

Resource Materials on Judicial Independence

Compiled and Edited by Roy Schotland

In addition to the articles found in this issue of *Court Review*, which present the considered views of the authors on various subjects, we also seek to stimulate the thinking of the reader regarding judicial independence. For those attending the annual conference of the American Judges Association this year, this will involve review of the materials in this issue and interchange with authors of the articles and a number of others who have given substantial thought to the topic—as well as interchange with other judges in attendance.

For those whose involvement with the National Forum on Judicial Independence will come only through the pages of *Court Review*, in this issue and the next, we provide in the next few pages some materials that we hope will give you pause and stimulate your thinking. There are two distinct types of materials included. We are indebted to Professor Peter M. Shane of Ohio State University, who has given permission to include several of the hypothetical problems on judicial independence that he presented to the U.S. Conference of Chief Justices at its 2001 midyear meeting. In addition, from a variety of sources, I have culled the views on judicial independence of a number of thinkers. Interspersed within the views of others I have included some of my own comments.

HYPOTHETICAL PROBLEMS ON JUDICIAL INDEPENDENCE

Let us begin, then, with the hypothetical problems presented by Professor Shane. We note, also, that the sixth hypothetical was contributed to Professor Shane by Stewart Jay, professor of law at the University of Washington School of Law.

On decisional independence:

1. An East Carolina District (*i.e.*, trial) Court judge has issued an injunction against the state's current system of financing its public schools through property taxes. While the case is on appeal to the Court of Appeals, the House majority leader declares on the floor of the House: "The judiciary has requested \$50 million to upgrade court facilities and technology and to improve judicial pay. If the Supreme Court ultimately affirms the challenge to property tax-based public school financing, they will not see a dime of the budget they have requested." Is this appropriate? Would it be any more or less appropriate for the House majority leader to convey the same message privately to the Chief Justice?
2. East Carolina's District Court has issued an injunction requiring a series of administrative and facilities improvements in the state system of publicly funded mental hospitals. While the case is pending on appeal, the House of Representatives schedules a committee hearing on the mental hospital system and requests that both the District Court judge and the Chief Justice of the East Carolina Supreme Court testify. Should they?
3. The Constitution of the state of East Carolina provides that Supreme Court Justices "shall be liable to impeachment for high crimes or misdemeanors, or malfeasance in office." During the past year, the court has decided two highly controversial cases. In the first, the court invalidated a state law prohibiting the distribution of birth control information and supplies to minors without parental consent or notification. The court based its decision on the "right of privacy" under the East Carolina Constitution. In the second, the court upheld a custody award to the divorced husband of a woman managing partner at a major law firm on the ground that the lower court properly took account of the time demands of the mother's job. Outraged conservative legislators have demanded the impeachment of the justice who wrote the birth control opinion, while outraged liberal legislators have demanded the impeachment of the justice who wrote the custody opinion. Is either demand proper?
4. East Carolina Supreme Court Justice Nicole Green concurred last year without opinion in a unanimous opinion vacating a death sentence based on procedural error in the sentencing hearing. During her retention election, a conservative radio talk show host has galvanized a campaign against Justice Green on the ground that she is "leading the anti-death penalty charge" in East Carolina. The Governor, facing a tough reelection campaign next year, has publicly expressed his doubts about any justice who would "deny the people of East Carolina the benefit of the ultimate penalty for a heinous capital crime." How should Justice Green, the judiciary, or the organized bar respond?
5. Fred Bundy has been convicted and sentenced to death for an especially heinous killing of a police officer. The case against him is overwhelming on the facts. But his court-appointed lawyer was observed at trial sleeping through portions of the testimony of key witnesses. He failed to bring out on cross that one of the witnesses against Bundy had been convicted of fraud. Also, although Bundy's trial venue was probably the most conservative county in East Carolina, the defense attorney wore a "Gay Rights" button on the first day of trial. On appeal, a three-judge panel of the state's intermediate appellate court voted 2-1 to uphold his conviction. The dissenting judge, Lonnie Brown, would have ordered a retrial on the ground of ineffective assistance of counsel. (As a general matter, Judge Brown has voted to affirm criminal convictions in 90% of the cases he has heard on appeal and in 78% of the cases involving death sen-

tences.) Unlike Judge Brown, his opponent in his next reelection campaign is a multimillionaire with virtually unlimited resources for advertising. The opponent's ads show a male hand unlocking a jail door and allowing the inmate, a scruffy and malevolent looking fellow, to walk out smirking. A voice says: "Judge Lonnie Brown is soft on crime. If it had been up to Judge Brown, Fred Bundy would be a free man today." How should Judge Brown, the judiciary, or the organized bar respond?

On institutional independence:

6. Reacting to complaints from the public and the bar about the tardiness of certain trial judges in completing cases, the state enacts a law to encourage speedier dispositions. The Commission on Judicial Administration is charged with setting general timetables for disposing of various matters (e.g., motions for summary judgment/dismissal, post-trial motions, issuing findings of fact/conclusions of law, rendering final judgments). Each trial judge in the state is required to keep a record of the time spent on these matters in every case. These records are reported to the Commission on an annual basis. The Commission is required (1) to publish a "report card" (using such labels as "completes work on time" or "takes substantially longer than other judges to decide cases") to be included in a Voters' Guide whenever any sitting judge seeks reelection, and (2) to impose penalties (measured as a portion of the judge's salary) if the judge exceeds the time limits by certain percentages, i.e., the slower the disposition, the higher the penalty.

The state constitution provides, "The judges of the Supreme Court and judges of the superior courts shall severally and at stated times, during their continuance in office, receive for their services the salaries prescribed by law therefor, which shall not be increased after their election, nor during the term for which they shall have been elected." The constitution also states: "Each cause submitted to a judge of a superior court for his or her decision shall be decided by such judge within 90 days from the submission thereof; *Provided*, that, if within said period of 90 days, a rehearing shall have been ordered, then the period within which the judge shall decide shall commence at the time the cause is submitted upon such a hearing." Are the new statute's provisions appropriate responses to judicial tardiness?

7. East Carolina's Senate Committee on the State Judiciary sends a questionnaire to the presiding judge of each state court and to the Chief Justice of the Supreme Court. The questionnaire seeks not only case management statistics for each court as a whole, but also the following statistics for each judge:

- Number of opinions assigned
- Number of opinions written

- Average number of days between case argument and announcement of decision
- Cases still pending for decision for 30 days or less, for 30-90 days, for 90-180 days, and for more than 180 days
- Hours per week on non-court related professional activity, including a list of all such activities
- Hours per week on non-case related travel, including documentation of the expenses for all such travel; and
- For each appellate judge, the number of votes to affirm lower court judgments and the number of votes to reverse.

Are all of these inquiries appropriate? How should the courts respond?

8. The East Carolina Court of Appeals hears appeals as a matter of right from virtually all state district court cases. The nine judges have a screening system. If a screening panel of three judges agrees (a) that a case does not require oral argument before resolution, and (b) on the proper disposition of the case, then the case is resolved entirely on the briefs. Approximately 40% of the court's caseload is handled this way. The court also has a "summary affirmance" process that permits lower court opinions to be affirmed without a written statement of reasons. About a quarter of the cases screened and about 10% of the cases decided after oral argument are summarily affirmed. The East Carolina Constitution expressly authorizes the state legislature to enact procedures for all courts below the Supreme Court. The legislature is considering a bill that would require the Court of Appeals to permit oral argument in all cases and to decide each case based upon a written opinion stating the court's reasons for affirmance or reversal. The legislation does not contemplate the creation of new judgeships. How should the state judiciary respond?

Reacting to complaints from the public . . . , the state enacts a new law to encourage speedier dispositions.

VIEWS ON JUDICIAL INDEPENDENCE

The excerpts to follow from several sources are intended to advance one's thinking about the concepts raised in considering judicial independence. After one of them, I have included my own comments (marked as "Editor's Note").

John Adams' view on judicial independence, according to David McCullough's recent biography: Essential to the stability of government and to an "able and impartial administration of justice" is separation of judicial power from both the legislative and executive. There must be an independent judiciary. "Men of experience on the laws, of exemplary morals, invincible patience, unruffled calmness and indefatigable application" should be "subservient to none" and appointed for life.¹

Footnotes

1. DAVID G. McCULLOUGH, JOHN ADAMS 201 (2001).

Courts are not representative bodies. They are not designed to be a good reflex of a democratic society.

Felix Frankfurter

James Madison saw independence for judges as a protection against legislative and executive oppression, but in 1789, on the floor of the House of Representatives when he was proposing the Bill of Rights, he added this: “[I]ndependent tribunals of justice will consider themselves in a peculiar manner

the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive.”²

The States’ treatment of judicial independence varied. The “founding generation was ambivalent about the independence of the judiciary.” The nature of this ambivalence was the tension between competing values. On the one hand, an impartial, independent judiciary was viewed as a necessary protection of the rights of the people. On the other hand, a truly independent judiciary would conflict with the principle of majority rule.³

Felix Frankfurter, in the 1951 case of *Dennis v. United States*: “But how are competing interests to be assessed? [W]ho is to make the adjustment? — Who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.”⁴

Otto Kaus, who served on the California Supreme Court from 1980 through 1985, described memorably the dilemma of deciding controversial cases while facing reelection. He said it was like finding a crocodile in your bathtub when you go in to shave in the morning. “You know it’s there, and you try not to think about it, but it’s hard to think about much else while you’re shaving.”⁵ He said this in 1985, the year before Chief Justice Rose Bird was denied retention, along with (and because of) two of her colleagues.

Alfred P. Carlton, Jr., a North Carolina lawyer who served as president of the American Bar Association in 2002-2003: “Judicial independence is precious to our way of life. Judicial independence is a fundamental principle upon which our country was founded and for which Americans have died, not only at Yorktown and Valley Forge, but at the Alamo, Iwo Jima, Inchon, Khe Sanh, and, now, Mazar-E-Sharif.”⁶

The majority in *Republican Party of Minnesota v. White*⁷ held that a provision of the Minnesota Code of Judicial Conduct, which said candidates for judicial office, including incumbents, could not “announce his or her views on disputed legal or political issues” violated the First Amendment. That Code provision, called the “announce clause,” was in effect in only 7 other states at the time of the *White* decision. Most other states with codes based on the American Bar Association’s Model Code of Judicial Conduct had since adopted different, more narrow restrictions.⁸ From the majority opinion:

“One meaning of ‘impartiality’ in the judicial context—and of course its root meaning—is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. . . .

“We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*. To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

“It is perhaps possible to use the term ‘impartiality’ in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular *legal view*. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires. 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

2. Maeva Marcus, *The Adoption of the Bill of Rights*, 1 WM. & MARY BILL RTS. J. 115, 119 (1992) (quoting June 8, 1789 speech of Madison).

3. Gerhard Casper, *Separating Power: Essays on the Founding Period* 137 (1997), as described in Paul J. DeMuniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 373 (2002).

4. 341 U.S. 494, 525-27 (concurring opinion).

5. Gerald F. Uelmen, *Otto Kaus and the Crocodile*, 30 LOYOLA L.A. L. REV. 971 (1997).

6. Alfred P. Carlton, Jr., *Preserving Judicial Independence—An Exegesis*, 29 FORDHAM URBAN L.J. 835, 837 (2002).

7. 535 U.S. 765 (2002).

8. See generally Roy A. Schotland, *Should Judges Be More Like Politicians?*, Spring 2002 COURT REVIEW at 8.

virtually impossible to find a judge who does not have preconceptions about the law. . . . Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. ‘Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.’

“A third possible meaning of ‘impartiality’ (again not a common one) might be described as openmindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose. . . .

“The short of the matter is this: In Minnesota, a candidate for judicial office may not say ‘I think it is constitutional for the legislature to prohibit same-sex marriages.’ He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of openmindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.”⁹

Editor’s Note: The discussion of bias and impartiality in the Court’s decision in *White* would have benefited from remembering the thoughts of Justice Cardozo, and Kenneth Culp Davis who, like Scalia, taught administrative law. Cardozo wrote that judges are shaped in part by “the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.”¹⁰ Davis, meanwhile, explained the meaning of bias:

“The concept of ‘bias’ has at least five meanings. Although the five kinds of bias shade into each other, the main ideas about bias in adjudication may be stated in five sentences, each of which deals with one kind of bias: (1) A prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is *not, without more, a disqualification*. [As the great Ad Law professor Louis Jaffe wrote: “Our tradition rightly understood is that a judge shall be neutral toward the question of whether a specific defendant is guilty. It is a

perversion of the tradition to demand that the judge be neutral to the purposes of the law.”] (2) Similarly, a prejudgment about legislative facts that help answer a question of law or policy is *not, without more, a disqualification*.

(3) Advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts, but a prior commitment may be. (4)

A personal bias or personal prejudice, that is an attitude toward a person, as distinguished from an attitude about an issue, is a disqualification when it is strong enough and when the bias has an unofficial source; such partiality may be either animosity or favoritism. (5) One who stands to gain or lose by a decision either way has an interest that may disqualify if the gain or loss to the decisionmaker flows fairly directly from her decision.”¹¹

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The remaining excerpts (except for the last two at end) are from a book that followed a 2001 conference on judicial independence at University of Pennsylvania Law School, sponsored by the American Judicature Society and the Brennan Center for Justice at New York University. The book opened with these comments from **Stephen B. Burbank, Barry Friedman, and Deborah Goldberg:**

“Believing that the debate about judicial independence has produced more heat than light and that scholars in different disciplines have been talking past one another, we convened a conference of some 30 prominent academics with backgrounds spanning four disciplines to discuss what we know, and ought to know, about judicial independence. . . .

“At the core of the conference sat the puzzle of exactly what we mean—or could possibly mean—by the phrase ‘judicial independence.’ ‘Independent from what?’ was a typical reaction, and every bit of common wisdom on the subject was challenged. For example, . . . the common intuition of the participants was that wholly unaccountable judges are as likely to deviate from what the law might demand as follow it. Thus, *some* amount of accountability seems essential to ensure judicial adherence to popularly specified legal norms and therein lies a dilemma. . . .

“An important insight emerged from the conference repeatedly: Policy debates and academic research about

9. 535 U.S. at 775-780.

10. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921).

11. KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 2 *ADMIN. L. TREATISE* 648-49 (4th ed. 2002) (emphasis added).

Decision makers are independent if they are not affected by any signal from another actor.

Edward L. Rubin

the judiciary should separate high—or constitutional—courts from other courts According to the traditional view, trial and intermediate appellate courts deal with the gritty facts of ordinary cases. It is here, specifically, that we seek decisions rendered on those facts free of any outside influence. High courts and

constitutional courts, by contrast, are more likely to deal with broad questions of public policy. Although we may want those judgments rendered in a forum different from that of ordinary politics, we may not want them entirely immune from democratic accountability.”¹²

Edward L. Rubin, a law professor at the University of Pennsylvania law school, wrote:

“[Let us clarify] the distinction between independence and neutrality, a separate matter that is frequently conflated with it. Decision makers are neutral if they are indifferent about the consequences of their decisions; decision makers are independent if they are not affected by any signal from another actor. An umpire for a baseball game is neutral if he or she does not care which team wins the game; he or she is independent if no one on the field or in the stands can influence his or her calls. The two considerations can operate separately, although they often occur in conjunction. For example, the umpire has lost both neutrality and independence if one team offers a bribe to decide in its favor, but only neutrality is lost, and not independence, if he or she has bet on one team. Racist judges are perfectly independent; no signal from any other actor induces them to decide against minority group litigants. They are entirely self-motivated.

“Neutrality is not even desirable in most governmental situations because we generally want public officials to care about the results of their actions. What is undesirable, and what we attempt to prevent, are decisions based on personal gain or on factors that we deem to be irrelevant. . . .

“[W]e are not concerned if a judge’s decision will improve his or her position, financial or otherwise, as a member of the general public. As critical legal studies, feminist, and critical race theory scholars have pointed out, public decision makers often act, or can be seen as acting, to improve the status of their own social class, gender, or race, but our concept of required neutrality does not reach these effects. Similarly, prejudice against an individual or group may be considered a forbidden breach of neutrality by the decision maker if that attitude is

deemed irrelevant by law or public morals. It is currently considered improper for a public official to explicitly disfavor blacks or Jews, but this was not true with respect to blacks in early 19th century America, nor with respect to Jews in medieval Europe, and it is currently not improper for officials to express distaste for criminals. But our concept of neutrality only reaches outright and explicit prejudice; the collection of attitudes that every individual possesses is regarded as too complex and obscure to serve as the basis of a legal rule In general, neutrality, although an important concept, is a limited one, and reaches only extreme situations such as a direct financial interest in the outcome, or an explicitly and strongly stated prejudice that is deemed legally improper. . . .

“[N]eutrality is a practical standard only in the most extreme situations because attitudes and judgments are ubiquitous. Politics is similarly ubiquitous and no general prohibition of it, however defined, can constitute a coherent standard.”¹³

Stephen B. Burbank, an administration of justice professor at the University of Pennsylvania, **Barry Friedman**, a law professor at the New York University School of Law, and **Deborah Goldberg**, a scholar with the Brennan Center for Justice, wrote:

“[D]iscussions of judicial independence often proceed on the erroneous premise, stated or unstated, that judicial independence and judicial accountability are discrete concepts at war with each other, when in fact they are complementary concepts that can and should be regarded as allies. This supposed dichotomy between independence and accountability is a favorite target of legal scholars in search of a paradox The instrumental view of judicial independence urged here, on the other hand, requires no dichotomy and sees no paradox, because it proceeds from the premise that judicial independence and judicial accountability are different sides of the same coin. . . .

“No rational politician, and probably no sensible person, would want courts to enjoy complete decisional independence, by which we mean freedom to decide a case as the court sees fit without any constraint, exogenous or endogenous, actual or prospective. Courts are institutions run by human beings. Human beings are subject to selfish or venal motives, and even moral paragons differ in the quality of their mental faculties and in their capacity for judgment and wisdom. In a society that did not invest judges with divine guidance (or its equivalent), the decision would not be made to submit disputes for resolution to courts that were wholly unaccountable for their decisions. One implication of this proposition is that we need law to constrain judges rather than judges to serve the rule of law.”¹⁴

12. Stephen B. Burbank, Barry Friedman, & Deborah Goldberg, *Introduction*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 4, 7 (2002).

13. Edward L. Rubin, *Independence as a Governance Mechanism*, in

JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 65-66, 69 (2002).

14. Burbank, et al., *supra* note 12, at 10-12.

Lewis A. Kornhauser, an economist and law professor at the New York University School of Law, wrote:

“First, the judge should only be free of ‘inappropriate’ influence. Second, and related, the judge need not be free of the influence of *all* individuals. The parties may influence a judge through legal arguments that persuade judges and that are offered orally in court or in papers submitted to the court; such persuasion does not constitute ‘inappropriate’ influence. Arguments offered *ex parte* might be inappropriate though we may not characterize the exercise of this sort of influence as compromising judicial independence. Similarly, judges who take bribes are subject to inappropriate influence. Neither lower court judges who follow the decisions of superior courts nor state supreme court justices who are persuaded by the rulings of courts outside their jurisdiction are subject to inappropriate influence. Most important, judges who render judgment on the basis of commitment to some set of moral and political principles are not subject to inappropriate influence.”¹⁵

“The concept of judicial independence does not further the development of normative theories of adjudication, does not advance understanding of the functioning of extant judicial systems, and does not aid in the design (or improvement) of judicial institutions. . . .

“The concept of judicial independence is not useful. Legal debates over adjudication, debates over the design of judicial institutions, and the explanation of the emergence and performance of various judicial institutions would be clearer and progress more rapidly if we abandoned the concept.”¹⁶

Mark Twain, who needs no title, wrote:

“Man is the only animal that blushes. Or needs to.”

Stephen B. Burbank, Barry Friedman, and Deborah Goldberg again:

“Perhaps the most important and least understood aspect of judicial independence is the relationship between public opinion and judicial decision making. . . . Do judges cater to, or are they even aware of, public opinion? And does the public watch and react to what judges do? In the common wisdom of judicial independence, the answer to the first question ought to be no but the second regrettably is yes. As it turns out, this may be exactly backward. What evidence there is suggests that a remarkable number of high-profile decisions comport with public opinion. At the same time, it seems the public has very little clue what the judiciary is up to. This juxtaposition of results presents serious normative questions about whether judges are paying too much attention to public opinion and whether the public is paying too little atten-

tion to what judges are doing. It also presents a real set of questions about how the public forms its opinion of judges.”¹⁷

Edward L. Rubin again:

“[I]ndependence is not an inherent feature of the judiciary, either as a descriptive or a normative matter. Rather, it is a technique of governance that is widely deployed in a modern state and that serves a variety of functions. The question, therefore, is entirely open. Should the judiciary be independent and if so, to what extent?”¹⁸

“[I]n important cases, in which major issues of public policy are at stake, . . . signals [transmitted to the court by nonjudicial governmental units or by private parties] are deemed acceptable because these signals are understood to relate to the case’s implications, not to the fate of the particular individuals who are before the court. The extreme version of this is public interest litigation. In *Brown v. Board of Education*, few people really cared where Linda Brown went to school; the issue was American apartheid and thus people felt as free to express their views about the case as they did when the same issue came before Congress in the debate over the Civil Rights Act.”¹⁹

“The prohibition of . . . signals to the judiciary applies only to decisions in specific cases, however, and not to signals about the judiciary’s general performance. It is considered acceptable for public officials to transmit informative signals and expressive signals to the judiciary; for example, a legislator can provide information to the judiciary about the extent of medical malpractice and condemn the judiciary for being too lenient with defendant physicians, or he or she can note the number of offenders on probation who commit additional offenses, or issue a public condemnation of the frequency with which the judiciary grants probation. Similarly, it would be considered quite proper to condemn the general performance of a particular state’s judiciary as reflecting racial prejudice and to document that condemnation with statistics about the differential treatment of the races in question. Such statements are part of our accepted political discourse; the judiciary’s performance is a matter of public concern, and non-judicial officials are entitled to speak to such matters, whether or not they have a direct role in the selection of judges. . . .”²⁰

What evidence there is suggests that a remarkable number of high-profile decisions comport with public opinion.
Stephen B. Burbank,
Barry Friedman &
Deborah Goldberg

15. Lewis A. Kornhauser, *Is Judicial Independence a Useful Concept?*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 48 (2002).

16. *Id.* at 53-54.

17. Burbank, et al., *supra* note 13, at 6-7.

18. Rubin, *supra* note, at 69.

19. *Id.* at 75.

20. *Id.* at 77-78.

The real problem is that an electoral regime inevitably exposes judges to . . . signals from the general public.

Edward L. Rubin

“Thus far, only the adjudicatory function of the judiciary has been considered. Although this certainly constitutes the bulk of the judiciary’s role, it does not constitute the entirety. Courts are assigned a variety of other tasks that vary in content from one American jurisdiction to another. . . . Consider, for example, the federal judiciary’s role in drafting the Rules of Civil Procedure. By

statutory authorization, the chief justice of the United States appoints an advisory committee to develop the initial draft. This draft, if approved by the advisory committee and two intermediate bodies, is submitted to the Court, which has authority to revise it. . . .²¹

“This point is underscored by the much more extensive independence that is granted to the Federal Reserve Board in carrying out its monetary control function. At present, the Fed controls the money supply—the amount of cash, check-able accounts, and certain other assets available in the nation—by buying and selling government securities on the open market. . . . To begin with, the governors of the Federal Reserve System, who constitute a significant portion of the Open Market Committee, are appointed to 14-year terms and can be removed only for cause; other members of the committee are civil service employees with similar levels of protection. . . .²²

“Still another example of the way that the mechanism of independence can be used for nonadjudicatory decisions that implicate efficiency, not fairness, is the Defense Base Closure and Realignment Act of 1990. The end of the Cold War, the change in defense strategy by military analysts, and the effort to balance the federal budget brought an awareness that the United States had an excessive number of military bases and that a significant number should be closed. But most bases are economic mainstays of the community where they are located, a phenomenon that has very little to do with the base’s military necessity. Legislators often win or lose elections based on their ability to secure or retain such valuable economic assets for their constituents; thus, any effort to close military bases runs into determined opposition from the affected state’s delegation, the classic pork barrel scenario that ends up sacrificing public interest to particularized benefits. Congress enacted the Base Closure Act to prevent itself from succumbing to these political pressures, the image of Ulysses lashing himself to the mast as he passes the Sirens being an inevitable metaphor. . . .

“[I]ndependence is not always linked to fairness, any more than it is linked to the judiciary. It is not a necessary aspect of our efforts to provide fairness to groups, for

example. On the other hand, independence is often a mechanism that is deployed to achieve other goals, such as efficiency. Control of the money supply is a function in which efficiency considerations have suggested that the decision maker should be granted a very high level of independence, one that is virtually as extensive as that granted to adjudicators, and perhaps greater in certain ways. The same considerations have led to the creation of other agencies with lesser, but still significant levels, of independence such as the FTC and the FCC. These uses of independence have nothing particular to do with fairness or with the judiciary. . . .²³

“Elections are a different matter. Although it is not possible for the electorate, as a body, to transmit an informative signal to a judge—how would a general mass of citizens give the judge any persuasive information about a particular case—it can certainly transmit an expressive signal. Such signals can be extremely influential, whether the judge must stand for reelection after a term of years or is subject to periodic or ad hoc recall. Consider, in our current tough-on-crime environment, a judge who feels that the case against a person who is probably guilty of a heinous crime should be dismissed because the crucial evidence was illegally obtained, or a judge who wants to sentence a whole category of youthful offenders to alternative sentences, knowing that at least one of these offenders will probably commit a serious crime at some time in the future. Or consider a judge in the pre-World War II South who feels that a black man accused of raping a white woman should receive an acquittal notwithstanding the verdict because the evidence was insufficient. To these dramatic examples may be added the more frequent case of the judge whose ordinary decisions incrementally produce a general impression that he or she is soft on Communism, soft on crime, or soft on any other issue on which the public wants him or her to be hard. Not only are these expressive signals likely to be influential, but there is probably no informal norm against transmitting them and they are impossible to prohibit. Public officials may be forbidden or discouraged from expressing opinions about judicial performance as part of the understood obligations of their government position. But there is no practical way to prohibit the general public from expressing such opinions, and it would probably violate the First Amendment even to try.

“Thus, the problem with elected judges is not the oft-stated one that it politicizes the judicial role. Any method of selection will do that and, besides, the role is inherently political by virtue of the judge’s attitudes. The real problem is that an electoral regime inevitably exposes judges to expressive signals from the general public. The strong influences that result could deny fair adjudications to individuals who are potentially subject to disadvantages. Perhaps it would go too far to assert that judicial elections violate the due process clause, given the long history of

21. *Id.* at 82.

22. *Id.* at 82.

23. *Id.* at 83-84.

this mechanism and the traditional nature of due process, at least with respect to civil trials. But these influences do indicate that judicial elections violate our general sense of fairness and should be abolished as a matter of policy.

“A second institutional question involves salary and resources protection. Here again, many states depart from the federal baseline. To begin with, salary protection is found in only a minority of states, a situation that some would rank with elected judges as a major risk to judicial independence. But microanalysis suggests that salary protection may not be as critical as is sometimes assumed. Of course, lowering a specific judge’s salary would constitute a powerful signal to that person, but the process is too cumbersome to be used with respect to an individual decision, and civil service rules would generally preclude its use with respect to the general pattern of decisions by an individual judge. By and large, salary reductions can only be imposed on the judiciary as a whole. As such, it is an extremely crude means of sending signals and it is not necessarily an effective one. It is certainly possible to construct a scenario in which the legislature or chief executive punishes a judiciary whose decisions antagonize the public, but the actualization of this scenario is a bit more difficult to envision. An elected official who interfered with the decisions of the judiciary in such an obvious fashion might be taking a greater political risk than one who tolerated the judiciary’s unpopular stance. Moreover, the judiciary’s response, when confronted in such an obvious manner, might well be recalcitrance, particularly if the salary reduction were only a modest one, which would probably be the case.

“On the other hand, a mere proposal to reduce judicial salaries might serve as an expressive signal by the legislature or the chief executive. But it is questionable whether we really intend to forbid such signals. Although there are strong norms against expressive signals from public officials regarding the outcome of a particular case, there are no such norms against expressions of general disapproval, as noted above. There are, moreover, valid reasons to grant elected officials the authority to reduce judicial salaries. Such salaries represent a higher proportion of state and local budgets than of the federal budget; if all government salaries are being reduced as part of a general economy effort, excluding judicial salaries might be burdensome.”²⁴

Terri Jennings Peretti, a political science professor at Santa Clara University in Santa Clara, California, wrote:

“Judicial independence is considered to be a norm of vital importance in our legal system. Its goal is in ‘law-based’ decision making by judges Because the people can be confident that judges made their decisions fairly and objectively, compliance with court rulings is

thereby assured. High regard for courts continues, as then does their legitimacy, power, and unique ability to protect our treasured rights and liberties.

“I am tempted to refer to this collection of claims as ‘the judicial independence myth.’ This is due to its proponents’ tendency to present judicial independence as fact rather than as

an ideal or set of normative values about courts. As this suggests, I am rather dubious about the existence of judicial independence. Unlike many scholars, however, I am not particularly troubled by this state of affairs. . . . Whether one’s goal is to protect judicial independence or to limit it, social science research regarding courts has much to offer and is ignored at the reformer’s peril.²⁵

“Research shows that, at least with regard to the U.S. Supreme Court, none of these claims is valid. In fact, compliance with the Court’s rulings is uneven, public awareness and understandings of them are minimal, and public evaluations are neither exceptionally high nor rooted in beliefs about the Court’s impartiality. . . . The modest public support that exists for the Court appears not to be dependent on a belief in its neutrality or independence. Instead, scholars agree that the dynamics of public support for the Court ‘bear a remarkable resemblance to those for Congress and the presidency.’ Research reveals that public approval of the Court, at both the individual and the aggregate level, is strongly tied to ideology, with evaluations dependent on political agreement with the substance of the Court’s decisions.”²⁶

Charles M. Cameron, a political science professor at Columbia University in New York City, wrote:

“[O]ne can meaningfully examine the relationship between [features like life tenure and protected salaries] and the operational fact of independence (or the lack thereof.) For example, [researchers Eli Salzberger and Paul Fenn] show that judges on the English Court of Appeals who consistently take antigovernment positions are less likely to be promoted to the Judicial Committee of the House of Lords, the highest judicial venue in England, than lord justices of appeal who are less antigovernment. Similarly, [Mark Ramsmeier and Eric Rasmusen] show that antigovernment judges in Japan suffer less successful and less pleasant careers than do pro government judges. The resulting incentive systems no doubt discourage antigovernment behavior by judges—which is to say, they diminish judicial independence from the government.”²⁷

I am tempted to refer to this collection of claims as “the judicial independence myth.”

Terri Jennings Peretti

24. *Id.* at 87-88.

25. Terri Jennings Peretti, *Does Judicial Independence Exist? The Lessons of Social Science Research*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 103 (2002).

26. *Id.* at 117, 119.

27. Charles M. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares?*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 138 (2002).

These three features . . . make all the difference in whether the judge is independent or not.
Kim Lane Scheppele

Kim Lane Scheppele, professor of law and sociology at the University of Pennsylvania, wrote:

“Imagine World A [where a statute, creating a clear exception to a prior law, is appropriately applied by a judge to a case within the exception’s reach.]

“Now imagine World B where (a) the general statute

enacted in the appropriate way covers a range of cases, including Case X. But (b) the head of the governing political party who is also (not coincidentally) the head of the government (perhaps as the president or the prime minister) calls the judge to say that, in Case X, an exception should be made to the usual rule to reach an outcome different from the one that the general statute would usually require. Let us further suppose that this political official is (c) generally authorized to be the lawmaker in this particular regime because the official has the power to issue binding legal decrees but (d) this particular instruction in the particular case is not given in the form of a decree but instead through a phone call that the judge and the politician both know is supposed to be kept secret. In World B, unlike World A, the outcome in the one specific case is dictated directly by the caller without reference to a legal norm. But let us suppose that the judge in World B, like the judge in World A, does as instructed; Case X, which has specific political interest to the regime, is handled as an exception to the general rule. In World B, I submit, the judge has no independence and no moral credit left because the judge has caved in to direct political pressure.

“But what exactly is the difference between World A and World B? In both worlds, the result is the same. This one particular case that came before the judge has been lifted out of the general run of cases to which a broader, more general rule applies and it has been handled as an exception. Moreover, it was the specific instructions from someone in political power that determined what happened in both cases. In World A, however, the instructions came in the form of legislation and in World B, the instructions were personally delivered without first being converted into a legal norm. In World A, the new norm was publicly announced whereas in World B, the

instructions were secret. In World A, the judge was left alone to interpret the legal norm to determine its application in the particular case; in World B, the desired application of the instructions was specifically directed without any intervening judgment by the judge.

“These three features—(1) proper procedure in making the law, (2) publicity in announcing the norms to be applied in the specific case, and (3) the discretionary space for judicial interpretation of those norms—make all the difference in whether the judge is independent or not. In fact, the loss of any one of the three would be sufficient to compromise judicial independence. . . .²⁸

* * * *

We close with two final views on judicial independence. The first is from **James Sensenbrenner**, chair of the Judiciary Committee in the United States House of Representatives. When judges and legal-reform advocates complained that the committee’s oversight of specific judges and decisions was “muddying the separation of powers between Congress and the judiciary,” Sensenbrenner responded: “The fact that judges have lifetime appointments gives them the independence they need, but Congress has the responsibility to watch the judiciary.”²⁹

The last word goes to **Florida Supreme Court Chief Justice Harry Lee Anstead**, who spoke for a unanimous court in a public, in-court reprimand of Judge Carven Angel:

“Judge Angel, would you please approach the podium and remain standing?”

“The charges filed against you arise from . . . your admitted misconduct during your [2002] campaign for re-election as a circuit court judge in Marion County. [In] a stipulation, you admitted the impropriety of your conduct. . . .³⁰

“Each of these incidents may give to the public the appearance that you were part of the partisan activities involved. This, of course, is prohibited by Canon 7 of the Code of Judicial Ethics. . . .

“Every judicial election presents both a great opportunity and a great risk. Those elections present us with a great opportunity to educate our citizens about the proper role and responsibility of the Third Branch. . . . Of course, absolute impartiality and freedom from partisan influences are the most important of these responsibilities.

“At the same time, however, judicial elections present

28. Kim Lane Scheppele, *Declarations of Independence: Judicial Reactions to Political Pressure*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 232-33 (2002).

29. Laurie P. Cohen & Gary Fields, *Legal Quagmire: High Court Ruling Unleashes Chaos Over Sentencing* . . . “Boiling Frustration on the Bench,” WALL ST. J., July 14, 2004, at A1, A12.

30. The charges were: He attended and participated in a regular meeting of the Ocala Republican Women’s Club and of the Republican Club of Sumter County; attended and campaigned for his election at a “Salute to Labor” picnic and Democratic candi-

date rally; his wife attended, with his knowledge, and participated on his behalf in the Lake County Federated Women Republican’s “Meet the Candidate Night” (she assumed the opponent had been invited, but the opponent had not been invited and was not present); he attended a partisan political gathering to support a Republican candidate for the House of Representatives, to which the opponent was not invited. Also, when asked about his political party affiliation, he identified himself as a member of a partisan political party.