Judicial Ethics: Independence, Impartiality, and Integrity

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I. INTRODUCTION: THE NEED FOR THE RULE OF LAW AND SEPARATION OF POWERS

The judicial system of the United States is founded upon a number of interrelated principles. The first of these principles is the rule of law, which is needed in order to restrict arbitrary government power. The rule of law is put into effect through a constitutional system by which power is separated and balanced among three branches of government. Under the separation of powers, the judiciary functions as an independent branch of government so that it may enforce the rule of law. Judicial independence, though, must be tempered with a certain degree of judicial responsibility. An independent judiciary can properly enforce the rule of law only if it is learned in the law and is characterized by impartiality and integrity.

The rule of law traces its roots to the England of 1215, when King John signed the Magna Carta, in which he promised that no person "shall be taken or imprisoned or dispossessed or outlawed or exiled or in any way destroyed except by the lawful judgement of his peers and the law of the land." Prior to the Magna Carta, the law was used erratically, at the King's whim and for his personal benefit rather than for the public good. Thus, the Magna Carta was the first step toward establishing the rule of law, according to which law is applied in a fair and equal manner to all persons rather than capriciously or arbitrarily. Under the rule of law, it is recognized that no one is above the law. King, counsel, and commoner alike are all subject to the law. The rule of law is the very antithesis of arbitrary and unbridled government power. It brings reason, fairness, and equality to the law. In the United States today, the rule of law finds its quintessential expression in the Constitutional provisions which state that no person shall be deprived of life, liberty, or property without-due process of law, nor denied the equal protection of the laws. These provisions, which are the direct descendants of the Magna Carta, establish the rule of law as the constitutional right of all persons.

The framers of the Constitution also recognized the need to create a national government that has sufficient power to effectively govern the nation, yet is restrained by a system of checks and balances specifically designed to limit the abuse of power. Before gaining its independence, he United States was a British colony, and the American colonists had experienced inequities at the hand of the English monarchy. Painfully aware of the tyranny that can result from unbridled government power, the framers of the Constitution sought to create a government characterized by separation of powers among the three branches of government--the executive, the legislature, and the judiciary.

The doctrine of separation of powers lies at the heart of the Constitution of the United States and also at the heart of the individual constitutions of each of the 50 states of the union. Like the federal Constitution, each of the state constitutions establishes a tripartite government composed of three branches, which are allocated distinct spheres of authority. Situated at the very core of both federal and state constitutions, the doctrine of separation of powers is based upon the principle that each branch of government has its own sphere of authority and no branch should interfere with another's fundamental role under the Constitution. As a realistic matter, absolute separation of powers between the three branches of government is impossible, and some overlap of authority is bound to occur. Nonetheless, the Constitution requires a government of

separated powers, and to the extent possible, the Constitution restrains the ability of one branch to overreach its bounds and interfere with another.

In addition, by protecting each branch of government from encroachment by the others, the doctrine of separation of powers protects the individual rights possessed by each citizen of the United States. By separating and hence limiting governmental authority, the doctrine of separation of powers restrains the capacity of any branch of government to impinge upon individual rights. The doctrine of separation of powers thus serves a dual function; it structures and thereby limits government power, and it protects the rights of individuals.

The doctrine of separation of powers recognizes that the judiciary is a separate branch of government that is coequal to the legislative and executive branches of government. It is the doctrine of separation of powers that underlies the need for an independent judiciary that acts as a counterweight to the legislature and executive. Accordingly, there is a delicate balance between the three branches of government. To maintain this balance, the judiciary has been granted the power of judicial review. This means that the courts have the authority to review the acts of the other branches of government to determine if they meet constitutional standards. If, in the opinion of the courts, an act of the legislature or executive is contrary to the Constitution of the United States, the courts have the authority to nullify that act. Thus, the judiciary stands as the final arbiter of the Constitution, and has the responsibility to review legislative and executive action to determine its constitutionality, and hence its validity. Judicial review is the most significant function performed by the judiciary and operates as an integral cog in the system of checks and balances created by the Constitution.

Nonetheless, there is some historical controversy as to whether the Constitution originally was intended to authorize judicial review. Article III of the Constitution, which is the judicial article, grants 'judicial power" to the courts, but otherwise makes no mention of judicial review. There is some question about whether the phrase "judicial power" was intended to include the authority of judicial review. However, in 1803 in the famous case of Marbury v. Madison,[1] the Supreme Court of the United States ruled that the judiciary did possess the authority of judicial review. That ruling has stood the test of time, and to this day judicial review plays an important role in the American system of government.

II. THE NEED FOR JUDICIAL INDEPENDENCE

A. History and Purpose

By establishing a government of separated powers, the framers of the Constitution intended to create an independent judiciary. The legal system of the United States reflects a strong belief in the principle that judges should be independent. The American principle of an independent judiciary originated from the days when the United States was still a British colony. The colonial courts that were established in the United States were under the control of the King of England, who could dictate the decisions made by the courts. From this experience, the American colonists came to recognize the need for an independent judiciary that would resolve disputes impartially. So, judicial independence goes hand in hand with judicial impartiality and

[1] Marbury v. Madison, S *U.S.* (1 Cranch) 137 (1803).

the idea that disputes between people ought to be decided according to the law, rather than according to the dictates of other government officials. An independent judiciary is an indispensable requisite for a free society under the rule of law.

What exactly is meant by the concept of judicial independence? It is a concept that suggests that judges ought to be free from influence by the other branches of government, as well as from political, social, economic, or other influences. For the British, judicial independence meant that judges should be free from influence by the King or Parliament. For us in the United States, judicial independence means that judges should be free from influence by the executive or legislature. And in fact, judicial independence also means that judges should be free from influence by the people. Of course, judges are bound to follow the law, which the people may revise or amend through their representatives in the legislature. Naturally, judges should make their decisions according to the law, but otherwise should not be influenced by what the executive, the legislature, or even the people might think. Under this view, the ideal judge is a person who is learned in the law and who is independent, so that he or she will be guided in decision, making solely by legal knowledge and judicial experience.

Article III of the United States Constitution vests the "judicial power of the United States" in an independent department of government —the judiciary— which is granted by Article III the authority to hear all cases arising under the Constitution and laws of the United States. This grant of authority was intended by the framers as a mandate to an independent judiciary to check and balance abuses of authority by the other branches of government. "The essence of judicial independence, therefore, is the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality."[2]

B. The Need for Protection of Minority Rights

It also is significant for judicial independence that under the United States Constitution, federal judges are appointed rather than elected. They are appointed to their offices by the President, with the advice and consent of the Senate, which has the power to veto presidential appointments to the judiciary. The fact that federal judges are appointed rather than elected might surprise some people, since election obviously is the more democratic method of selection, and the United States supposedly has a democratic government. Certainly it is true that the American Constitution was inspired by democratic ideals and that it creates a government that is mostly democratic in nature. But the Constitution also is based on one rather undemocratic idea, the idea that there is a need for protection against a tyranny by the majority. The Constitution recognizes that, while there should be majoritarian control of the government, there also should be some form of restraint upon the majority, because majorities can be selfish and oppressive or tyrannical, and some rights are so important that they should belong to everyone, even if the majority does not think so.

So, while the American system of government is primarily democratic or majoritarian, it is not purely so. The Constitution of the United States creates a government that operates as a limited democracy or what is at times referred to as a constitutional democracy because it places constitutional limits upon the authority of the government. Most of these limits can be found in

[2] I. Kaufman, The Essence of Judicial Indedendence. 80 Columbia L Rev. 671, 688 (1980).

the Bill of Rights of the Constitution, which states, for example, that Congress shall make no law abridging freedom of speech, and that no state shall deprive any person of life, liberty, or property without due process of law or deny to any person the equal protection of the laws. So, even if Congress and the President, which after all are elected by the people, decided unanimously to abridge someone's freedom of speech, they are proscribed from doing so by the Constitution. Even if a state legislature and governor voted unanimously to deny a person or group the equal protection of the laws, the state is prevented from doing so by the Constitution. The Constitution itself limits the authority of the Congress, the President, and the states to deprive individuals of their rights.

Moreover, the branch of government that was specifically designed to protect the rights of individuals and to make certain that the other branches of government do not exceed their constitutional authority is the judiciary. Because they are appointed rather than elected and because they do not have to stand for reelection, federal judges are part of the counter-majoritarian branch of government. As a counter-majoritarian branch of government, the federal judiciary functions to oversee the other branches of government, that is, the majoritarian branches of government, to make sure they do not engage in tyranny by the majority. It is apparent, therefore, that judicial independence becomes extremely important to guard against a tyranny by the majority. If judges do not have independence, if they can be voted out of office, or otherwise removed, or if their salaries could be lowered, they hardly would be in a position to oversee the other branches of government or to guard against the excesses of the majority.

C. The Creation of Judicial Independence

Of course, there is a very important question about judicial independence: How is it created and maintained? How does a nation or a state establish a judiciary that is in fact independent?

If we look to the judicial article of the federal Constitution, which is Article III, we see two significant devices that protect judicial independence. First, Article III states that federal judges shall hold their offices during good behavior and can only be removed from office by impeachment for the commission of high crimes or misdemeanors. Secondly, under Article III, the salaries of federal judges may not be lowered while they are in office. So, federal judges have virtual life tenure, so long as they do not misbehave, and their salaries are protected during that tenure. This is done in order to insulate them from attack by the executive branch or the legislature.

In addition to the federal judicial system, each of the 50 states in the United States has its own judiciary. The United States is a federated nation that has a federal government with its own sovereign authority and that also is composed of 50 separate states, each of which has its own sovereign authority and each of which has its own executive, legislature, and judiciary. All 50 of the state systems adhere to the doctrine of separation of powers and to the principle of an independent judiciary. However, judicial independence is achieved differently in some of the states than it is in the federal system.

In contrast to federal judges, state judges are selected by a variety of methods that differ from state to state. Two states follow the federal model and appoint their judges for life. In other states, judges are elected, either in partisan or nonpartisan elections. Yet other states have adopted the merit selection system for choosing judges, according to which a commission or panel of both lawyers and non-lawyers prepares a list of judicial candidates, selected on the basis of merit, from which the governor of the state appoints members of the judiciary. The merit selection plan may be combined with a retention election, that is, an election after a judge has served for a certain term of years in which the judge runs unopposed so the electorate can decide if the judge should be retained in office.

Judicial selection in the United States continues to evolve. Before this country gained its independence from England, the king selected judges. This caused a great deal of resentment among the populace. After the United States gained its independence, the states continued to select judges by appointment, either by the legislature or the governor. After 1825, however, there was increasing dissatisfaction with this method of appointment for selecting judges. More and more people came to believe that the appointment process was controlled by wealthy individuals or special interest groups, whose influence enabled them to dictate judicial appointments. With the rise of Jacksonian Democracy, there was a movement toward making government more responsive to the common people. As part of this movement, many states changed their method of selecting judges to popular election. By 1865, twenty-four of the then thirty-four states selected their judges through popular elections. The obvious advantage of selecting judges by election is that it is democratic; it enhances the participation of the people in their own government.

In practice, though, the elective system of choosing judges, is not without its own flaws. After many states adopted the elective system for choosing judges, it became apparent that the electorate paid little attention to judicial candidates. *This* left political machines free to select judges with little effective oversight by the populace. As a result, special interest groups once again were able to dictate the selection of judges. Eventually, the perception arose that the persons who gained judicial office were incompetent or corrupt. A few states moved to reform this situation by selecting their judges through nonpartisan elections. Even more states adopted the merit selection system in an attempt to remove politics entirely from judicial selection and to base judicial selection strictly on merit. By today, thirty-three states choose some or all of their judges by the merit selection system.

D. Judicial Immunity

Whatever method is used to select judges, judicial independence is also enhanced by granting judges immunity from civil liability. In both the federal and state judicial systems, judges enjoy absolute immunity from civil liability for the acts performed as part of their official duties. This is considered necessary so' that judges will not be deterred from vigorously performing the functions of office. As the Supreme Court of the United States has said, judicial immunity is needed to protect the independence of judges, because they often are called upon to decide controversial, difficult, and emotion-laden cases, and should not have to fear that disgruntled litigants will hound them with litigation seeking to obtain financial compensation for

alleged damages.[3] The doctrine of judicial immunity is deeply entrenched in American jurisprudence. It has been used to guard judges from common law causes of action, including false imprisonment, malicious prosecution, and defamation, as well as from statutory causes of action for the deprivation of civil liberties and constitutional rights.

Judges in the UI1ited States enjoy absolute immunity for their official acts, which means that they may not be held accountable for wrongful behavior in a civil action even if they act with malice or intentional disregard of the law. Similarly, legislators in this country also enjoy absolute immunity in the exercise of their official functions. On the other hand, members of the executive branch of government only possess a qualified immunity, which exempts them from civil liability for their wrongful acts unless it can be shown that they knew or should have known that their behavior was improper. While it is generally agreed that judges should possess a certain degree of immunity in order to maintain judicial independence, there is some debate as to whether judges should enjoy absolute immunity. It has been argued that a qualified immunity, similar to that granted to members of the executive branch, would provide sufficient protection for judicial independence while holding judges accountable for intentional abuses of authority.

Nevertheless, the United States Supreme Court has continued to adhere to the principle of absolute judicial immunity. In 1991, the high court reaffirmed its commitment to absolute judicial immunity in a case that vividly illustrates the operation of absolute immunity.[4] The case was a civil action filed by a public defender seeking damages from a state judge. The public defender alleged that after he failed to appear for the initial call of the judge's morning calendar, the judge became angry and ordered two police officers to forcibly seize the public defender and bring him to the courtroom. Moreover, the public defender alleged that the judge deliberately approved the use of excessive force by the police officers, knowing that he had no authority to do so. Although the Supreme Court accepted these allegations as true, it nonetheless ruled that the judge was cloaked with absolute immunity for his actions, and that absolute immunity was not overcome by allegations of bad faith or malice.

It should be pointed out that while judicial immunity is absolute, it only applies to action that is "judicial" in nature. Unfortunately, it is extremely difficult to define exactly what constitutes a judicial act. There are some extreme actions, though, that can be said to be beyond the scope of the judicial function, and therefore not protected by judicial immunity. For example, in one instance a judge actually left the bench to physically assault a person he thought was disrupting the courtroom. Clearly, this was not part of the judicial function. In another instance, a judge "arrested" someone and conducted a "trial" at a city dump. These actions also are clearly beyond the judicial function, and therefore are not cloaked by judicial immunity.

For actions that are part of the judicial function, however, absolute judicial immunity means that judges may not be sued in a civil action for their wrongful acts, even when they act for purely corrupt or malicious reasons. This is not say, however, that judge cannot be held

[3] Pierson v. Rav. 386 U.S. 547, 554 (1967); see also FolTesterv. White. 484 U.S. 219 (1988).

[4] Mireles v. Waco. 502 U.S. 9 (1991).

responsible for corrupt behavior. Judicial immunity only extends to civil liability, and judges are not immune from criminal sanctions when they engage in corruption. Nor do judges enjoy immunity from disciplinary action for misbehavior. All of the 50 states as well as the federal system have established mechanisms to discipline judges for violating the Code of Judicial Conduct. Judicial corruption, though, since it is a criminal activity, usually is dealt with through the criminal system.

Judicial immunity does not extend to criminal activity. For example, judicial immunity does not shield judges from criminal liability for fraud or corruption, or for soliciting or taking bribes. While judicial immunity is important to protect the independence of judges, its scope should not reach so far as to exempt judges from the criminal law. Thus, judicial immunity stops short of shielding criminal behavior. Moreover, in some states it is provided by law that conviction of a judge of a serious crime operates automatically to remove the judge from office. These laws differ somewhat from state to state. In some states, the laws mandate removal from office upon conviction of a felony; others upon conviction of a crime of moral turpitude; and yet others upon conviction of an "infamous" crime: The common thread of these laws is to require the automatic removal of a judge from office if he or she is found guilty of a crime of a serious nature. Under these laws, judges have been removed from office for convictions of fraud, racketeering, bribery, extortion, obstructing justice, assault, and other serious offenses.

III. JUDICIAL RESPONSIBILITY, INTEGRITY, AND DISCIPLINE

A. Impeachment

Judges are required to do more than merely comply with the criminal laws, and as noted above, every state and the federal system have established methods for enforcing standards of judicial behavior. Historically in the United States, judges who engaged in misbehavior could be removed from office through impeachment. Impeachment is a legislative procedure used to remove government officials from office for engaging in misconduct. Impeachment is initiated by a formal accusation referred to as "articles of impeachment" which are drawn by the lower house of the legislature. Thereafter, the charges are tried by the upper house of the legislature, much like a criminal case would be tried by a court. In the federal system in the United States, conviction requires a two-thirds vote, whereas in the state systems the necessary majority to convict varies from state to state. The federal Constitution specifies the grounds for impeachment as "Treason, Bribery, or other high Crimes and Misdemeanors."[5] The typical state constitution also refers to criminal activity as grounds for impeachment, although some state constitutions additionally recognize serious malfeasance in office or gross incompetence as other grounds for impeachment.

There are several drawbacks to impeachment as a method for dealing with improper judicial behavior. It is a cumbersome, inefficient proceeding. Moreover, it provides only one sanction —removal from office— and hence is only appropriate for the most serious misbehavior. As an historical matter, impeachment proceedings often have been entangled in partisan politics or have been used for political retaliation. Given these drawbacks, it is not surprising that impeachment has been used relatively rarely in the United States. That is not to

[5] U.S. Const. Art. II, section 4.

say, though, that it is never used. Over the years, twelve federal judges as well as a number of state judges have been impeached.

B. The Code of Judicial Conduct

In 1924 the American Bar Association set forth the original Canons of Judicial Ethics as a standard of professional and ethical behavior for judges. While the general terms of the Canons were broad enough to proscribe corruption and other criminal activity by judges, the main concern of the Canons was directed to judicial behavior that was unethical, unprofessional, or otherwise inappropriate. It was thought that the criminal process and impeachment would remain the primary means for dealing with criminal behavior by judges, while the Canons of Judicial Ethics were directed principally at ethical matters. The original Canons were intended as an ideal guide of behavior rather than an enforceable set of rules.

In 1972, the American Bar Association revised the original Canons, and gave them a new name, the Model Code of Judicial Conduct, which in 1990 was re-written yet again. Unlike the 1924 Canons, the Code was intended to be an enforceable set of rules. And, in fact, it has been adopted as such by 48 of the 50 states, as well as by the federal court system. Although in adopting the Code, the states and federal system have felt free to revise it here or there, nonetheless the Code forms the basis for a fairly uniform body of law throughout the nation that regulates judicial conduct.

The Code of Judicial Conduct governs off-the-bench activities of judges as well as their on-the-bench activities. It places restrictions upon extra judicial conduct in addition to restrictions upon activities that are part of the official judicial function. Indeed, the Code expressly states that "a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities," and "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[6] Public confidence in the judiciary is essential to the maintenance of an independent judiciary that enforces the rule of law. The Code is composed of general standards and specific rules. As a general matter, it requires judges to uphold the integrity and independence of the judiciary, to avoid impropriety and the appearance of impropriety, and to perform the duties of office with diligence and impartiality. These general standards are given more definitive meaning by some of the more specific provisions in the Code, and by court decisions interpreting them in various factual contexts.

It is important to note that when a judge commits a legal error —that is, makes an incorrect ruling of law— it usually is a matter to be corrected on appeal that does not rise to a violation of the Code of Judicial Conduct. The preservation of judicial independence requires that a judge not be subject to disciplinary action under the Code merely because the judge may have made an incorrect ruling. An independent judge is one who is able to rule according to his or her conscience without fear of jeopardy or sanction. So long as judicial rulings are made in good faith and in an effort to follow the law, as the judge understands it, the usual safeguard against legal error is appellate review. Indeed, Canon One of the Code of Judicial Conduct states

[6] Model Code of Judicial Conduct (1990) Canon 2.

that an independent judiciary is indispensable to justice in our society, and the courts have often stated that the judicial disciplinary process should not be used as a substitute for appeal.

While the courts have often professed that mere legal error does not amount to a violation of the Code of Judicial Conduct, that is not to say that legal error can never amount to a Code violation. The Code of Judicial Conduct also states that a judge should be faithful to the law and maintain professional competence in it. Accordingly, flagrant legal error, legal error motivated by bad faith, or a continuous pattern of legal error will be considered to violate the Code of Judicial Conduct. Otherwise, though, legal error will be dealt with through the appellate process, so as to maintain judicial independence.

C. The Creation of Judicial Conduct Agencies

In each of the 50 states, a permanent government agency has been established to enforce the dictates of the Code of Judicial Conduct, while in the federal system, judicial councils have been formed to enforce the Code. The first state judicial conduct organization was created in California in 1960, and since then each and every state has seen fit to establish a similar agency.

Although their structure varies from state to state, all judicial conduct organizations can be divided into two basic models: the one-tier agency and the two-tier agency. In a one-tier system, a panel, which is typically composed of judges, lawyers, and non-lawyer representatives of the public, investigates complaints, files and prosecutes formal charges, holds hearings, makes findings of fact, and either imposes sanctions or recommends them to the state supreme court. The one-tier commission works within the state court system to the extent the Supreme Court is normally responsible for the final disposition of cases and usually has *de novo* review powers. In a two-tier system, a panel, also usually composed of judges, attorneys, and public members, investigates complaints and files and prosecutes formal charges (tier one), while a select panel of judges or a special court adjudicates the formal charges and determines their final disposition (tier two). Two-tier systems operate independently of the state courts, in that they usually provide for finality at the second-tier, thus precluding Supreme Court review.

In all states, judicial conduct commissions may impose or recommend a range of sanctions. Usually these sanctions include: (1) private admonition, reprimand, or censure; (2) public reprimand or censure; (3) temporary suspension from office; (4) mandatory retirement; and (5) permanent removal from office. Forty-one states have adopted the one-tier model, while the remaining nine states have opted for the two-tier system. There are advantages and disadvantages to both systems. The two-tier system follows a due process of law model that separates the prosecutorial and adjudicative function in order to avoid biased decision-making. By combining the investigative and adjudicative functions in a unitary agency, the one-tier system avoids duplicative work and provides more promptness, while guarding against bias by leaving the final disposition of cases to the state supreme court.

One-tier systems have been criticized on the ground that by combining the investigative and adjudicative function in a single body, they go so far as to violate due process of law. This criticism is based on the well-established principle that an impartial adjudicator is an essential element of due process of law. Notwithstanding that principle, there is a considerable amount of

opinion which holds that the mere combination of investigatory and adjudicative authority in a single administrative agency, absent more, does not run afoul of due process standards. In cases challenging the one-tier model, the courts have taken a pragmatic view, which presumes that the one-tier system complies with due process of law unless the party challenging it can prove that actual bias has occurred.

Some observers have suggested that the two-tier system provide more rigorous discipline by virtue of its independence from Supreme Court review. It should be kept in mind, however, that in a two-tier system, like a one-tier system, the final disposition of cases is made by judges or a combination of judges and attorneys, although only in the former system do the judges sit on a panel or court that is independent of the other courts within the state. The size of judicial conduct commissions varies from state to state, ranging from a low of five persons to a high of thirteen. A majority of commissions have either seven or nine members. In a substantial majority of states, the commissions are composed of a combination of judges, lawyers, and non-lawyer public members. Judges are in the majority on twelve commissions, and public members are in the majority on six. Three states do not have any non-lawyer public members, and five states do not require judges to be on their commissions. Two states specify that their commissions include members of the legislature.

Ordinarily the judges who serve on commissions are appointed by the state supreme court or are selected through judges' organizations. The attorneys on commissions typically are appointed by the governor. In twelve states, the legislature participates in either the selection or approval of some commission members. In the nine states that have adopted two-tier systems, the adjudicative body consists entirely of judges or a combination of judges and attorneys. All commissions employ staff members to help conduct their operations. The staffs usually include a director, attorneys, investigators, and other personnel, although a few commissions retain attorneys or investigators on a part-time basis as the need for them arises.

When the first state commissions were formed, some people opposed them on the ground that they constituted a threat to judicial independence. There were those who feared that the commissions would exercise their supervisory authority over judges in retaliation for unpopular decisions. Fortunately, this fear has not come to fruition. In enforcing the Code of Judicial Conduct, state judicial commissions respect judicial independence and rarely institute proceedings against a judge on the basis of a decision rendered by him or her. The disciplinary process is not directed toward judicial decision-making, and therefore maintains judicial independence, except on those rare occasions when commission disciplinary authority 'is misused. The vast majority of disciplinary cases, however, demonstrate that the judicial commission system and judicial independence can co-exist.

In the federal judicial system, a somewhat different method is used to enforce the Code of Judicial Conduct. In 1980, Congress enacted the Judicial Councils Reform and Judicial Conduct Disability Act, which authorize judicial councils in each of the thirteen federal (geographic) circuits to review complaints against federal judges and to order sanctions for violations of the Code of Judicial Conduct. Unlike state judicial conduct agencies, the federal judicial councils are composed entirely of judges, and operate under the direction of the chief judge of each circuit. Council decisions are reviewable by the Judicial Conference of the United States.

Whereas in the state commission systems the range of sanctions available includes removal of a judge from office, in the federal councils system the power to remove a judge from office for engaging in misconduct was not granted by Congress to the federal councils for fear that it may be unconstitutional on the ground that federal judges may only be removed from office through impeachment by Congress. Still, the Judicial Councils Act of 1980 does authorize the federal councils to impose other sanctions short or removal from office upon errant judges. These sanctions include private and public censure, requesting a judge to retire, temporarily suspending a judge's caseload, and recommending that impeachment proceedings be initiated against a judge.

All of the state judicial commissions as well as the federal judicial councils have rules to keep their records and proceedings confidential, at least for some period of time. It is believed that confidentiality in the judicial disciplinary process is necessary to avoid premature disclosure of information and thereby protect the reputation of innocent judges who have been mistakenly accused of misconduct. Moreover, confidentiality encourages participation in the judicial disciplinary process by protecting complainants and witnesses from retaliation.

On the other hand, confidentiality is contrary to the principle of openness in government and freedom of speech, which is guaranteed by the First Amendment of the United States Constitution. Judges and judicial conduct agencies are both part of the government and therefore subject to oversight by the people they serve. The First Amendment was intended to insure free and open discussion of government affairs and to foster extensive public scrutiny of the government. Judicial conduct is certainly a matter of public concern, as is the operation of a judicial conduct coDU11ission. Thus, the dictates of the First Amendment and the need for openness in government call for limiting confidentiality in the judicial disciplinary process.

Many state commissions follow a rule of confidentiality, but only until they have determined that probable cause exists to institute formal charges of misconduct against a judge. This approach has the advantage of preventing the airing of unfounded charges against a judge that could do unwarranted damage to the judge's reputation, while allowing public access to information about a judge's behavior once it has been determined that there is substantial reason to suspect misconduct. So, this approach balances, on one hand, the interest of judges to avoid undeserved damage to their reputation and, on the other hand, the public interest in obtaining information about public officials and the judicial disciplinary process.

D. Advisory Committees

In addition to federal councils and state commissions which exercise disciplinary authority, judicial advisory committees are present in many jurisdictions to provide advice to judges concerning their ethical and professional responsibilities. These committees exercise advisory functions rather than disciplinary ones, and they have the advantage of deterring judicial misconduct rather than responding to it after it occurs. The Judicial Conference of the United States has established an advisory committee to provide advice to federal judges, and more and more states are creating advisory committees for their judges. In addition to the federal advisory committee, thirty-four states have established similar bodies to give advice to judges.

In a few states, the judicial conduct agencies have authority to issue advisory opinions to judges. This has the obvious advantage of providing advice regarding the Code of Judicial Conduct from the very agency that has the most expertise about the Code. On the other hand, it has been suggested that the advisory function and the disciplinary function be best effectuated by keeping them separate. Accordingly, in most states the advisory committees are separate agencies from the judicial conduct commissions. In some states, judicial advisory opinions are issued by bar association committees, or by a committee of the state judicial association. In other states, special committees have been formed to issue advisory opinions to judges. These committees usually are composed of a combination of judges, lawyers, and lay persons, which is a combination that has the advantage of representing a variety of viewpoints as well as being capable of acquiring adequate expertise concerning the Code of Judicial Conduct.

Originally, there was opposition in some states to the creation of committees to provide advice about judicial ethics to judges. It was argued that advisory opinions would be issued in a one-sided context, wherein only the judge provided his or her view of the relevant factual information to the committee, and furthermore did so at a point in time prior to the actual development of all the relevant facts. Hence, it was argued that the advisory committees might end up giving advice on the basis of incomplete or inaccurate facts. Notwithstanding these misgivings, it appears that judicial ethics advisory committees can structure their proceedings so that the facts are adequately elucidated. The fears that some persons had about the ability of judicial advisory committees to engage in fact-finding probably were exaggerated. Moreover, judicial advisory committees have the great advantage of preventing judicial misconduct and providing sorely needed advice to judges. Thus, more and more states have created judicial advisory committees and more and more judge turn to them for advice about their behavior.

E. Judicial Training and Education

Judicial independence presupposes a judiciary that is well trained and educated in the law. If judges are to be granted independence, as they are in the United States, it is extremely important that they exercise their authority with expertise in the law. Accordingly, the ideal judge is independent, impartial, and learned in the law.

In the United States, the training and education of judges does not follow the same path as it does in some civil law countries, where persons are specifically trained to become judges. Here persons are educated in law school to become lawyers rather than judges. After practicing law for some time, a lawyer may be chosen or elected to become a judge. Up to that point in time, the person has been schooled in the law, but has received no formal education specifically directed toward being a judge. However, beginning in 1956 a movement began in the United States which eventually would see the creation of a number of education and training programs designed specifically for judges. By now, there are programs in both the federal judicial system and the state judicial systems to provide training for new judges and continuing legal education for judges who already are on the bench.

The movement toward judicial education in the United States was initiated in 1956 when the Institute of Judicial Administration was established at New York University and began to

sponsor seminars for appellate judges. Each seminar consists of a two-week session, held during the summer months when it is easier for judges to attend, to discuss the function of judging and the nature of the judicial process. Each seminar is typically attended by 20 to 25 judges.

This program proved to be the catalyst for a number of other educational programs for appellate judges. In the 1960's the Appellate Judges Conference of the American Bar Association established the Appellate Judges Seminar Series to offer continuing judicial education to appellate judges throughout the United States. This program addresses a variety of issues of interest to appellate judges, and is designed to encourage repeat attendance. The same conference also sponsors a LL.M. program specifically designed for appellate judges at the University of Virginia Law School. And in the 1970's, the American Academy at Boulder, Colorado began to offer its Legal Writing Program for Appellate Court Judges.

In the federal judicial system, a development with great significance for judicial education occurred in 1967 when the United States Congress enacted legislation to establish the Federal Judicial Center. According to this legislation, the purpose of the Center is to "further the development and adoption of improved judicial administration in the (federal courts)," which includes a directive to "stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the government."[7] The Center provides training seminars for new judges and continuing education courses for judges already on the bench, particularly among new judges.

For new federal trial judges and magistrates, the Federal Judicial Center offers two seminars, each of a week's duration.[8] First, it offers a regional orientation seminar that focuses on procedural and management aspects of the judicial function. Secondly, it offers an orientation seminar in Washington, D.C. at the Center itself that reviews basic legal subjects and explores high volume federal litigation topics such as civil rights and procedural due process. The Center also provides slightly less extensive orientation programs for new appellate federal judges, which are supplemented by circulating publications and videotapes on topics of special interest to appellate judges.[9] The Center further conducts programs for more experienced judges, both at the Center itself and throughout the country in the various judicial circuits into which the federal court system is divided.[10] In addition to conducting seminars, the Center performs a variety of other functions, including publishing educational manuals and monographs.

For state judges in the United States, there is a private institution, The National Judicial College, that conducts judicial education workshops and seminars. Formerly known as the National College of State Trial Judges, this institution was created in 1963. It is located in Reno, Nevada, and is affiliated with the American Bar Association. The National Judicial College offers workshops and seminars for the orientation and continuing legal education of both trial and appellate judges, but its primary focus is on providing training for trial judges. The College conducts one to four-week courses at its location on the campus of the University of Nevada, as

[7] 28 U.S.C. section 1620 (1982).
[8] Federal Judicial Center Annual Report 1995.
[9] Id
[10] Id.

well as at several other locations in the United States. Each year about 1,800 judges attend courses offered by the college.

Another private organization, the American Judicature Society, conducts national and regional conferences and seminars for judges on judicial conduct and ethics, as well as matters regarding sound judicial administration. The Society was founded in 1913, and is dedicated to improving the administration of justice. In 1977, the Society established the Center for Judicial Conduct Organizations, which became a research and educational center in the field of judicial ethics. In recent years, the Center has stressed educational programs for judges concerning the Code of Judicial Conduct and other professional or ethical rules that pertain to the judiciary.

Additionally, many states have established offices or center to provide training and education for their own judges.[11] The first of these to be created was the California Center for Judicial Education and Research, which is located in Berkeley, California.[12] Almost all states now have judicial education offices or centers, which usually are under the aegis of the state supreme court. These states often conduct orientation programs for new judges that typically consist of two- or three-day training sessions that are conducted by experienced judges and (at times) professors or lawyers. They also usually conduct annual judicial conferences of two- or three-day duration, which are typically conducted by experienced judges, professors and lawyers.

More and more states are making continuing legal education mandatory for judges. Accordingly, they will either require attendance at their own orientation programs or annual conferences, or they will require that judges attend a minimum number of hours at some other educational program. An increasing number of states also are making funds available for individual judges to be able to attend conferences and educational sessions wherever they may be held.

Almost all of the educational programs for judges in both the federal and state systems provide training and education about both substantive legal subjects and about procedural or administrative matters relative to the judicial function. That is, they will teach judges about substantive topics, such as torts or constitutional law, as well as teaching about procedural or administrative matters, such as management of caseloads and the rules of evidence or procedure. Some of the programs also offer sessions concerning the Code of Judicial Conduct and the ethical standards that pertain to judges in the United States. A few of the programs also may cover philosophic subjects about the judicial function. There are even some specialized programs available where judges study works of literature and relate them to the judicial function.

It is necessary for both new and experienced judges to study substantive legal topics, such as torts or constitutional law for two reasons. First, it is important to keep abreast of recent developments in the law, and secondly, it is needed to master areas of the law in which they have little or no experience. The judge who has spent most of his or her previous career as a lawyer may have little or virtually no knowledge of many legal matters which will have to be faced as a judge. A former corporate attorney, for example, may know very little about constitutional law, while a former prosecutor or public defender may know very little about patent and copyright

[11] F. Klein, FEDERAL AND STATE COURT SYSTEMS-A GUIDE 45-46 (1977).
[12] Id.

law. Thus, there is a need —and a continuing one at that— on the part of judges to learn about substantive legal topics. Obviously, judges also need training and education about procedural and administrative matters. While judges can be expected to have studied the rules of evidence, civil procedure, and criminal procedure as students in law school, they may have had little practical experience with those matters in their years as attorneys. And the vast majority of persons appointed or elected to be judges have not previously studied judicial administration or judicial ethics. So, there is a strong need to teach these subjects as part of judicial education programs.

F. Judicial Impartiality

In granting judges independence, it is extremely important that their judicial authority be exercised in an impartial manner. Judicial independence brings with it the responsibility to administer the law impartially. Judicial impartiality is a fundamental component of justice. Judges are expected to be impartial arbiters so those legal disputes are decided according to the law free from the influence of bias or prejudice, or political pressure. The principle of judicial impartiality is dictated by statutory and common law, is required by the Code of Judicial Conduct, and is essential to due process of law.

The Code of Judicial Conduct requires a judge to be disqualified from presiding over any proceeding in which the judge's impartiality might reasonably be questioned. This means that judges are disqualified from presiding over cases not only when they are in fact partial to one side or the other, but also when there is an appearance of partiality to the reasonable observer. Hence, judges are expected to avoid not only actual partiality, but the appearance of it as well, because the appearance of a judge who is not impartial diminishes public confidence in the judiciary and degrades the justice system.

Moreover, the Code of Judicial Conduct prohibits judges from engaging in ex parte —that is, one- sided— conversations, because to do so might taint the ability of a judge to remain impartial. A one-sided conversation can give an unfair advantage to one of the parties in litigation and has much potential to impair judicial impartiality. Hence, ex parte conversations by judges are strictly prohibited by the Code.

The principle of impartiality calls for the law to be applied by judges without personal bias or prejudice toward individuals. Judges should extend the law uniformly and consistently to all persons. In other words, judicial impartiality should be akin to equal protection of the law. Judges should apply the law equally or impartially to all persons. This principle is violated when a judge has a personal bias or prejudice concerning one of the parties to a controversy. A feeling of ill will or, conversely, favoritism toward one of the parties is improper, and indicates that a judge does not possess the requisite degree of impartiality to decide a case fairly.

Certain kinds of bias are incompatible with the judicial function and are unacceptable in judges. Clearly, racial bias should play no part in the judicial temperament. In the vast majority of situations that come before judges, race is an irrelevant consideration that has nothing to do with the matter at hand. Racial bias often is based upon misguided stereotypical thinking about groups of people. Racial bias is demeaning and offensive to the individuals to whom it is directed. It denies equal protection of the law, and simply has no place in the judicial process.

Similarly, gender bias and bias based on ethnic or religious background is inappropriate for a judge and should be excluded from the judicial process. In fact, bias against any ~ of persons may be incompatible with the judicial function, because class bias incorrectly ascribes the attributes of a group of people to individual members of the group. Where a judge has a predilection against a class of persons, it may operate to improperly predetermine the outcome of individual cases and deny a litigant the right to have his or her case decided on the basis of the evidence presented at trial. Thus, the 1990 Code of Judicial Conduct expressly prohibits judges in the performance of their duties from manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.[13]

Judicial impartiality may also be lacking if a judge has a personal relationship with an attorney or party in a lawsuit over which the judge is presiding. Under the Code of Judicial Conduct, judges are disqualified from presiding over cases if an attorney or party in the case *is* a close relative of the judge. Similarly, judges are disqualified from presiding over cases where a close personal friend is an attorney or party to the case. In these circumstances the judge may unfairly favor the relative or friend, and even if the judge is able to put aside his or her feelings of favoritism, the appearance of it may still be present. In either case —actual favoritism or the appearance of it— disqualification of the judge is required.

A judge, however, is only disqualified from presiding over a case on account of bias or prejudice when it is personal. That is, bias or prejudice does not refer to the attitude a judge may hold about the subject matter of a lawsuit. That a judge has a general opinion about a legal or social matter that relates to the case before him or her does not disqualify the judge from presiding over the lawsuit. Despite earlier fictions to the contrary, it is now understood that judges are not devoid of opinions when they hear and decide cases. Judges do have beliefs and values, which cannot be magically shed upon taking the bench. The fact that a judge may have publicly expressed views about a particular matter prior to its arising in court should not automatically call for the judge's removal from a case. So long as the judge can keep an open mind and does not predetermine the result in a case, any opinions the judge may have about the legal or social issues in the case should not be considered disqualifying.

On the other hand, personal bias or prejudice on the part of a judge is improper and should not be tolerated. Antagonism or favoritism directed personally at a party by a judge indicates that the judge does not have the requisite degree of impartiality to decide a case fairly. Animosity or irrational biases are clear signs of improper partiality that disqualify a judge from presiding over a case.

Similarly, a judge is disqualified from presiding over cases which might have an impact upon the judge's financial or property interests. It is well settled that a judge may not preside over any case in which he or she has a financial or property interest that could be affected by the outcome of the case. For example, a judge is disqualified from presiding over a case if one of the parties in the case is a company in which the judge owns stock. Even if the amount of stock owned judge is small, disqualification should be required because the judge might be predisposed to rule in a way that would favor the judge's own financial interest.

[13] Model Code *of* Judicial Conduct, Canon 38(5) (1990). Model Code *of* Judicial Conduct, Canon 38(5) (1990).

In addition, a judge is disqualified from presiding over any case where the judge has prior personal knowledge of evidentiary facts concerning the case. In the American legal system, facts are to be determined on the basis of evidence presented in court within the adversary process, so that each side has the opportunity to present its version of the facts (subject, of course, to the bounds of honesty). Prior personal knowledge of facts may cause a judge to predetermine a case or to evaluate facts on a one-sided basis, which precludes the plaintiff or defendant from having an equal opportunity to present their view of the facts. Even in cases where the jury and not the judge sits as the finder of fact, the judge should not possess prior knowledge concerning the facts of a case, because that knowledge could unfairly influence the judge's rulings and other actions in the case. Where a judge sits as fact-finder, there is all the more reason to prohibit his or her prior knowledge of factual matters about the case.

G. Judicial Integrity

In granting judges independence, it also is extremely important that their judicial authority be exercised with the utmost degree of propriety. The Code of Judicial Conduct states that judges shall avoid not only impropriety, but also the appearance of impropriety in all of their activities. This proscription applies to off-the-bench conduct as well as on-the-bench conduct. Because a judge's extra judicial behavior may diminish public confidence in the judiciary, judges should avoid impropriety and the appearance of impropriety at all times, whether in their official functions as judges or in their extra judicial behavior as private citizens. Therefore, the Code of Judicial Conduct directs that a judge shall respect and comply with the law, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

One aspect of this mandate is that judges should not lend the prestige of the judicial office to advance the private interests of others. The judicial office was created for the purpose of administering justice; it was not intended to be used to support the private ventures of others. Accordingly, it is a violation of the Code of Judicial Conduct for a judge to attempt to use the prestige of office to do favors for friends or relatives. For example, it is improper for a judge to intervene before a government agency that grants licenses to ask for special consideration from the agency for a friend or relative. Similarly, it is improper for a judge to intercede in criminal proceedings before another judge on behalf of a friend or relative. This occurs most commonly in cases involving traffic tickets, one judge will ask another to dismiss a traffic ticket that is pending against a relative or friend. Occasionally, this will happen in more serious criminal prosecutions. But whether in a serious case or not, it is improper for a judge to use the prestige of office in this manner, because judicial authority was not intended to be used to advance the purely private interests of another individual.

It is also improper for a judge to use the prestige of office to advance his or her own private interests. Accordingly, in one case it was found to be a violation of the Code of Judicial Conduct for a judge to assign cases to attorneys with whom he was formerly associated and still maintained financial ties.[14] It also is a violation of the Code for a judge to use the judicial office to seek personal revenge or retribution. For instance, in another case it was found to be misuse of

[14] In re Lawrence, 335 N.W. 2d 456 (Mich. 1983).

the judicial office for a judge to organize his court so as to delay the cases of local attorneys who had filed a grievance against the judge with the state judicial conduct commission.[15] In a particularly egregious case, a New York judge was removed from office for (among other things) ordering that a coffee vendor be brought before him in handcuffs, and then screaming at the vendor for selling "putrid" coffee.[16] Obviously, this sort of behavior is a gross abuse of judicial authority that violates the Code of Judicial Conduct.

Furthermore, judges are not entitled to any special favors by virtue of the office they hold. In fact, the Code of Judicial Conduct prohibits judges, as well as members of their family who reside in the judge's household, from accepting gifts, bequests, favors, or loans unless they fall into certain exceptions. The most significant of these exceptions allows judges to accept gifts that are part of ordinary social hospitality. When a judge accepts a gift or a favor that goes beyond ordinary social hospitality, however, it creates an extremely negative impression in the public eye. It appears that the judge may be "bought" or unduly influenced. And, of course, the judge is accepting something to which he or she has no true entitlement.

There is an especial danger when judges accept gifts from attorneys or parties who appear before the judge in litigation. Hence, it has been found to be improper for judges to accept paid vacations, car rentals, and other sorts of favors or gifts from attorneys. Judges may even be held responsible when employees under their supervision accept improper gifts or favors. Under the Code of Judicial Conduct, a judge has the responsibility to properly supervise the court personnel under his or her direction. Failure to do so may result in a judge being held accountable for the improper behavior of employees, even if the judge was unaware of what the employee was doing. For example, the Texas Commission on Judicial Conduct once publicly admonished a justice of the Texas Supreme Court, because two of his law clerks accepted a free weekend trip to Las Vegas from a member of a law firm that had several cases pending before the Court.[17] Although the justice had no knowledge of the trip, the commission still found that he violated the Code of Judicial Conduct by neglecting to properly supervise the members of his staff.[18]

It is also obviously improper for judges to misappropriate public property or public funds. Court property or funds should not be used by judges for personal purposes. Thus, it is a violation of the Code of Judicial Conduct for a judge to charge the expenses of a personal trip to the state. Though perhaps less serious, it also is improper for a judge to assign court personnel to perform personal tasks for the judge, because it amounts to a misappropriation of court personnel that compromises the integrity of the judiciary. There also have been several instances when judges have required prisoners to perform personal tasks for them, such as having prisoners paint the judge's home or work on his farm. This also is an impropriety that violates the Code of Judicial Conduct. There is even one case where the chief justice of a state supreme court required his secretary, as a condition of employment, to baby-sit for his child. This, too, was found to violate the Code of Judicial Conduct.

[15] In re Terry, 323 N.E. 192 (Ind. 1975)
[16] In re Perry, 53 A.D. 2d 882 (N.Y. 1976).
[17] In re Kilgarin, Unreported Order (Texas Commission on Judicial Conduct, June 8, 1987).
[18] Id.

In addition, the Code prohibits judges from belonging to any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Membership in such an organization can create the appearance of impropriety, and thereby erode public confidence in the integrity and impartiality of the judiciary. Along similar lines, several courts have ruled that it is improper for a judge to associate with criminals, because to do brings the judicial office into serious disrepute. Thus, on several occasions it has been found to be a violation of the Code of Judicial Conduct for judges to socialize with criminals. Under the Code, judges are required to act at all times in a manner that promotes public confidence in the integrity of the judiciary. Therefore, the Code expressly states that judges shall avoid impropriety and the appearance of impropriety in all of their activities.

IV. CONCLUSION

Judicial independence is critical to the maintenance of the rule of law. An independent judiciary provides a balance and check upon the authority of the other branches of government and thereby prevents arbitrary government action. Whether elected or appointed, judges need to possess a certain degree of independence in order to foster the rule of law. Judicial independence may be achieved by granting judges immunity from civil liability and by protecting their terms in office by providing that they may not be removed from office or otherwise penalized on account of the decisions that they make.

There is, however, a corollary to judicial independence, namely judicial responsibility. If judges are to be granted independence, it is critical that they exercise their authority with competence, impartiality, and integrity. Judicial independence can operate properly only when judges are learned in the law and comport themselves with integrity and impartiality. The law must be administered professionally and impartially, with equality for all persons. Judges must avoid even the appearance of impropriety as well as actual impropriety. Judges are important public officials who exercise a great deal of authority over individuals. As such, they are guardians of the public trust. They must be granted independence to fulfill their responsibility of enforcing the law, but that independence must be tempered with the highest degree of impartiality and integrity. Public support of the judiciary is essential, and that support is only possible when members of the judiciary maintain an exacting standard of impartiality and integrity.

While judicial independence should be respected and protected, that is not to say that the judiciary should be entirely free from accountability. In the United States, judicial independence is maintained by granting judges tenure in office and immunity from civil liability. Judicial accountability, however, is effectuated by state judicial conduct commissions and federal judicial councils that enforce the standards mandated in the Code of Judicial Conduct. At the same time, egregious judicial behavior, such as corruption, may be dealt with through the criminal process or through impeachment by the legislature. In this way, judicial impartiality and integrity are upheld without compromising judicial independence. The goal is to foster an independent judiciary that will protect the rule of law, but a judiciary that is learned in the law, impartial, and honorable.