example of judicial leadership. The Conference of Chief Justices formed a national task force, which has developed principles and model statutes that local courts and administrators may

use to address the issue of fees, fines, and money bail. The problem has by no means been solved, but thanks to these judicial officers, it will no longer be ignored.

My second threat begins with the observation that many institutions that strive to neutrality and principled decision-making are under pressure and attack right now. Foundations, universities, professional associations, the Federal Reserve, and the courts find themselves drawn into controversies, mostly symbolic, that seemingly blow up overnight.

Of course, judges should not complain of thoughtful criticism whether of particular opinions or of court services and performance. But much of the criticism is not of this purpose or content or tone. And we are in a new era of social media in which interlocking networks may be mobilized and on the march in an instant.

I have had some experience in responding to these kinds of attacks through my association with several well-established institutions, and the line "do not try this yourself at home" comes to mind. Most of us have no

experience or expertise in this kind of communications and crisis management. There is a whole field of professionals who handle this kind of thing and can help guide the response. And the first response is just the beginning. The entity wishes to explain and put the controversy to rest; but the opponent's goal is just the reverse. It will churn out emails, blog posts, fund-raising appeals, and generally wear out the exclamation mark and all-caps keys.

Against this background, I read with some concern that an ABA committee I formerly chaired, the Standing Committee on the American Judicial System, held a conference on judicial independence at which several esteemed judges, state and federal, exhorted their judicial colleagues to speak out and defend themselves when attacked by political figures and other groups for particular decisions. I do not agree with this approach. Judges are neophytes and innocents in this harsh world of social media combat.

There are significant dangers here. Because judges do not have crisis managers and communications specialists, they are at risk of saying the wrong thing, in the wrong way, and in the wrong place. They even risk offending some of their own colleagues and creating rifts within a court if they say too much or too little or in not quite the right language or tone. And, there is the appearance: When a judge squares off outside the courtroom against a president or a governor or other political person or entity, may the public be forgiven if it sees a partisan judge? But more subtle and equally important is the risk to their own heart and soul, to their spirit of detachment, moderation, fairness and impartiality. Responding to criticism can become a full-time preoccupation. A judge's response may engender an even more bitter and ▶

I do think that anyone who actually watches a Supreme Court argument or gets to sit in on appellate court arguments would be moved by the seriousness with which the judges and justices take their mission and by the fairness of their treatment of the advocates. It's obviously been debated for a long time whether cameras should move into the Supreme Court as well as other courtrooms. But I think that it's probably been very salutary for people to be able to watch many state court appellate arguments and the federal circuit court arguments in some form, either live streamed or televised. In a way the process is its own best advertisement for excellence and fairness. ★



Kathleen Sullivan QUINN EMANUEL



Paul Clement KIRKLAND & ELLIS

I think that lawyers are probably the best natural constituency for the judiciary. If lawyers don't have a fair and impartial and independent judiciary, in the long run we're probably not going to have jobs – or at least the profession is going to change in a way where the difference between a courtroom lawyer and a lobbyist is going to be collapsed. Speaking only for myself, that probably wouldn't suit my skillset. So I think lawyers have a vested interest in getting the public to understand how the court system works. And frankly, I think that lawyers also are the natural constituency for this because lawyers have a little bit of the same problem. ★

The key to having a fair and impartial judiciary is not the process that we use, necessarily, but building a public respect and understanding for what judges do in the rule of law, and valuing it. I submit to you that unless our elected officials – those persons who in the so-called merit selection systems are responsible for appointing judges – unless there's a respect for the importance of a fair and independent judiciary [in evaluating candidates for the judiciary], we are in a lot of trouble. Absent that, I'd suggest to you if we focus too much on the selection process, it's tantamount to just tinkering with the chairs on board the deck of the Titanic. We're not going to make any change. We're going to rearrange the furniture. I think having a good process is a necessary but not sufficient way of getting a fair and impartial judiciary; unless that process rests on something – a public respect for what we do – it's on a very, very shaky foundation. ★



Judge Theodore McKee
U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT



Judge Renée Cohn Jubelirer
COMMONWEALTH COURT OF PENNSYLVANIA

In a way, there's a respect for the public in an elective system. You can think about it in the sense that when you're looking at these polls. It's very disturbing when the public doesn't understand and appreciate how judges make decisions, the kinds of agonizing that judges do on all the courts when faced with legal principles that you must apply and, in an individual factual scenario, may not appear to be consistent with your personal beliefs, but which you are, by your oath, required to convey. One way is to bring the public into it. If you have an elective system, you are forced to in some ways. You need to keep educating the public because you need them to participate, to be knowledgeable when they make their selections, to understand what judges do, and who the candidates are. It does give that opportunity. ★

unfair response, motions to recuse, and the like. This kind of conflict is distasteful to most judges but not so the critics. If judges enter the ring, they risk changing who they are. They may deprive themselves of the detachment and equanimity that are necessary to good judging.

I know this situation is frustrating and deeply disturbing to many judges. It does take courage and restraint in this environment to carry on without bitterness and with a steady adherence to equal justice. Fortunately, we have great examples of judges doing just that, now as before. At least for those judges who have lifetime tenure and guaranteed compensation, the framers foresaw the likelihood of conflict and strove to protect our judges from the corrosive effects of partisan competition. But they knew that it would still require courage to be a judge in our raucous republic.

Now it is up to us. The profession must put in many more resources to explaining what judges do and defending them from unfair and political attacks. While judges don't have crisis managers and social media experts, other groups do. It is distressing that in recent years we have seen the demise of two leading organizations most devoted to judicial independence — the American Judicature Society and Justice at Stake — as well as the defunding of the one American Bar Association committee dedicated to judicial independence. Our bar associations should realize that one of the main reasons lawyering is a profession is precisely so that an independent bar may defend the independence of the judiciary.

We can do much better and keep our judges out of the fray.

This doesn't mean that there is nothing judges can do. They can do so much, but not by responding to specific attacks. It's too late by then. Judges can

and do connect with their communities by holding court in high schools and other places and by giving talks on the rule of law, how judges decide cases, and the importance of judicial independence. They can speak about how they do their own work and what their aspirations are, how they became a judge and how they try to keep the public's confidence. They can articulate their rulings so that a person of reasonable education and intelligence can understand the reasoning. Every opinion is an opportunity for civic education on the role of the judge. This kind of important work is happening every day by judges inside and outside of the courthouse. There are many inspirational examples of what a justice or judge can do to explain the judicial role in preserving the rule of law.

My third and last threat to address is the challenge to fair and impartial courts presented by state judicial elections. For state court elections, the problem is not that the process ends up with unqualified or substandard judges. We have many wonderful state court judges who have been chosen and retained through election systems. There are also some benefits to judicial elections. For example, they are opportunities for civic education and outreach.

But the negatives are many. First, when one of the occasional contested and nasty elections occurs, a lot of damaging and misleading accusations will be made about judges, the judicial role, and the courts. Second, academic studies demonstrate that judges facing re-election will be affected in their judicial decisions in the time period running up to the election. State trial judges sentence more severely, appellate judges are less likely to overturn a conviction, and Supreme Court justices are less likely to overturn a death penalty. Third, partisan judicial elections are utterly

inconsistent with our effort to convince the public that our judges are not partisan. Even if it is possible to run as a Republican or Democrat Judge, wearing the team's jersey, and then become a nonpartisan judge in a black robe until the next election cycle, the electorate may not believe in this alchemy. Finally, judicial campaigns require money and organization, and judges naturally turn to lawyers and their business clients for assistance — lawyers and clients who may appear before the very same judge.

Surely we can ameliorate some of these negative consequences even if we cannot convince the American people to get rid of judicial elections.

More than anything we must preserve the judicial culture in this country. If the judicial culture is strong then, whatever the threats, we will have fair and impartial judges animated by the spirit of independence. They will aspire to be wise, courageous, open minded, thoughtful, and considerate. As Learned Hand explained some 75 years ago: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it." The same may be said of judicial independence, fairness and impartiality.

I marvel today as I have my entire legal career at the excellence of our judiciaries, state and federal. Despite low salaries, threats to judicial independence, and burdensome caseloads, our state and federal judges are among the unsung heroes of the Republic, jewels in the crown of our democracy. There is some miracle at work here, difficult to explain but wonderful to behold.

May it always be so. ★

¹ Michael Boudin, *A Response to Professor Ramseyer, Predicting Court Outcomes through Political Preferences*, 58 *DUKE L.J.* 1688 (2009).

Tweak the guiding paradigm

Over time, the public has simply ceased to believe judges when they say that they follow the law, and nothing but. If judges impose their ideological policy preferences, the argument goes, why should they be independent from political controls, when other policymakers are not? We have reached the point where, when judges seek to defend the customs and conventions that have guarded against incursions upon their independence by arguing that “we are all about the law and nothing else,” the public response has increasingly become, “No, no, no, your nose is growing.”

The collapse of independence conventions was facilitated by what I’ve described earlier as a protracted erosion of support for the role of judicial independence in the rule of law paradigm. One possibility is to shrug, let judicial independence collapse under its own weight, and welcome a judiciary that is more responsive to partisan and majoritarian pressures. That response would make sense if judicial independence is to blame for its own undoing.

But in my view, the problem does not lie with judicial independence itself, but with how judicial independence is conceptualized in the rule of law paradigm. The long-term solution is not to jettison judicial independence, but to tweak the guiding paradigm, in favor of what I rename a “legal culture paradigm.”

The legal culture paradigm I propose begins from the premise that judges take law seriously, and when they announce to the world that they are doing their best to uphold the law, that is what they are acculturated to do.

Second, likewise, beginning in law school, and continuing in practice, future judges are exposed to pervasive legal indeterminacy. Law students learn to exploit indeterminacy by arguing both sides of difficult legal questions, divorced from their own policy preferences, to the end of making them more effective advocates in an adversarial system of justice.

Third, future judges, again, beginning as law students, resolve indeterminate legal questions

with reference to competing policy arguments that aid them in deciding which of two comparably plausible interpretations of law is best. The argument judges find most persuasive can be informed by their background, their education, their life experience, their common sense, and their policy perspectives, aided by a strategic sense of the political context in which the case arose. That is not judging gone rogue, that is judging gone right.

The virtue of a legal culture paradigm is that it defends an independent judiciary in terms that social science verifies, and the public can accept. The problem that I’m trying to address is the problem of pretending that judges just call balls and strikes. It is more complicated than that, and the public is able to handle that truth. But by honestly acknowledging the role that extralegal influences can play in judicial decision-making, the legal culture paradigm has to allow for the possibility of gratuitous policymaking, in some cases, in which judges abuse their independence by disregarding the law that they are acculturated to follow, knowingly or not, and imposing their own policy predilections.

Accordingly, the legal culture paradigm needs to envision a more robust role for accountability, relative to the rule of law paradigm, to deter that kind of gratuitous policymaking and preserve public confidence. Without disputing the role that Congress plays in promoting accountability, the additional accountability that the legal culture paradigm envisions can be supplied in large part by intra-judicial mechanisms already in place that pose no meaningful threat to judicial independence.

It is unrealistic to hope that a modest reboot of the prevailing paradigm can by itself quiet the polarized partisan political fury and restore respect for an independent judiciary. In the short term, we must brace for a period of struggle akin to unrestrained, hardball litigation, in which pokes to the eye of established judicial independence conventions by partisans on one side of the aisle will elicit reciprocal pokes by



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partisans on the other side, in lieu of unheeded warnings not to poke at all.

Ultimately, however, hardball litigation is exhausting. Running a government without guiding conventions is chaotic, and therein lies hope. The more insufferable and unrestrained hardball gets, the more attractive the alternative of settlement becomes. A key to enabling settlement is to bring the parties together in a quieter and less formal setting to promote candor and discourage posturing for the benefit of external audiences.

Beginning in the late 1970s, the Brookings Institution hosted a series of conferences in Williamsburg, Virginia, and elsewhere. Those conferences brought representatives of all three branches of government together to discuss court-related issues for the purpose of improving inter-branch communication and promoting mutual understanding of the challenges confronting the judiciary.

And so, I look forward to a time when we can convene a series of tri-branch summits in the spirit of the Williamsburg conferences, once the adversaries are willing and receptive to meet. These summits could address such topics as the role of an independent and accountable judiciary in American government; the state of constitutional conventions that have served to protect an independent judiciary from encroachment; the need for procedural conventions; the appointments process; promoting a stable system of selection; and an independent, accountable judiciary.

It’s premature to convene these summits until the populist wave has crested, and the disputants are prepared to meet and listen. There is, however, room for optimism that the current appeal of the Biblical edict, “An eye for an eye,” will eventually yield the wisdom of Mahatma Gandhi’s admonition that an eye for an eye makes the whole world blind. ★