

Judicial Independence: The Need for Education About the Role of the Judiciary

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In the cacophony of voices decrying the principle of judicial independence and branding judges as activists, is a clarion call. While it is proper and indeed healthy to debate and criticize judicial opinions or developments in the Rule of Law, this exercise is not constructive when it is fueled by a lack of knowledge or understanding of the subject. Insiders, whether judges, lawyers, or law students, often find themselves providing the most basic lessons to family members and friends. We are thus called to educate those voices and those who heed those voices.

Our nation is largely illiterate in matters of civics and government, and particularly so in matters concerning the judicial system. There are many erroneous assumptions and a host of misperceptions that underlie much of the criticism lodged against the judiciary. One need only survey the radio air waves, the press releases of members of the executive or legislative branches, and the content of news and opinion pieces in various media to identify wrong assumptions and perceptions.¹ Among

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1. See, e.g., *Judiciary Under Attack*, THIRD BRANCH (Administrative Office of the United States Courts, Office of Public Affairs, Washington, D.C.), Aug. 2003, available at <http://www.uscourts.gov/ttb/aug03ttb/attack/index.html> (discussing a bill by the House of Representatives that would withhold funds under a judiciary appropriations bill to enforce two controversial federal court decisions); Donald Lambro, *DeLay Slams Court Activism as 'Autocracy'*, WASH. TIMES, Aug. 15, 2005, available at <http://www.washtimes.com/national/20050814-115425-3341r.htm>; Television interview by Dan Abrams with Rep. John Culberson, *Abrams Report* (MSNBC television broadcast Apr. 5, 2005) (transcript available at 2005 WLNR 5327481); Phillip L. Jauregui, *Judicial Activism and Judicial Accountability: Remediating the Biggest Problem in American Politics*, <http://www.judicialactiongroup.com/JudicialActivismandAccountability.pdf> (last visited Apr. 2, 2007); Thomas Lifson, *Judicial Activism's Perfect Storm*, AMERICAN THINKER, Mar. 17, 2005, http://www.americanthinker.com/2005/03/judicial_activisms_perfect_sto.html. See generally INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE Part 4.A.1 (ABA Commission on Separation of Powers and Judicial Independence ed., 1997) [hereinafter INDEPENDENT JUDICIARY REPORT], available at <http://www.abanet.org/govaffairs/judiciary/report.html>; Martha Neil, *Half of U.S. Sees 'Judicial Activism Crisis': ABA Journal Survey Results Surprise Some Legal Experts*, ABA JOURNAL EREPORT, Sept. 30, 2005, <http://www.abanet.org/journal/redesign/s30survey.html> (citing survey that found one-half of survey

the more common assumptions are these:

- Judges decide cases in accordance with their ideology or political allegiance.
- Judges decide cases in accordance with their personal or financial interests.
- Judges favor certain individuals or classes of litigants.
- Judges usurp the legislative role and the will of the populace by creating laws.
- Judicial independence accords judges the latitude to subvert the will of the people and the authority of the legislature without accountability.

The role of the judiciary and the nature of its work are fundamentally misunderstood. If one believes that judges have unbridled power, which they use at will for improper purposes, with improper motivations, of course the notion of judicial independence is alarming. As Justice O'Connor and other jurists have noted, before we can champion the principle of judicial independence, we must first educate and enlighten those voices as to the judiciary's role and purpose.²

Indeed, much of the misunderstanding of the role of the judiciary parallels a misunderstanding of the adversarial system—the role, purpose, and work of lawyers. Just as voices cry out that judges rule in accordance with their own personal opinions, voices challenge lawyers who represent criminal defendants, or those accused of unseemly conduct. The assumption that lawyers who represent “undesirables” must themselves be undesirable or corrupt, or at least hoodwinked, parallels the assumption that judges' decisions represent their own ideology or preferences. A fundamental lesson that must be imparted is that our judicial system is designed to provide legal representation for everyone, so that the truth can be ascertained after development of the facts by an objective trier of the facts, and after determination of the law by an objective adjudicator. A parallel lesson that must be imparted is that our judicial system is designed to resolve controversies based on a set of laws, principles, or rules that are applied objectively and reliably to provide litigants with some measure of predictability of the outcome of their controversy. In fact, it is this set of laws or rules, the Rule of Law, that allows most controversies to be settled without trial; the parties, acting through their advocates, can do a risk assessment based on the predictability provided by the Rule of Law.

respondents agreed with a congressman who called judges “arrogant, out-of-control and unaccountable”).

2. See, e.g., *Justice O'Connor Speaks Out*, THIRD BRANCH (Administrative Office of the United States Courts, Office of Public Affairs, Washington, D.C.), May 2006, available at <http://www.uscourts.gov/ttb/05-06/justiceoconnor/index.html>; cf. INDEPENDENT JUDICIARY REPORT, *supra* note 1, at App. B (identifying the need for education in response to unfair criticism of judges).

We must educate these critical voices that judges are dependent on the Rule of Law, allegiant to the Constitution, and sworn to decide cases in accordance with both. We must educate these voices with the knowledge that lawyers rely on the Rule of Law, depend on the Constitution for fair process and outcome, and are sworn to represent the good, the bad, and the ugly. Because of judges' allegiance to the Rule of Law and because of advocates' reliance on the Rule of Law, a judge's ideology or personal preferences is largely irrelevant and invisible.

Another fundamental lesson is not as simple, but is again a lesson about the respective roles of judges and lawyers and their ability to separate their advocacy for a party from their personal views or interests. To the uneducated, it may seem unlikely that a judge would rule against the position propounded by a lawyer whom that judge sat next to at a bar function last week, or by a lawyer whom the judge has known for many years. Yet this happens, and happens often. Perhaps this lesson can be broached in this way: although litigants become emotionally invested in the controversy, and thus in the litigation designed to resolve the controversy, lawyers do not. Lawyers are advocates, lawyers are counselors, but lawyers have not personally experienced their client's controversy and do not have the emotional attachment to the dispute that their clients have. It is possible for a lawyer to be a fierce advocate for their client, but at the same time respect and even like the opposing counsel who is also acting as a fierce advocate for their respective client. For example, many lawyers have had both employers and employees as clients, or represented other opposing classes of litigants, yet have always served as fierce advocates for their client no matter the client's status or personal interests. Thus, it is inappropriate to characterize a lawyer by the types of clients he or she represents.

It is similarly inappropriate to make broad, sweeping generalizations about a judge's views based on one case or even a number of cases because cases or controversies are decided based on their own unique facts in the context of broad laws and principles. Judges are former lawyers, who as lawyers advocated various positions on behalf of their clients. As lawyers, judges advocated positions that were not their own, but those of their clients. Similarly, as judges they are called upon to, and in fact do, render justice objectively, unencumbered by either the working relationship formed between advocate and client or the aspiration to meet a client's needs. Rather, judges are endowed with the duty to render justice fairly and impartially and in accordance with the Rule of Law.

To be sure, judges are not automatons. They come to the bench with life experiences, opinions, and views on a variety of issues, just as every other person has. Yet, judges' commitment to the oath they take

to decide cases objectively and fairly is constantly reaffirmed as they go about their work. For judges will tell you that they sometimes do not like the outcome in their decision, but know that it is the right outcome given the Rule of Law. Judges will also tell you that to the extent they formulate an impression of a case early on in the litigation, they often find that after hearing the evidence or reading the legal briefs and researching the law, their initial impression was wrong or contrary to an established rule of law. Judges will also tell you that their commitment to decide cases fairly and objectively necessitates a great deal of introspection about who they are and how their experiences have shaped their perception, so that their decisions are not colored by their own personal experiences or interests.

Judges honor their oath and commit to decide cases fairly and objectively, not once, but on a daily basis. It is a process. Indeed, in the context of deciding cases and controversies, judges are students for life. Judges are often reminded of their status as students when they find any preconceived notions shaken and any assumptions blasted. They are thus reminded, sometimes on a daily basis, of the necessity that they not allow their own perception or experiences to color their decision in a way that bends, misshapes, or controls their determination of the germane facts or their determination and application of the Rule of Law.

We can educate, through example and explanation, that in the vast majority of decisions, it is thus quite impossible to glean a judge's ideology, personal opinions, race, gender, political party, or religious beliefs from the substance of an opinion. In the federal district courts for example, there are a significant number of employment discrimination cases filed.³ Many of these cases are not tried.⁴ Some of these are dismissed because the undisputed facts show that the plaintiff cannot prove all of the required elements of his or her claim. Most of the remaining cases are settled after the court determines that there are disputed facts, which if proven in plaintiff's favor would entitle plaintiff to a monetary judgment. Through example and explanation, lawyers and judges can educate others that the judicial analysis in these decisions is quite consistent from judge to judge, district to district, and even across the nation, to the extent that the Supreme Court has announced rules of law on the pertinent issues. This consistency is the hallmark and the benefit of the Rule of Law.

At the same time, to the uneducated eye, significant differences in decision-making might be perceived in situations that look very similar.

3. *Civil Rights Complaints in U.S. District Courts, 2000*, BUREAU OF JUSTICE STATISTICS CIVIL JUSTICE DATA BRIEF (U.S. Department of Justice, Washington, D.C.), July 2002, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/crcus00.pdf> (providing statistics for federal courts including that plaintiffs filed 21,032 employment civil rights complaints in 2000).

4. *Id.*

We must explain that a judge's decision sometimes can turn on one discrete fact, something that may not at all be apparent to the untrained eye. We must explain that there are different laws in different states, and a body of federal law separate and apart from the various states' laws. We must further explain that differences in these laws make it exceedingly difficult to compare outcomes or decisions from one state to the next. Indeed, the states have their own system of courts and are sovereign, subject to the Supremacy Clause of the Constitution.⁵

These fundamental lessons about the purpose of the Rule of Law, the effect it has on judicial decision making, and the consistency it accords to litigants may very well calm those voices who cry out that judges' decisions are based on their favoritism to certain classes of litigants—such as employers or employees, or labor unions or management—or who attribute judges' decisions to their own preferences, political partisanship, or personal and financial interests.

Any potential external pressures on judicial decision-making are largely deflated by a host of ethical rules governing judges' conduct at work and outside of work.⁶ Judges are constrained from political activity; even judges who are elected typically are constrained from partisan political activity.⁷ Federal judges, for example, are prohibited from any political activity, including making campaign contributions, posting candidate signs in their yard, or affixing bumper stickers to their vehicles.⁸ While judges carry their spirit of public service into extracurricular activities in various charitable organizations, federal judges, for example, are prohibited from fund raising for any organization.⁹

There are similar conflict of interest rules based on relationships the judge may have with litigants or lawyers, as well as the scope or depth of the judge's knowledge of the particular litigation at hand, or based on a judge's financial interest in one of the parties.¹⁰ This belies another common assumption: that judges decide cases in which they have personal or financial interests. The uneducated may ask whether the judge and the lawyers, or the judge and one or more of the parties, are social friends or business associates. The uneducated may assume that the judge favors certain classes of litigants, certain parties, certain lawyers, and that this affects the outcome and the decision. But judges are subject to strict rules that virtually preclude them from sitting on any case in which they have a personal relationship with the parties or lawyers, or a financial interest in a party.

5. U.S. CONST. art. VI, cl. 2.

6. See *generally* CODE OF CONDUCT FOR UNITED STATES JUDGES (2000); MODEL CODE OF JUDICIAL CONDUCT (2004).

7. See MODEL CODE OF JUDICIAL CONDUCT Canon 5.

8. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 7.

9. *Id.* at Canon 5B(2).

10. See MODEL CODE OF JUDICIAL CONDUCT Canon 3.

Indeed, federal judges are required to recuse themselves from any case in which they or a family member have any measure of ownership in a party.¹¹ Thus, if a judge's child owns even a fractional share of stock in General Motors, the judge cannot preside in those cases, nor make any decisions or rulings in those cases. Despite the fact that the judge in this example is unlikely to be influenced by a child's fractional share of General Motors stock, the rule prohibits that judge from presiding over a case in which General Motors is a party. Even though a judge owning one share of General Motors stock is unlikely to be influenced by that minor investment, the rules exist to provide assurance to the litigants, irrespective of whether the judge's objectivity is truly impaired.

Judges who fail to adhere to such institutional controls are held accountable through a process of judicial discipline. Some judges may face removal pursuant to disciplinary rules.¹² Most jurisdictions further provide lesser disciplinary remedies such as public or private censure or admonishment, or administrative oversight by other judges.¹³ Federal judges are subject to these lesser disciplinary measures, although they may be removed from office only for high crimes and misdemeanors after impeachment by the House and conviction by the Senate.¹⁴ Although removal of a federal judge is rendered more difficult by these constitutional requirements, the founders, in their considered and educated judgment, determined that on balance, the need for a judiciary free of political or undue influence necessitated a judiciary that could render decisions without allegiance to the popular opinions or the most vocal proponents in the community.¹⁵ Federal judges are appointed, however, only after rigorous evaluation and vetting by the executive and legislative branches, and indeed only if their confirmation is approved by the majority of United States Senators.¹⁶

These disciplinary rules, rules on conflicts of interest, and the remedy of recusal operate to urge the judge's introspective consideration of his or her ability to decide a case objectively, and at the same time, operate to assure the parties that the judge has no impairment in objectivity when there are circumstances in which the judge's objectivity could be reasonably questioned. And although recusal is not an everyday occurrence, we might explain that a judge typically feels no hesitation to recuse under appropriate circumstances, and in so doing, address an-

11. 28 U.S.C. § 455(b)(4) (2000).

12. *E.g.*, KAN. S. CT. R. 620 (providing that discipline for judges means public censure, suspension, or removal).

13. *Id.* Most states have adopted some form of the Model Code of Judicial Conduct.

14. U.S. CONST. art. I, § 3, cl. 6; *id.* art. II, § 4; *see also* INDEPENDENT JUDICIARY REPORT, *supra* note 1, at App. A.

15. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

16. U.S. CONST. art. II, § 2; *see also* INDEPENDENT JUDICIARY REPORT, *supra* note 1, at App. A.

other common assumption about judges. People think judges handle one case at a time. Juries, for example, often register shock when they are told that the judge who just presided over the week-long or month-long trial, all the while had hundreds of other cases pending. Recusal from one case does not diminish the judge's workload. In fact, given their case assignments, judges struggle, using various case management techniques, innovations, and just plain hard work, to keep up with their workload and to minimize the age of any pending case.¹⁷

These above-described institutional rules and procedures operate to shield a judge from external or internal pressures or influences on decision-making. But the process of judicial decision-making itself further ensures an outcome that is based on the Rule of Law rather than personal interests or undue influence. As a practical matter, many decisions are not easily made and are the product of research, study, and deliberation. Many people are surprised to learn that most judges do not sit on the bench all the time, but spend varying amounts of time in their chambers formulating or writing considered decisions based on numerous rules of law. Sometimes judges must render a decision in the context of conflicting rules of law, or in the context of no authoritative or even persuasive law on the subject at hand. And in many decisions, it is possible for another reasonably minded jurist to view the facts and interpret the law quite differently. Any given decision may be the product of a learned mind, taking a reasonable view of the facts and a reasonable interpretation of the law. Inconsistent decisions or seemingly inconsistent decisions are not indicative of "activism."

Indeed, the very notion of "activism" is grounded in another mistaken perception about the role and power of judges. A judge's role is to decide actual cases and controversies.¹⁸ They do not render opinions on issues debated on the floor of Congress, the airwaves, or around the dinner table, unless those issues are before them in an actual case or controversy. In fact, judges are prohibited from deciding any issue that has not arisen in an actual case or controversy pending before the judge.¹⁹ Constitutional principles and statutes limit the courts' jurisdiction in many ways, including requiring that the judge only decide actual cases and controversies that are ripe for decision and that present issues that are justiciable—that is within the scope of issues the founders intended for courts to decide.²⁰ Judges are forbidden from writing "advi-

17. See Federal Court Management Statistics, <http://www.uscourts.gov/fcmstat/index.html> (last visited Apr. 2, 2007), for judicial caseload profiles. For example, in 2006, the District of Kansas had 1,896 pending cases, or about 316 per judge. *Id.*

18. U.S. CONST. art. III, § 2; see *Muskrat v. United States*, 219 U.S. 346, 361-62 (1911).

19. *Muskrat*, 219 U.S. at 361-62.

20. *Poe v. Ullman*, 367 U.S. 497, 502-04 (1961); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).

sory opinions.”²¹

Conversely, when a judge renders an opinion in a case or controversy whose subject matter is a controversial, hotly debated issue of the day, it is not because the judge opts to render that opinion. Indeed, a judge must render an opinion on disputed issues of law in an actual case or controversy.²² It is inappropriate to view such a judge as an “activist” when the judge is necessarily deciding an issue, because to avoid a decision would be to abdicate the judge’s duties and responsibilities of office. Thus, judges are not “activists” in the sense that they render decisions on issues because they desire to announce their position or stance. Indeed, judges are sometimes reluctantly called upon to resolve difficult, controversial, and even emotionally charged issues because it is necessary and germane to the actual case or controversy before the judge.

Perhaps the loudest and most caustic voices proclaim that judges usurp the legislative role and the will of the populace by “creating” laws. These voices directly challenge the principle of judicial independence as causative of a judiciary that exceeds the proper bounds of adjudication by legislating from the bench. This reveals not only a misunderstanding of the purpose and scope of judicial independence, but it reveals a misunderstanding of the fundamental nature of judicial decision-making. Although a conversational knowledge of these subjects might require a lengthy course in these matters, there are several discrete lessons that might guide one to some measure of understanding.

As a starting point, the basis for judicial decisions must be identified: statutes, regulations and rules, or prior judicial decisions known as common law. This law is interpreted and applied to the typically unique set of facts presented in the particular case at hand. We must instruct on the history and tradition of common law—the need for a body of decisions applied to a myriad of facts and circumstances, some with common threads across time, some that develop just as surely as our world and culture evolves. It is simplistic to call this “judge created” law, for even common law is framed and shaped by larger principles—precedent or established methodology of analysis and problem solving. The Rule of Law embodied in common law provides the reliability, predictability, and equity that satisfies our fundamental desire for fairness.

Secondly, we might show how a judge processes an issue requiring statutory interpretation. A brief discussion of what is binding authority and what is persuasive authority would explain that even statutory interpretation sometimes involves new, unprecedented analysis and interpretation of a given statute. Such interpretation might be unprece-

21. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 302-03 (2004) (discussing the history of the Supreme Court’s position that all advisory opinions are beyond the power of the judiciary).

22. See, e.g., *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992).

dened because that particular language has never been construed, or the statute has never been interpreted in light of the unique facts presented in the case at hand.

Moreover, a brief discussion of the legislative process that yields an enacted law might inform the listener of the limited resources available for a judge to glean congressional intent, at least through an analysis of words spoken and written during the course of enactment of that legislation.²³ In short, statutory interpretation is far more complex than it sounds. Statutory interpretation sometimes requires gleaning meaning from ambiguous language, or requires gleaning meaning in light of facts and circumstances never anticipated by the legislature. At times, reasonable minds can differ.

While statutes are typically a legislative response to a contemporary and readily identifiable need or issue in the community, the Constitution is a 250 year-old timeless document, which must be applied in light of issues, needs, and problems that could not possibly have been anticipated by the founders. As Justice Breyer characterizes it, judges are called to police the boundaries of laws—boundaries established by the Constitution—and ensure that laws do not push or creep outside those boundaries.²⁴ While statutory interpretation may be complex, policing the constitutional bounds of laws is exceedingly complex. At times, reasonable minds can differ. But when a judicial decision represents a reasonable and studied analysis, it can hardly be called “activist” simply because another reasonable mind might have analyzed the question differently or reached a different outcome.

Judges were always intended to make a reasonable and studied analysis of an issue and decide it based on the Rule of Law.²⁵ Judges were never intended to make decisions based on opinion polls of their “constituents” within the jurisdiction or region of their court. Indeed, judges have no constituents.²⁶ And, if judges were to make decisions based on the will of the majority of voters or constituents in their jurisdiction, there would be no need for this third, co-equal branch of government. Decision making, resolving controversies, and reactive problem solving would be relegated to the executive and legislative branches, who would presumably submit actual cases and controversies to decision by voters, by elected legislative officials, or by decision makers in the executive branch appointed by the President.

Perhaps the greatest measure of accountability for all trial court

23. *E.g.*, *Lippoldt v. Cole*, 468 F.3d 1204, 1212 (10th Cir. 2006) (discussing methods of statutory interpretation).

24. *See, e.g.*, Gina Holland, *Breyer Warns on Politicizing Court. Justice Says Attacks Threaten Judiciary's Independence*, PITTSBURGH POST-GAZETTE, Aug. 10, 2005, available at <http://post-gazette.com/pg/05222/551307.stm>.

25. THE FEDERALIST NO. 78 (Alexander Hamilton).

26. *Id.*

judges is the litigant's generally broad right of appeal. One or more appellate courts may review the judge's decision or the jury's verdict. This, coupled with the transparency of legal decision making, is one way in which the public, with a basic and accurate understanding of the process, can evaluate a judge's performance of her sworn duties. Also, judicial decisions can effectively be overturned by subsequent legislation, particularly when the legislative branch determines that a judicial decision was not true to legislative intent. In this way, the populace has a means, through their elected representatives, of shaping or creating law. Just as the legislative branch serves to protect, represent, and effectuate the will of the contemporary populace, the judicial branch serves to protect, represent, and effectuate the will of the entire nation—the abiding will for all times, as spelled out in the Constitution. The judiciary ensures that contemporary legislation, responsive to current needs and developments, remains true to the constitutional principles and within the constitutional boundaries for all times.

All of these fundamental lessons about the role and operation of the judiciary illustrate that while judges operate with a measure of judicial independence, and necessarily so, judges also operate with subjugation to the letter and spirit of the Constitution and lesser laws. These fundamental lessons further illustrate that a judge's decision making is required to be free of external pressures or internal influences. To that end, there are a number of constitutional principles, laws, and ethical rules that limit a judge's authority and proscribe problematic conduct. But these rules and proscriptions are not entirely ameliorative. For judicial independence allows the judiciary to decide cases free from external pressures, without fear of retribution or removal from office.

Judicial independence is itself a necessary prescriptive for undue influence or external pressures on decision-making. It is judicial independence that ensures that judges are free to honor their oaths, free to follow the Rule of Law, and free to dispense justice by a decision-making process, rather than an outcome-oriented process. Judicial decision making dependent on political views, opinion polls, majority vote, the relative financial strength of litigants, or the relative power of litigants, would render impossible any allegiance to the Constitution or Rule of Law. The Rule of Law and the principles of equity, objectivity, and fairness dictate the need for a judiciary free to make decisions without regard to political influence, fleeting public opinion, or special interests.

Judicial independence is merely a means to an end. The end is a system in which cases and controversies are decided based on an objective determination of the relevant facts, free from political, social, relational, or personal influence. The end is a system in which cases and

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controversies are decided based on the application of a guiding Rule of Law to a particular case, with such allegiance that the parties can make a reasoned prediction of the outcome of the controversy or the odds of a particular outcome. The end is thus a system of predictability, reliability, fairness, and equity, without regard to the identity of the litigant, and without regard to the litigants' relative standing or popularity in the community. A judiciary beholden to a political party, community leaders, opinion polls, popularity contests, ideology, position on a particular issue, or their own personal opinions would be enslaved and would thereby enslave those who come for resolution of cases and controversies. Judicial independence is to be championed, celebrated, respected, and protected, so that fairness, equity, and justice reign. Educating the uninformed about the role of the judiciary and how judicial independence is critical to its mission may foster a cacophony of voices that champion judicial independence as a means to the end we all seek.