

# Toward a Judiciary Both Independent and Accountable

Robert H. Tembeckjian

There may be no state interest more compelling than the independence, impartiality, and integrity of the judiciary.<sup>1</sup> There may also be no public office for which individual accountability is so critical, not only because judges often have the last word in our society's disputes, but because public confidence in the courts is fundamental to the rule of law around which our society is organized. Trust in the administration of justice depends not only on the merits of the verdicts rendered in the courtroom but on the probity and the appearance of probity among those who decree them. A litigant may not feel happy about losing a case, but no one should walk out of a proceeding reasonably believing that the process was tainted by an arbiter who was biased, improperly influenced, or otherwise unfair.

By the early twentieth century, some states had individually attempted to address the delicate balance between judicial independence and accountability, typically by drafting rudimentary standards of ethical conduct to which judges could aspire.<sup>2</sup> The American Bar Association then took up the issue and in 1924 issued Canons of Judicial Ethics, which attempted to harmonize the judicial responsibility to decide cases free from outside influence with the judge's obligation to behave on and off the bench in a manner that enhances respect for the independence, integrity, and impartiality of the judiciary.<sup>3</sup>

Throughout the United States, while the 1924 ABA code offered commendable aspirational guidance to the bench, enforcement was either entirely lacking or left to the courts themselves. Not surprisingly, judges were not especially energetic about enforcing rules of conduct on one another.<sup>4</sup> Nor was the alternative remedy of impeachment apt to be initiated by a legislature.<sup>5</sup>

It was not until 1960 that a state adopted a method of judicial ethics enforcement that was not controlled by the judiciary itself.<sup>6</sup> The California Commission on Judicial Performance was created to investigate and, where appropriate, impose public discipline on judges who were found to have violated promulgated rules of judicial ethics.<sup>7</sup> As other states followed suit and there was talk of implementing ethics oversight in the federal courts, associations representing judges and some newspapers expressed concerns that judicial con-

duct commissions would chill judicial independence.<sup>8</sup> Far less frequently appreciated was the degree to which a judicial conduct commission could protect and promote the independence of the judiciary. Now, nearly 60 years after the advent of the first one, independent ethics entities have not only become part of the judicial landscape in the states, they have indeed safeguarded judicial independence as surely as they have redressed judicial misconduct.

## JUDICIAL INDEPENDENCE

Although the judiciary article of the United States Constitution<sup>9</sup> is far shorter than the legislative and executive articles that together established our tripartite system of government, its role and impact are outsized. From the founding of the American republic, an independent and impartial judiciary has not only been the indispensable anchor of our tripartite system of government, it has been an immeasurable protector of our most basic rights and liberties, such as ensuring the right to counsel, the right against self-incrimination, the right to a fair trial, the right to free expression, and the right to worship. This may subject judges to unfair and certainly unwanted criticism. A prosecutor may denounce the release of a defendant on recognizance. A public defender may decry the imposition of the maximum sentence against a convicted felon. An editorial may take issue with an appellate court's legal reasoning. A public official may claim bias because of a judge's political pedigree or ethnic ancestry.

Whatever pressure or public clamor may be brought to bear, the judge's job is to act at all times, on and off the bench, in a manner that upholds and promotes public confidence in the independence, integrity, and impartiality of the judiciary.

Why are judicial probity and fairness so significant? Because public confidence in the administration of justice is what keeps people coming back to the courts and what empowers the writ of our law. The judicial branch may be the most subtle and least understood of the three, but its independence, integrity, and impartiality are at the heart of what George Washington identified as the "due administration of justice" that is the "firmest pillar of good government."<sup>10</sup> And as Alexander Hamilton explicated in *The Federalist* in 1787-

## Footnotes

1. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 739 (2014); *Raab v. Commission on Judicial Conduct*, 100 N.Y.2d 305 (2003); *Watson v. Commission on Judicial Conduct*, 100 N.Y.2d 290 (2003); see also, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).
2. In 1909, for example, the New York State Bar Association adopted Canons of Judicial Ethics.
3. ABA, *Canons of Judicial Ethics*, available at <https://bit.ly/2YRHb4S>.
4. G. Stern, *Is Judicial Discipline in New York State a Threat to Judicial Independence?*, 7 PACE L. REV. 292-94 (1987).

5. *Id.* at 296.

6. Calif. Const., art. VI, §18, available at <https://cjp.ca.gov/>

7. *Id.*

8. *A Threat to Judicial Independence*, N.Y. TIMES, July 28, 1978, at 22, col. 1; *System Relieving Judges of Duties May Not by Legal, Justice Says*, N.Y. TIMES, Nov. 17, 1977, at 34, col. 3.

9. U.S. Const, art. III.

10. George Washington, Letter of Attorney General Edmund Randolph, Sept. 28, 1789, available at <https://founders.archives.gov/documents/Washington/05-04-02-0073>.

88,<sup>11</sup> and history has repeatedly underscored, the judiciary owes its power not to an army to enforce its will, nor to the public purse to fund its mandates, but to the integrity of its judgments. It is confidence in that integrity, and in the principle that the litigant will get a fair shake from an impartial magistrate, a fair-minded jury, and an unbiased appellate reviewer, that keeps citizens coming to the courts rather than turning to the streets to resolve disputes.

Time and again, from the earliest days of our civil society to the present, the courts have stood up to the potential tyranny of the mob and government. Not always, of course. Judges and juries are fallible human beings. Try as they might to get it right, sometimes they get it wrong. As every trial judge knows and occasionally jokes, that is why we have appellate courts.

But at critical junctures in our history, ordinary citizens, protected by evenhanded judges, have made extraordinary decisions that shaped what we became as a society of laws. In New York in 1734, when a Grand Jury refused to indict John Peter Zenger for libel but the Attorney General charged him anyway, a petit jury acquitted him, and two classic American principles were enshrined before we even had a national constitution: freedom of the press and truth as a defense. Nearly three centuries later in California in November 2017, when a jury found Jose Ines Garcia Zarate guilty of felonious possession of a firearm but not guilty of the heartbreaking murder of Kate Steinle, another anonymous group of average citizens demonstrated what the rule of law looks like. Despite the massive attention drawn to the case because the defendant was a repeat illegal entrant into the United States, a jury of average citizens upheld the proposition that a defendant may only be convicted if the proof is properly presented and beyond a reasonable doubt, and that even the xenophobic public pronouncements of politicians must not lead jurors to where the evidence does not go.<sup>12</sup>

## JUDICIAL ACCOUNTABILITY

Before there was a code of judicial conduct, it was not necessarily uncommon for judges to engage in activities that compromised or appeared to compromise their judicial independence. Indeed, the 1924 ABA Canons of Judicial Ethics was adopted in significant measure because Kennesaw Mountain Landis, the first commissioner of major league baseball who was also a federal judge, refused to quit the bench and insisted on performing both jobs contemporaneously.<sup>13</sup> Although Landis eventually relinquished his judgeship, without meaningful enforcement mechanisms in either the federal or state court systems, the 1924 Canons were largely hortatory, and compliance was voluntary.

Beginning with California in 1960, all 50 states moved to

fill the vacuum between judicial independence and accountability with judicial ethics enforcement commissions.<sup>14</sup> Moreover, every state has adapted the ABA Model Code, most recently revised in 2007, whose preamble describes it as “rules of reason” intended as both a guide to ethical behavior and a basis for imposing sanctions.<sup>15</sup> At the federal level, and even in states that have adopted codes and means of enforcement for executive and legislative branch officials, judges are bound to a more stringent set of promulgated standards of conduct than any other public officers. And few are as energetically enforced. In 2018, for example, 136 judges were publicly disciplined in 34 states, including 29 in Texas, 19 in New York and eight each in California and Washington.<sup>16</sup>

While the concept of an independent judiciary came well before public insistence on an accountable one, it would be wrong to conclude that the latter is a brake on the former. Contrary to what may be a common complaint among judges, judicial conduct commissions, far from inhibiting judicial independence, actually and critically protect it. Recognizing that judicial commissions are here to stay, in 1994 the ABA also adopted Model Rules of Judicial Disciplinary Enforcement, *inter alia* to help ethics professionals avoid crossing the line between independence and accountability.<sup>17</sup>

A judicial conduct commission is not an appellate court. It can neither remand nor remit a case, nor overrule a court-adjudicated finding of fact or conclusion of law. Nor in most states does the commission have administrative authority over the courts, so it cannot transfer cases from one judge to another, nor reassign a judge to a different term of court or part of the state. Typically, it can only investigate and, where appropriate, discipline a judge for violating the Code. Even where the commission determines that a judge was unethically motivated to decide a case a certain way and should be removed from office—say, a close relative of the judge was a party or lawyer in the matter, or the judge had a substantial undisclosed interest that was affected by the outcome—the determination may only discipline the judge; it has no effect on the court case itself. An aggrieved party would have to seek redress through the courts themselves to mitigate or undo the disciplined judge’s mal-motivated decision.

Whether by confidential caution, public reprimand or removal from office, the commission holds the judiciary to account for ethical transgressions and plays an important role

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11. The Federalist, numbers 78 through 83.

12. *The Kathryn Steinle Murder Trial: Why the Jury and Trump Saw Two Different Cases*, L. A. TIMES, Dec. 2, 2017, available at <https://www.latimes.com/local/lanow/la-me-kate-steinle-analysis-20171202-story.html>.

13. John Roberts, 2011 Year-End Report on the Federal Judiciary, at 1-2, available at <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

14. Judicial ethics enforcement entities are variously called commissions, boards, offices, etc. For purposes of this article, they are generically referred to as “commissions.”

15. ABA Model Code of Judicial Conduct, Feb. 2007, available at <https://bit.ly/2HLvNlf>.

16. National Center for State Courts, Center for Judicial Ethics.

17. ABA, Model Rules for Judicial Disciplinary Enforcement, available at <https://bit.ly/2EH1xr9>.

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in protecting the public from unfit incumbents.<sup>18</sup> Many also have authority to retire a judge for physical or mental disability.<sup>19</sup>

Of course, however justified, even the mildest discipline will sting the affected judge. It may, therefore, be natural for judges to

view judicial commissions with suspicion, as a scold or even as an inhibitor rather than protector of judicial independence. But they would be wrong.

Examining the record of the New York State Commission on Judicial Conduct, statistically the most active in the country since its creation in 1978, makes the point.

There are over 1,400 courts throughout New York, and approximately 3,300 judges. Since 1978, the commission has issued over 850 public disciplinary decisions including 172 removals from office.<sup>20</sup> But these startling numbers do not tell the entire story. For in addition to the disciplines it imposes, the commission absorbs a great deal of public and personalized criticism that would ordinarily be directed to the judiciary. Those 850 disciplines comprise a mere 1.5% of the more than 58,000 complaints received, processed, analyzed, and mostly rejected over that same time frame. In other words, 98.5% of the time, the commission tells a complainant that there was no ethical wrongdoing, and it explains why.<sup>21</sup> Nearly half of those complaints were limited to expressions of dissatisfaction with the court's decision, and not one of those was investigated.<sup>22</sup>

In receiving, considering, dismissing, and explaining its reasons for declining to investigate such complaints, the commission deflects and takes upon itself the anger of litigants that would otherwise be aimed at the courts. Moreover, in a public annual report, it not only elucidates the behavior that *did* result in discipline but also demonstrates with statistical evidence that it shields judges from unfair attack.<sup>23</sup> As such, the commission helps to protect the judge's freedom and responsibility to rule on the merits.

The New York experience is representative. In virtually all jurisdictions, the statistical record is the same. The vast majority of complaints are dismissed as without merit.<sup>24</sup>

The recent firestorm of controversy in California regarding the so-called "Stanford rape case" is a prime example of how a disciplinary commission may actually protect the independence of the judiciary. It is also a lesson in the perils of allowing a superseding process to negate that protection.

Whatever one's view of the merits of Judge Aaron Persky's sentencing of former Stanford University swimmer Brock Turner for the sexual assault of an unconscious "Emily Doe"—three months in jail, plus three years' probation and registration as a sex offender—it was the California Commission on Judicial Performance that initially answered the public outcry from those who considered the sentence lenient. The California commission examined and found that the sentence was lawful and within the judge's discretion, that he had not been motivated by such misconduct as bias based on gender, race, or socioeconomic status, and that he was not insensitive to the seriousness of sexual assault.<sup>25</sup> That should have been the last word, but it was not. The California commission was subjected to fierce political criticism for exonerating Judge Persky of misconduct,<sup>26</sup> and the state auditor initiated an investigation of the commission itself.<sup>27</sup>

As for Judge Persky, being cleared of misconduct by the commission did not save him from California's recall provision, through which he was ousted from office by majority vote.<sup>28</sup> In a spectacular irony, a judge who was ethically bound "not [to] be swayed by public clamor or fear of criticism"<sup>29</sup> was removed from the bench as a result of both. Mindful of the warnings over 225 years ago, not only by Alexander Hamilton about tampering with judicial independence but also by James Madison about the "impulse of passion" that may perniciously factionalize the body politic,<sup>30</sup> one might ask: What is more likely to chill the independent rendering of judicial decisions: the removal of a judge for ethical misconduct by a disciplinary commission after a due-process proceeding, or the recall of a judge by an electorate unhappy with a single decision?

The California commission's experience in *Persky* is not singular.

In 1997, in *Matter of Duckman*, a case that generated worldwide attention, the New York commission threaded the needle between acts of misconduct and judicial discretion.<sup>31</sup> Duck-

18. In many states, judicial disciplinary commissions also have the power to suspend a judge. New York's commission does not have such authority. Source: National Center for State Courts.

19. See, for example, N.Y. Const., art VI §22; Calif. Const., art. VI §18; N.M. Const., art. VI §32; Ariz. Const, art. 6.1.

20. State of New York Commission on Judicial Conduct, Commission Decisions, available at <https://on.ny.gov/2Wv2Q5z>.

21. N.Y. Jud L §44(11).

22. 2019 Annual Report, N.Y. State Commission on Judicial Conduct, at 258, available at <http://cjc.ny.gov/Publications/AnnualReports/nyscjc.2019Annualreport.pdf>.

23. 2019 Annual Report, N.Y. State Commission on Judicial Conduct, at 1-18, available at <http://cjc.ny.gov/Publications/AnnualReports/nyscjc.2019Annualreport.pdf>.

24. Calif., <https://bit.ly/2HLxFKN>; Ariz., <https://bit.ly/2EL1qcK>; N.M., <https://bit.ly/2HQSBQZ>; Wash., <https://bit.ly/2JPeuSI>.

25. Press Release, California Commission on Judicial Performance, Commission on Judicial Performance Closes Investigation of

Judge Aaron Persky, available at <https://bit.ly/2XiAR5Y>.

26. *Recall Judge Persky Leader Takes Issue with Judicial Commission Finding*, MERCURY NEWS, Jan. 6, 2017, available at <https://www.mercurynews.com/2017/01/06/recall-judge-persky-leader-takes-issue-with-judicial-commission-finding/>.

27. *California's Judicial Disciplinary Agency to be Audited After Complaints*, S. F. CHRON., Sept. 20, 2018, available at <https://www.sfchronicle.com/news/article/California-s-judicial-disciplinary-agency-to-be-13245619.php>.

28. *Santa Clara County Voters Recall Judge Aaron Persky*, STAN. DAILY, June 6, 2018, available at <https://www.stanforddaily.com/2018/06/06/voters-recall-judge-aaron-persky/>.

29. ABA Model Code of Judicial Conduct, Rule 2.4(A).

30. The Federalist, number 10.

31. *Duckman v. Commission on Judicial Conduct*, 92 NY2d 141 (1998), available at <http://cjc.ny.gov/Determinations/D/duckman.htm>.

man, a New York City Criminal Court Judge, had reduced the bail on a defendant from \$5,000 (which he couldn't make) to \$2,000 (which he could). The defendant promptly went out and killed both his girlfriend and himself. The political and tabloid outcry against Judge Duckman was unprecedented. The then-governor, mayor and state Senate majority leader, among many others, called for his removal.<sup>32</sup> The tabloid focus on Duckman brought to light numerous other problematic acts in his judicial record, and the commission determined to remove him from office for *inter alia* repeatedly making statements that were gender and race insensitive, and for deliberately dismissing accusatory instruments as facially insufficient when he knew they were not, because he did not believe the lower-level crimes at issue should be prosecuted. But as to the matter for which the governor and others wanted him removed—the bail reduction that led to murder—the commission dismissed the charge, having determined that it was a lawful ruling within the judge's discretion, and that it had not been tainted by prejudice or other misconduct. Promptly thereafter, the evidently displeased governor recommended a cut in the commission's budget, which was later restored by the legislature.

#### JUDICIAL DISCIPLINARY ENFORCEMENT IN THE FEDERAL COURTS

As effective as the states have been in enforcing judicial ethics, the federal judiciary has lagged far behind. To be sure, there is a Code of Conduct for United States Judges, based on the same ABA Model Code the states have all adapted and adopted.<sup>33</sup> But there is no office or dedicated professional staff to enforce it. The federal judiciary has retained the exclusive authority to police itself—the failure of which in the states led to the evolution of independent ethics-enforcing commissions.

It is exceedingly rare for a federal judge to be disciplined. In 2016, for example, 1,303 complaints were filed with the federal circuits, but only four were investigated.<sup>34</sup> In the past decade fewer than one federal judge per year has been disciplined.<sup>35</sup> In the history of the United States, only 15 federal judges have been impeached; eight were convicted, three resigned, four were acquitted. Two who had been convicted of crimes—Harry Claiborne of Nevada and Walter Nixon of Mississippi—refused to quit, went to jail and drew their judicial

salaries until Congress impeached and removed them from office.<sup>36</sup>

These shortcomings were most recently illustrated by the failure of the federal judicial disciplinary “system” to complete ethics inquiries into important complaints because the judges at issue suddenly resigned—e.g., former Ninth Circuit Chief Judge Alex Kozinski, who was accused of sexual harassment,<sup>37</sup> or Third Circuit Associate Judge Maryanne Trump Barry, who was accused of financial fraud<sup>38</sup>—or failed even to undertake an investigation because the judge, Brett Kavanaugh, was elevated to the Supreme Court, which does not apply the Code of Judicial Conduct to itself.<sup>39</sup>

Such high-profile failures and generally low investigative numbers inevitably suggest that the federal bench, which is probably no more or less ethically challenged than the typical state bench, is self-protective. Indeed, a committee chaired by Supreme Court Justice Stephen Breyer commented in a 2006 report that a system in which judges judge one another is at risk of undue favoritism.<sup>40</sup>

Public confidence in the federal courts could be improved by the creation of an independent judicial monitor to collect complaints, investigate those with merit, and initiate proceedings before a disciplinary panel of judges designated by the chief justice for lesser, *i.e.* non-removable offenses. In egregious cases, the independent monitor could recommend proceedings to the House of Representatives, since the only means by which a federal judge may be removed is impeachment by the House and conviction by the Senate.<sup>41</sup>

The languid federal ethics enforcement record has been addressed more than once by the Supreme Court, the United States Judicial Conference, and the United States Senate, but meaningful, comprehensive reform has remained elusive. The Breyer committee in 2006 recommended a uniform procedure throughout all the federal circuits for dealing with complaints against judges, but it did not recommend a centralized staff or process. There is no staff specifically trained and dedicated to adjudicating let alone rooting out misconduct among judges systemwide. There is no equivalent to the ABA Model Rules of Judicial Disciplinary Enforcement.

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32. *Pataki Calls for Judicial Panel to Remove a Brooklyn Judge*, N. Y. TIMES, Feb. 29, 1996, at B1, col. 2, available at <https://www.nytimes.com/1996/02/29/nyregion/pataki-calls-for-judicial-panel-to-remove-a-brooklyn-judge.html>.  
 33. U.S. Courts, Code of Conduct for United States Judges, available at <https://bit.ly/2VVup3F>.  
 34. *Sexual Misconduct by Judges Kept Under Wraps*, CNN, Jan. 26, 2018, available at <https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html>.  
 35. *Id.*  
 36. U.S. Senate, The Impeachment Trial of Harry E. Claiborne (1986), U.S. District Judge, Nevada, available at <https://bit.ly/2JM68vj>; U.S. Senate, Senate Impeachment Trial Powers Upheld, January 13, 1993, available at <https://bit.ly/2KdF0EC>.  
 37. *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harass-*

*ment Allegations*, N. Y. TIMES, Dec. 18, 2017, available at <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html>.  
 38. *Retiring as a Judge, Trump's Sister Ends Court Inquiry into Her Role in Tax Dodges*, N. Y. TIMES, Apr. 10, 2019, at A23, available at <https://www.nytimes.com/2019/04/10/us/maryanne-trump-barry-misconduct-inquiry.html>.  
 39. *In re Complaints Under the Judicial Conduct and Disability Act* (Judicial Council Tenth Cir., Dec. 18, 2018), available at <https://bit.ly/2JNi7bP>.  
 40. Judicial Conduct and Disability Act Study Committee, Implementation of the Judicial Conduct and Disability Act: A Report to the Chief Justice (Sept. 2006), available at <https://bit.ly/30XlouE>.  
 41. United States Const., art. I, sec. 2; art. II, sec. 5; art. III, sec. 4.

**[T]he judiciary must not become just another casualty of partisan politics or culture wars.**

The Executive Committee of the United States Judicial Conference, chaired by Judge Merrick Garland of the D.C. Circuit Court of Appeals, recently reexamined the federal court ethics enforcement system, but in its March 2019 report it, too, chose to keep judges firmly in charge of their own discipline.<sup>42</sup> This will not likely inspire public confidence

or result in more sanctions than what has become the minimal norm. While the federal courts did take a step forward by creating a Judicial Integrity Office in December 2018 that became operative in April 2019, its mandate is limited to “workplace conduct matters” for court employees.<sup>43</sup> The broad range of ethical matters addressed in the judicial code of conduct, applicable to judges, are apparently not within the purview of the new judicial integrity officer.<sup>44</sup>

More than once since 2006, Congress has entertained proposals to strengthen the system by creating an “Inspector General for the Judicial Branch,” to be appointed by the chief justice on consultation with congressional leaders.<sup>45</sup> Among other things, the inspector general would investigate possible misconduct by judges, as well as conduct audits and pursue inquiries as to non-judicial employees to prevent and detect waste, fraud, and abuse. It would report to the Chief Justice and to the Congress on matters that may require action by either, which could result in the reprimand of a judge by the courts or the impeachment and removal of a judge by the House and Senate.<sup>46</sup> While such legislation has never advanced beyond committee, the less effectually the courts appear to deal with the next string of notorious Kozinski-Kavanaugh-Barry type issues, the more likely Congress will be to act, for better or worse. Having a system legislatively imposed on the courts could be avoided by crafting a meaningful one on their own.

Would it be too much to expect, in a cynical and dizzying political era, for our federal judiciary to demonstrate how to accept responsibility and promote accountability in contrast to political actors that often try to avoid both? Might an invigorated national system of judicial ethics enforcement show, as state government entities have long demonstrated, that officers of at least one branch of government are held to the highest standards of conduct, with measurable and measured consequences when, on occasion, they fail to meet those standards?

Doing so would considerably enhance public confidence in what always must remain the “firmest pillar” of our constitutional republic.

**BUILDING AND MAINTAINING PUBLIC CONFIDENCE IN THE COURTS**

Judges and ethics enforcers have important roles to play in protecting the independence of the courts and the public’s confidence in it. At times that may mean acting contrary to popular opinion. It may mean restraint when action would be so much easier and more politically expedient. It may require engaging in some public education, as the California commission did in the *Persky* matter, and the New York commission did in *Duckman*. Yet the greatest risk to judicial independence is one that a judicial ethics enforcement entity has no power to combat.

In an age when normative public standards and constitutional institutions routinely come under attack, in some instances by the very people who are sworn to preserve, protect and defend them, the judiciary must not become just another casualty of partisan politics or culture wars. Yet a judicial ethics commission has no authority over a president who seems blithely to criticize judicial decisions as “a disgrace” simply because he disagrees with them,<sup>47</sup> nor over a Congress that seems to spiral ever downward toward an acrimonious partisan abyss.

Perhaps nowhere is the threat to an independent judiciary more evident than the rancorous manner in which we elect or appoint judicial officers. As the US Supreme Court case of *Caperton v. Massey Coal* and the blood sport of federal judicial nominations all too vividly reveal, special interest groups now commit unseemly amounts of money to affect judicial elections and nominations. In *Caperton*, millions of coal industry dollars were spent to elect a West Virginia Supreme Court Justice who then cast the tie-breaking vote in a case favoring the coal industry. The US Supreme Court found the compromise to independence and impartiality so great as to invalidate the decision.<sup>48</sup>

Yet seven years before *Caperton*, in *Republican Party of Minnesota v. White*, the Supreme Court had released judicial candidates from rules that prohibited unfettered comment on political issues in the course of their campaigns.<sup>49</sup> Short of making a pledge, promise, or commitment with respect to cases, controversies, or issues likely to come before the court, judicial candidates were freed to say just about anything that circumpect judges had previously avoided.

42. U.S. Courts, Judicial Conference Approves Package of Workplace Conduct Reforms (Mar. 12, 2019), available at <https://bit.ly/2HpZlWZ>; Guide to Judiciary Policy, available at <https://bit.ly/2wrUYDc>; Ann E. Marimow, *Federal Judiciary Leaders Approve New Rules to Protect Court Employees from Workplace Harassment*, WASH. POST, Mar. 12, 2019, available at <https://wapo.st/2MnJYBw>.

43. U.S. Courts, Judicial Integrity Officer Named for Federal Judiciary (Dec. 3, 2018), available at <https://bit.ly/2W6xygW>.

44. Id.

45. News Release, Sen. Chuck Grassley, Grassley Bill Would Improve Oversight of the Federal Judiciary (Mar. 22, 2015), available at

<https://bit.ly/2HPjijH>; Judicial Transparency and Ethics Enhancement Act of 2015, S. 1418, 114th Cong., available at <https://bit.ly/2wtirnr>.

46. Id.

47. *Trump Takes Aim at Appeals Court, Calling It a “Disgrace,”* N. Y. TIMES, Nov. 20, 2018, at A11; available at <https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html>; see also, <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts>.

48. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 US 868 (2009).

49. 536 US 765 (2002).

A related Code provision, the “disqualification rule,” requires a judge to recuse in any case where his or her impartiality might reasonably be questioned, including where the judge, while a candidate, made a public statement that commits, or appears to commit, the judge with respect to an issue in the proceeding, the controversy itself and, in some jurisdictions, the parties or a class of parties.<sup>50</sup> In his concurring opinion in *White*, Justice Anthony Kennedy noted that the states may adopt disqualification standards more rigorous than due process requires and may discipline judges who violate those standards.<sup>51</sup> Yet despite reasonable and constitutionally valid restrictions on judicial campaign conduct, *Caperton* demonstrates the extreme partisanship into which formerly staid judicial campaigns may descend.

Do we really want a judiciary that is elected in the same way as legislators and executives, picking up special-interest endorsements, hustling for votes? What would be the judicial equivalent of a pledge to “bring home the bacon”—a figurative wink to landlords while addressing a real-estate group, or to renters while addressing a tenants’ association? Do we want to create the impression, and even worse, the reality, of judges beholden to voting blocs? Will we so taint the judiciary by the manner in which we elect them that they cannot be or appear impartial once they get to the bench?

Ultimately, the burden to sort through these conundrums falls on judicial ethics enforcers. For example, under *White* a judicial candidate may permissively say, “I have always believed life begins at conception,” but not say, “If an abortion case comes before me, I will rule in favor of the unborn child.” The latter would likely result in discipline under the “pledges or promises” clause. It would also likely trigger disqualification from an abortion-rights case because the candidate would have made a statement that did or appeared to commit to a party or a particular result. Substitute “pro-choice” for “right-to-life” in this example, and the ultimate result would be the same. (How ironic that publicly declaring one’s allegiance on an issue, to gain the vote of its adherents, would end up disqualifying the candidate, once elected, from hearing cases on that very issue.)

Other campaign statements may not violate the rules so clearly. If a candidate were to say, “I have long been pro-choice [or right-to-life], and on the bench, I will always try to do the right thing,” a disciplinary enforcer would have to weigh whether this was a disguised and prohibited issue-related “pledge” or “promise,” and whether imposing discipline for it

would promote or erode judicial independence. This would not be an easy call, and the result might well trigger a First Amendment appeal akin to *White*, with unpredictable and unintended consequences.

Electoral campaigns are not the only place in which judicial aspirants are subjected to partisan pounding. In United States Senate confirmations, passionate liberal or conservative activists mobilize their bases: pro-choice and right-to-life groups, pro-business and pro-consumer associations, pro-gun and gun-control lobbyists, law-and-order advocates and civil libertarians, and countless others. Rarely in these debates, except from well-schooled nominees who deflect specific issue-related questions, do we hear any passion for the idea that a judge should rule with integrity on the facts and law without injecting personal beliefs into the equation. Yet that is the ultimate ideal. A judge who believes in either pro-choice or right-to-life should still be able to decide whether there was trespass at an abortion clinic, on the facts, without ideology.

The increasingly divisive, special-interest, and politically driven view of the judiciary cannot be what we want for our system of justice. But, like the electoral recall of Judge Persky in California, it poses a far greater threat to judicial independence and the rule of law than any judicial disciplinary commission ever did. This trend toward factionalizing the judiciary, which brings with it the potential to eviscerate the most distinguishing, liberty-saving feature of our constitutional governance, must be resisted. It cannot be said forcefully enough that there is a compelling, even overriding state interest in the independence, impartiality, and integrity of the judiciary. We play with it, and fail to protect it, at our great national peril.



Robert H. Tembeckjian has been Administrator and Counsel to the New York State Commission on Judicial Conduct since 2003. He received an AB from Syracuse University, an MPA from Harvard University’s Kennedy School of Government, and a JD from the Fordham University School of Law. He was a Fulbright Scholar to Armenia in 1994 teaching a university course in ethics and constitutional law. From 2003 to 2007 he served as an advisor to the American Bar Association commission that revised the Model Code of Judicial Conduct.

50. ABA Model Code of Judicial Conduct, Rule 2.11(A).

51. 536 US at 793-95.



Answers to Crossword  
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