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Judicial Independence and Independent Judges

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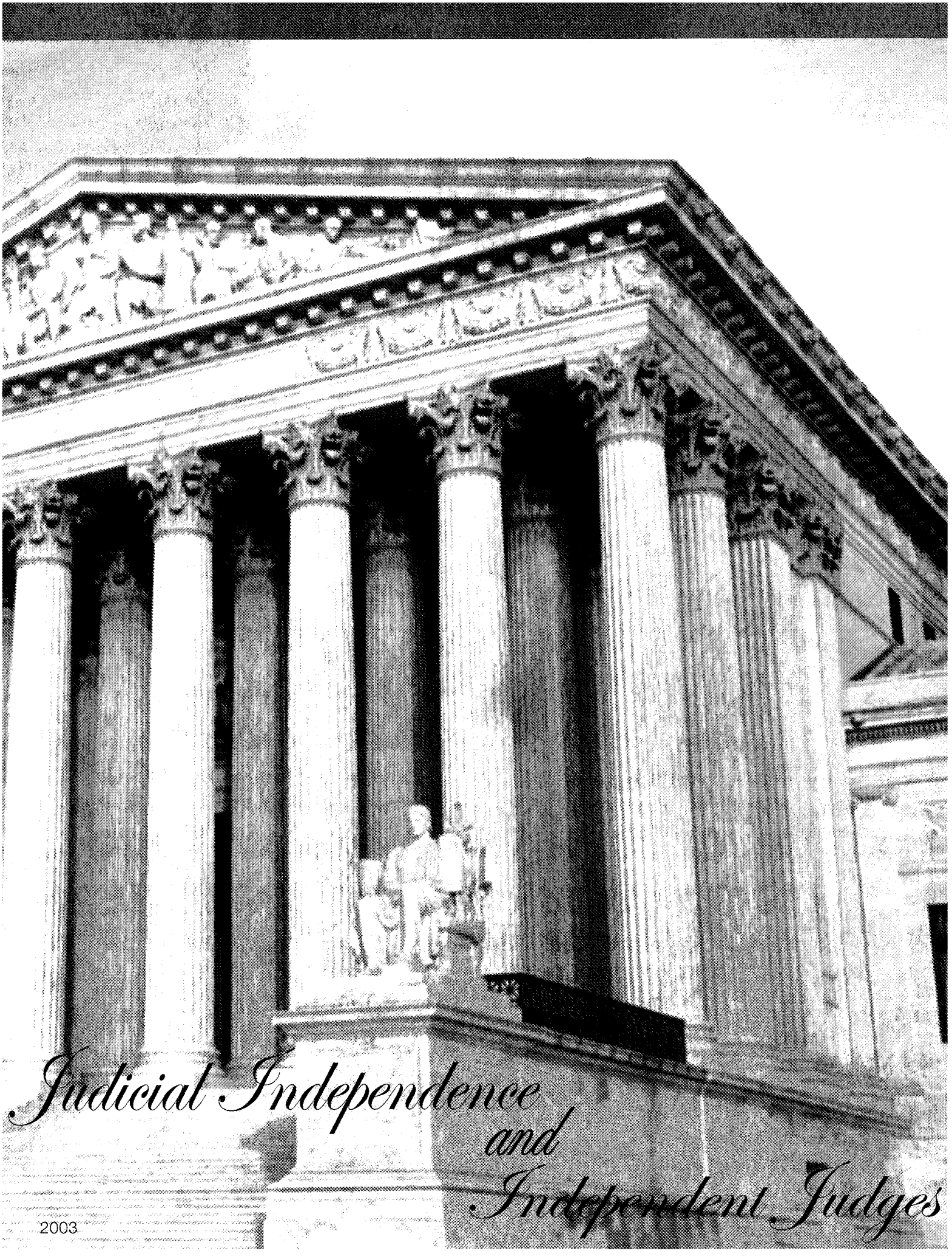
Judicial independence is one leg of the three-legged stool that comprises our system of government. Without it, the system topples. So far, so good; most people would agree with to that proposition. Now comes the rub: What is judicial independence; how should we identify those individuals whom we choose to uphold the duties of an independent judiciary; and what obligations do judges have once appointed?

Judicial independence is not political rhetoric; rather, it is a state of mind that is ever-present in the deliberative process of a good judge. Judges have a preeminent obligation to perform the duties of their offices impartially, and to address each case on its merits. In Colorado, Canon 3 of the state's Code of Judicial Conduct demands that a "judge should be faithful to the law and . . . be unswayed by partisan interest, public clamor, or fear of criticism."[1] In service of that impartiality, a judge "should abstain from public comment about a pending or impending proceeding in any court."[2] Indeed, the whole purpose of the judiciary in our tripartite system of government is independence from the other two branches: so as to maintain a nation ruled by laws, not by men; a nation in which minority interests and the rights of individual citizens find protection even in the face of societal pressures; and, a nation in which equality and justice for all is a reality.

I. Judicial Independence: Its History

The concept of a judiciary beholden to no one is fairly new, historically speaking. In medieval England, judges were anything but independent.



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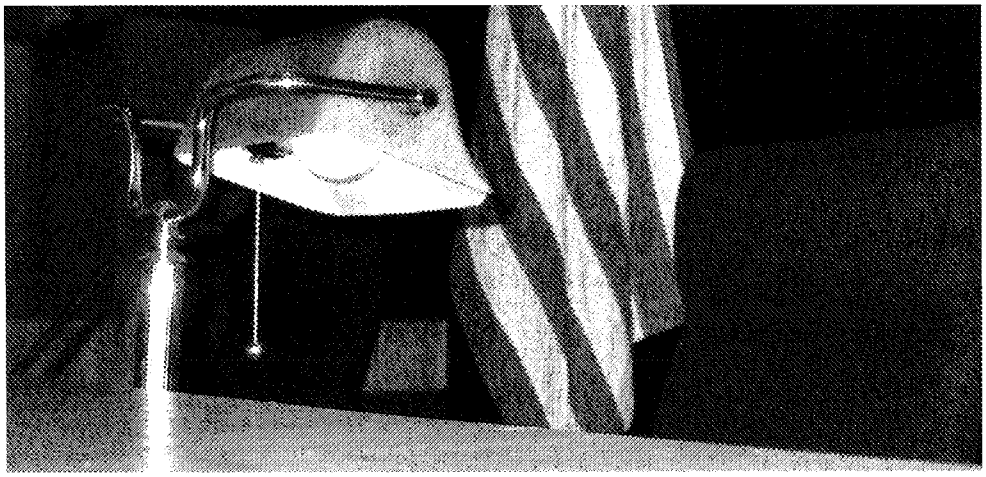

They were servants of the crown, who served at the pleasure of the crown. They enforced the will of the sovereign—whatever he or she might from time to time decree. In 1215, the Magna Carta announced the first substantial step toward a rule of law by declaring, "We [will not] proceed against or prosecute him [a free man], except by the lawful judgment of his peers and by the law of the land."[3] The notion of a rule of law was the first step, and a necessary one, toward judicial independence, and away from the expectation that the judge was the delegate of the crown or of some other body, enforcing the will of that authority—not the rule of law.

In 1608, one of the first crises of judicial independence occurred when James I sought to take cases away from the judges of England and decide them himself. In declining that request, Lord Coke wrote:

> *[C]auses which concern the life, or inheritance, or goods, or fortunes of his [Majesty's] subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which . . . requires long study and experience . . . that the law was the golden met-wand and measure to try the causes of the subjects.*[4]

The concept of judicial independence was brought to the colonies—and here amplified. In 1780, when John Adams put the phrase "a government of laws and not of men" into the Massachusetts Declaration of Rights,[5] he was anchoring that tradition. Nevertheless, the creation of a tripartite system of government, in which the courts and their judges were an equal and balanced part, was an evolution of the rule of law and an inspiration.

John Adams argued in 1776 that "judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both."[6] Adams did not want judges dependent upon any man or body of men for their salaries or their offices.

However, there was clearly an opposing view. Many of the early state constitutions made judges dependent on the legislature or electorate—by way of term limits, elections, or removal by the legislature. Jefferson said in 1776 that, in relation to legislatures, judges should be "mere machine[s]."[7] Between 1776 and 1787, Adams's viewpoint prevailed and by 1787, even Jefferson lobbied for independence in the face of a rising fear of "legislative despotism."[8]

The Ninth Resolution of the Virginia delegation to the Constitutional Convention stated an intention to establish a national judiciary who would hold their offices during good behavior—ultimately accompanied by a provision that salaries could be increased, but not decreased, during a judge's tenure.[9] Thus was born our flagship of judicial independence: the federal judiciary. The controversy surrounding that decision reflects the fact that judicial independence is, admittedly, contrary to the notion of majority rule and to accountability. An independent judiciary sometimes concludes that an act of Congress is unconstitutional, or that the tide of public opinion is—however strong—nonetheless wrong.

II. Does it matter?

Justice Aharon Barak, the President of the Israeli Supreme Court, spoke about the meaning of democracy and the role of an independent judiciary as follows: "[M]ajority rule [can infringe] upon the rule of law and the independence of the judiciary; majority rule [can infringe] upon human rights—majority rule of this kind violates the notion of democracy."[10] At one time, he noted, we might have believed that respect for basic principles "could be guaranteed by relying on self-restraint of the majority."[11] But history shows otherwise: "In

many regimes, the majority [has been] ready to abuse its full power in order to violate values, principles, and human rights which stood in its way."[12]

Judicial independence has been a vehicle for the curbing of excesses of other branches of government over the years—on a case-by-case, deliberate, and precedent-bound basis. The courts gave the protections of the First Amendment life; the courts gave voice and forum to the tension between federalism and states' rights; the courts enforced school integration, permitted slaves to own property, and curbed some of the excesses of the McCarthy era. Without a judiciary independent of the other two branches of government, those fundamental steps toward human liberty might never have taken place.

III. Colorado: Judicial Appointment and Retention

As distinct from the federal system, each state has a judicial system that represents its own answer to the tension between accountability and independence. In Colorado, since 1966, we have had a modified Missouri Plan for the selection and retention of judges. The constitutional amendment that took judges out of partisan elections was spearheaded by a group of citizens. Under our system, judicial nominating commissions accept applications for each judicial vacancy. They meet, review the applications, call references, interview the candidates, and nominate two to three (normally three) candidates. The nominating commissions consist of either thirteen or seven members (thirteen for the statewide commission and seven for district commissions). The commissions are comprised of a majority of non-lawyers, with not more than one-half being members of the same political party. The Governor, Attorney General, and Chief Justice, in a collaborative process, appoint the lawyer members. The Governor appoints the non-lawyer members. After receipt of the nominees from the commission, the Governor has fifteen days to decide which of the nominees he wishes to choose for the position. His staff consults various sources to obtain information on the candidates, and frequently the Governor interviews the nominees as well.

Once the Governor chooses a judge, that person serves a provisional term of two to three years depending upon when the next general election will occur. At that time, he or she will be on the ballot for a general "yes/no" vote from the electorate. If retained, Supreme Court justices serve ten-year terms; court of appeals judges serve eight-year terms; district court judges, six; and, county court judges, four.[13]

In 1988, Colorado implemented a statewide system of judicial performance evaluation in order to assist voters in making decisions about whether to retain a particular judge. Colorado was the second state in the nation to establish such a program. The judicial performance commissions consist of ten members—again, a majority of non-lawyers. The Chief Justice, the Governor, the Speaker of the House, and the President of the Senate appoint the members. Evaluation of a particular judge takes place through the use of survey questionnaires sent to lawyers, trial court judges, litigants, probation officers, social services, court personnel, and law enforcement agencies. The commissions review the information about the judges and then interview the judges individually. The commissions then issue a "retain" or "do not retain" recommendation, coupled

FAST FACT

Of the seven Colorado Supreme Court Justices, three are women. Significantly, a woman is the presiding Chief Justice. The Justices are as follows: Chief Justice Mary J. Mullarkey, Justice Rebecca Love Kourlis, and Justice Nancy E. Rice.

Colorado Judicial Branch Website, Judges of the Court of Appeals, http://www.courts.state.co.us/coa/coajudges.htm (last visited Sept. 1, 2003).

with a biographical statement about the judge and a brief compilation of comments about the judge.

The judicial performance commissions have two real benefits: first, they provide the voters with information about the judges on the ballot; and second, they give the judges themselves feedback about how they are viewed by the people whose lives they impact. Beginning in 1998, information about judges from the judicial performance commissions is included in the "blue book" distributed to all electors. For the first time in 2001, the General Assembly approved significant funding for judicial performance commissions—for an objective, professional survey and the accumulation of important input on judges.[14]

Other states have a variety of systems, which range from straight elective systems to appointive systems more akin to Colorado. Some states differentiate between appellate judges and trial court judges, with the trial court judges subject to election and the appellate judges subject to appointment. Other states have term limits for judges, capping the period of time that a judge may serve on a particular bench, or even in the judiciary.

With that brief overview of the federal system and the Colorado system, I return to the "hot topic" of judicial independence—a source of controversy, both systemically and ideologically.

IV. The Risks to an Independent Judiciary

Systemically, the discussion about judicial independence centers on political attempts to erode judicial independence—such as Congress's consideration of a bill that would allow it to overrule the Supreme Court, or talk of putting state judges back into an electoral system in states that have retention systems. Those changes would be dramatic, and I certainly would not state that they could not occur. They could, and it behooves all of us to be vigilant and vocal.

However, the more pervasive challenges to judicial independence are ideological. The clearest example of corrosion of judicial independence can be seen in partisan elections.[15] Elections of judicial officers necessarily impugn ideological independence—sometimes quite pointedly. Candidates for judicial office are asked to express their views on issues that will necessarily come before them if they are chosen to fill the position—issues such as domestic abuse, drunk driving, victim's rights, and criminal defendant's rights. It is a delicate matter for those candidates or applicants to express those views in generalities while still preserving the ability to hear individual cases without being rightfully accused of having prejudged the outcome.

Similarly, in an Alabama Supreme Court election, the state democratic party ran an ad calling for a vote against "Alabama's Republican Supreme Court" because the court had ruled for binding arbitration in the Firestone tire cases, rather than allow trial by jury.[16] The Michigan Republican State Committee recently ran an ad not authorized by any candidate, but which accused a judge of being "[w]eak on gun crime [and] wrong for the court," as the party contended that the judge had wrongly reversed over fifty criminal convictions.[17] A Georgia Supreme Court justice's opponent was cited by the Judicial Qualifications Commission for using false, deceptive, and misleading tactics by distributing a flier that called the justice a "judicial extremist" and accused her of "referr[ing] [sic] to traditional moral standards as pathetic and disgraceful."[18]

The United States Supreme Court opinion in *Republican Party v. White*[19] complicates the matter even further for candidates seeking a judgeship in a state that holds elections. The Court recently decided that the "announce clause" in the Minnesota Code of Judicial Conduct, which prevents a candidate seeking judicial office from "announcing their views on disputed legal or political issues," is unconstitutional.[20] Clearly, public pressure in those states will now be exerted to force judges to announce their positions on a variety of issues.[21] How can a judge exercise the necessary impartiality after having declared in the election process that he or she holds a particular ideology toward certain issues or types of cases?

Of course, there are also all of the problems associated with fund-raising in judicial elections. Overall, in 2000, state supreme court candidates raised $45.6 million—a 61% increase over 1998.[22] Not surprisingly, but certainly of concern, is the fact that

analyses have shown that at least half of those political donations come from lawyers and business interests.[23] These problems have become blatantly evident in Texas. On that point, a recent study indicated that individuals or entities who contributed to the justices' campaigns had an almost 400% better chance of having their petitions for certiorari granted.[24] Of the 442 petitions the court accepted, 70% involved at least one petitioning party who was a contributor.[25]

However, the corrosion of judicial independence is not limited to states with elective systems. Threats of recall and impeachment have also made it increasingly difficult for judges to act independently in the face of opposition. Over the last few years, numerous judges have been subject to great criticism by elected officials, the press, and the public for their decisions in particular cases.

For example, in 1996, a federal district court judge in New York ordered the suppression of evidence that he found to have been seized in an "unreasonable" search, within the meaning of the Fourth Amendment.[26] While the prosecution's motion for reconsideration was pending, congressional leaders threatened to initiate impeachment proceedings if the judge did not reverse his ruling.[27] The President also suggested that he might request the judge's resignation if the ruling was not changed.[28] The judge granted the motion to reconsider, allowing the evidence to be admitted.[29] Similarly, a superior court judge from California faced a recall effort based on the decision to award child custody to O.J. Simpson after he was acquitted of murder charges.[30] The group also criticized the judge for awarding partial custody to a woman who later killed her children and herself.[31] The judge defended her decisions as based on the law, but the group countered, accusing her of having "blood on her hands."[32] And, in Tennessee, state Supreme Court Justice Penny White was removed from the bench after she concurred with a majority decision to vacate a death sentence.[33]

In a time when we are increasingly dismayed by the impact of fund-raising upon our political candidates; when we worry about the leverage exerted by special interest groups or by lobbying efforts; and when we bemoan the balkanization of the political parties, why now are we infecting the judiciary with those very same ills?

V. Judicial Selection

If we accept the premise that an independent judiciary is a good thing, then how should we go about identifying those individuals who could serve as independent judges? Also, how realistic is it to argue that elected officials should be non-partisan in this effort?

Perhaps the place to begin is by creating a list of factors that most people would agree good judges should share. Those factors might consist of impartiality, industry, integrity, professional skills, community contacts, and social awareness. For appellate judges, one might add collegiality and writing ability; and for trial judges, one might add decisiveness, judicial temperament, and speaking ability.[34]

A good judge is not necessarily one who shares the political views of the appointing authority; and most definitely, a good judge is not someone who is willing to prejudge an issue and express an opinion about how he or she might vote on a case that might come before that court.

Why not? Why are we not, as a society, entitled to have a judiciary

FAST FACT

Four women currently sit on the Colorado Court of Appeals: Chief Judge Janice B. Davidson, Judge Sandra I. Rothenberg, Judge JoAnn L. Vogt, and Judge Marsha M. Piccone. Coincidentally, Judge Vogt attended the University of Denver College of Law (J.D. '86). The total number of judges on the Court of Appeals is 16.

Colorado Judicial Branch Website, Judges of the Court of Appeals, http://www.courts.state.co.us/coa/coajudges.htm (last visited Sept. 1, 2003).

that reflects the general morays of the public? The mere posing of the question suggests the answer. Judges should not be swayed by public opinion, and certainly should not conform their views to the majority or to the appointing authority's expectations once sworn into the office. Indeed, once the judge takes the bench, he or she is sworn to uphold the Constitution and the laws—not to conform decisions to the will of the majority. *Any* generalized attempt to force or induce a judge to express an opinion about a topic or case that will come before the court risks that judge's ultimate impartiality.

Furthermore, efforts to appoint partisan judges or judges who come to the bench with a particular bent of mind are shortsighted. First of all, those individuals may not, indeed, vote as predicted. Second, if one party succeeds in securing a series of appointees supportive of one ideology, the next time the other party comes into power, it will do the same. The battle is unending and counter-productive. Better by far to focus on choosing individuals who will serve with intelligence and integrity—individuals who can uphold the honor of an independent judiciary.

Accordingly, in my view, every individual in the business of choosing judges should be concerned with whether that person can apply the law in a fair and impartial manner on a case-by-case basis. As for trial court judge positions, the inquiry should center on whether the individual can truly be impartial, whether he or she can manage a courtroom, handle the work load, treat everyone in the courtroom with respect, and whether he or she has the industry and intelligence to become fully acquainted with the legal issues. Trial judges seldom rule on the constitutionality of a statute or decide issues that have policy implications.

Appellate judges sometimes deal with broader issues and, therefore, the inquiry of those applicants is necessarily broader. Toward that end, maybe the questions appellate judicial applicants should answer are questions such as:

1) Under what circumstances, if any, do you believe precedent should be over-turned?
2) What do you think the role of the courts is in interpreting legislation?
3) Do you think that the language of a statute or legislative intent is more important if the two conflict? Where would you look to find legislative intent?
4) Do you know what your biases are, and can you overcome them?
5) Do you have a particular ideological bent that would prevent you from judging each case before you fairly and impartially, based upon the facts of that case?
6) Absent a statute, what is the role of the courts in determining the law?

I certainly do not mean to imply that determining whether someone can be a good and fair judge is an easy task. I do think that frank and wide-ranging interviews, an analysis of that individual's writing and opinions (if any), and input from those with whom the individual has had professional contact are all very valuable. What I advocate here is that the decision-maker, be it the Governor in Colorado, the President, or a United States Senator, should be concerned with finding wise, smart, careful, thoughtful, and fair people who can uphold the independence of the judiciary with honor and integrity.

Lastly, I caution that we are "playing with fire" in this area. The judiciary is a very vulnerable branch of government that depends entirely upon public trust and confidence for its authority. If

FAST FACT

The Colorado Judicial Branch is comprised of 256 Judges and Justices: 7 Supreme Court Justices, 16 Court of Appeals Judges, 132 District Court Judges, and 101 County Court Judges. This excludes Denver County Court Judges, of which there are 17, who are appointed independently by the Mayor of Denver.

Colorado Judicial Branch Website, Court Facts, http://www.courts.state.co.us/exec/pubed/courtfactspage.htm (last visited Apr. 20, 2003).

judges are perceived as being unfair, political, or biased, the system begins to erode. We must remember how important both fairness *and* the appearance of fairness are to confidence in the courts. People only trust courts and our system of justice to the extent that they genuinely believe that they will be treated fairly. We cannot afford to undermine that perception in the process by which judges are selected. The independence of the judiciary is a hallowed and pivotal part of our system of government. It is critical to the system of checks and balances that we enjoy as a nation—and as a state. If we, as a society, can encourage respect for our rule of law and for our courts, we promote respect for authority and for society in general. We do so in part by supporting selection processes that designate the most impartial, independent, and thoughtful individuals as our judges. Those judges, in turn, bear the heavy responsibility of deserving that independence.

VI. After the Appointment: Then What?

The Colorado Code of Judicial Conduct begins with the admonition:

> *An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.*[35]

The canons demand that a judge should avoid impropriety and the appearance of impropriety in all activities (Canon 2), that a judge should perform the duties of his or her office impartially and diligently (Canon 3), that a judge is encouraged to participate in extra-judicial activities that do not detract from the dignity of the office or interfere with the performance of judicial duties (Canon 5), but that a judge should refrain from political activity (Canon 7).[36] The canons include detailed proscriptions and prescriptions for judicial behavior in service of the general goals. For example, a judge may not engage in ex parte communications about a case, or comment publicly about a pending or impending case.[37]

On the other hand, Colorado has recently amended its Code of Conduct to clarify that a judge is encouraged to engage in activities designed to improve the administration of justice; and is also encouraged to participate in civic and charitable activities, provided that they do not endanger the judge's impartiality.[38] In short, at least in Colorado, judges are expected to engage in overt efforts to improve our system of justice. That responsibility could take the form of attempting to develop better communications in a certain locale among schools, social services, probation, and religious entities about at-risk children; or, it could take the form of attempting to change the way that the entire system handles certain types of cases or treats jurors. Judges sometimes testify before legislative committees and often teach, speak to service groups, or host groups of children in their courthouses. Judges are, and should be, educators and innovators about our system of justice.

Additionally, judges should be a part of their communities, donating their time and efforts to those communities. Not only does that effort put the judge more in touch with community needs and problems, but it also puts a human face on the judiciary so that people are not as overwhelmed or mystified by it.[39]

Perhaps most importantly, judges have a duty to undertake the job of judging with wisdom, fairness, efficiency, and clarity. Trial judges must walk the daily tightrope of treating individuals in their courtroom with fairness and giving them their "day in court," while still being mindful of the hundreds of other cases awaiting court time. Those judges must remember that each individual case is about justice for those parties, and demeanor of a trial judge in a courtroom is of critical importance in upholding the integrity of the system. Additionally, judges must be case managers, who make the best use of in-court time as possible, and who move cases toward resolution appropriately. When judges rule, their decisions should be clear and understandable, so that all parties believe that, win or lose, they were heard and the decision makes sense.

Similarly, appellate judges have a duty to write opinions that are comprehensible for litigants, lawyers, law students, law professors, the media, and

trial judges. That is a diverse audience—but a realistic one for an important opinion.

Hence, all of those obligations accompany judicial independence from the perspective of a sitting judge. To continue to earn and deserve the independence that the Constitution envisions, those traits are optimal. Certainly none of us have them all, but, in general, Colorado's judiciary is held in high esteem nationally.[40]

The last set of obligations that come into play once a judge is appointed fall to other parts of society. Practicing attorneys and the organized bar bear some responsibility to defend and uphold the judiciary—particularly when the judiciary cannot speak for itself, such as on the heels of issuance of a particularly controversial opinion that is mandated by the wording of a statute or the application of precedent. In that circumstance, the judge or the court cannot offer a defense—but rather risk being pilloried in the media unless the bar steps in to defend the decision. In Colorado, the Colorado Bar Association has frequently taken on that role of supporting a decision or a judge.

The last step in this progression of interlocking responsibility falls upon the holder of the purse strings. To function, the judiciary must be adequately funded. The judiciary has no power to levy taxes, and must rely upon allocation of general fund monies. As a constitutional matter, the legislature bears the onus of funding the judicial branch of government.[41] Additionally, the courts have an affirmative obligation to perform their constitutional duties and to protect their independent status. Consequently, the courts possess the "inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities.[42] However, "a court may exercise its inherent powers only when established methods for procuring necessary funds have failed and the court has determined that the assistance necessary for the effective performance of judicial functions cannot be obtained by any other means."[43]

Indeed, in order to assure that funding entities—state or federal—do not attempt to punish the judiciary for unpopular decisions, no sitting judge's salary can be reduced while he or she is in office. But, of course, judges' salaries are just a small portion of what it takes to run a court system. Colorado's system currently consists of approximately 3,000 full-time employees, including judges. The non-judicial officers are the ones who file the cases, carry the probation caseload, compile the budgets, set up the technology systems, and manage to keep the system functioning. To make the court system one that deserves the trust and confidence of the public, we must constantly be innovative, responsive to new problems (such as the increasing need for translators or for assistance for litigants who choose not to hire attorneys), and ever mindful of our responsibility to provide equal justice for all. But we cannot do it without reasonable funding. If courts are not funded, what do they stop doing? Perhaps they stop accepting small claims cases, or civil cases in general, or perhaps misdemeanor crimes? Perhaps probation officers do not supervise probationers, and, instead, those individuals are committed to prison? All of us can envision a cascade of unacceptable problems stemming from any of those alternatives. The courts are not a luxury or a government program that could stand a little belt-tightening. The courts are a branch of government, charged with meeting constitutional responsibilities. Adequate funding is not optional; it is mandatory.

Conclusion

An independent and coequal judicial branch of government is as critical to our national well-being as water to drink, air to breathe, and food to eat. The courts safeguard not only our individual liberties, but also public safety, employment issues, personal injury recompense, enforcement of contracts, and a myriad of other social agreements. As judges, we are charged with upholding the dignity and sanctity of our offices. As a nation, we cannot afford to undermine the strength of that branch of government or the judges who people it.

Endnotes

† In preparation of this article, I am grateful for the assistance of Bragg Hemme, one of my 2002-03 law clerks, and Rosemary Motisi, my judicial assistant.

[1] COLO. CODE OF JUD. CONDUCT Canon 3(A)(1) (2002).

[2] *Id.* at Canon 3(A)(6).

[3] Magna Carta, c. 39 (1215) (Eng.), *reprinted in* A.E. DICK HOWARD, MAGNA CARTA, TEXT AND COMMENTARY 43 (1964).

[4] Prohibitions Del Roy, 77 Eng. Rep. 1342, 1343 (K.B. 1608), *quoted in* CATHERINE DRINKER BOWEN, THE LION AND THE THRONE 305 (1956).

[5] MASS. CONST. art. XXX.

[6] John Adams, *Thoughts on Government*, *in* THE POLITICAL WRITINGS OF JOHN ADAMS 482, 488 (George W. Carey ed., 2000), *quoted in* Charles Gardner Geyh, *The Origins and History of Federal Judicial Independence*, 1997 REP. OF THE A.B.A. COMMISSION ON SEPARATION OF POWERS AND JUD. INDEPENDENCE app. A, *available at* http://www.abanet.org/govaffairs/judiciary/rab.html.

[7] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 161 (1969) (quoting Letter from Thomas Jefferson to E. Pendleton (Aug. 26, 1776), JEFFERSON PAPERS I, 505 (Boyd ed.)).

[8] Geyh, *supra* note 6.

[9] *Id.*

[10] Aharon Barak, Remarks at the Opening Session of the Eleventh International Congress of Jewish Lawyers and Jurists (Dec. 28, 1998), *in Democracy in Our Times*, 20 JUST. 8 (1999), *available at* http://www.intjewishlawyers.org/pdf/Justice%20-%2020.pdf.

[11] Anthony Lewis, *Why the Courts*, 22 CARDOZO L. REV. 133, 137 (2000) (quoting Aharon Barak, Remarks at the Hebrew University Honorary Doctorate Award Ceremony 1 (June 7, 1998) (transcript on file with author)).

[12] *Id.*

[13] For general information regarding the judicial nomination process in Colorado, see Mary J. Mullarky & Gerald Marroney, *Media Guide to Judicial Nominating and Performance Commissions*, June 10, 2002, *at* http://www.courts.state.co.us/exec/media/notices/perfnom.

[14] *See id.* (providing general information on judicial performance commissions in Colorado).

[15] For an example of the perils of judicial elective systems in a water context, see Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122 (2001).

[16] *See* Deborah Goldberg et al., *How 2000 Was a Watershed Year for Big Money, Special Interest Pressure, and TV Advertising in State Supreme Court Campaigns*, THE NEW POL. OF JUD. ELECTIONS, Feb. 2002, at 24, *available at* http://www.justiceatstake.org/files/JASMoneyReport.pdf.

[17] *Id.* at 23.

[18] *See* American Judicature Society, *Judges Under Fire*, *at* http://www.ajs.org/cji/cji_fire.asp (last visited Apr. 9, 2003).

[19] 536 U.S. 765 (2002).

[20] *Republican Party*, 536 U.S. at 787-88; *see also* MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i) (1998).

[21] One author suggests that the pressure will not be confined to states with elective processes. *See* Robert E. Hirshon, *A Few Thoughts on the Importance of an Independent Judiciary*, 4 J. APP. PRAC. & PROCESS 331, 334 (2002).

[22] *See* Goldberg et al., *supra* note 16, at 4.

[23] *Id.* at 9.

[24] Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court*, at 8 (Apr. 2001), *available at* http://www.tpj.org/reports/paytoplay/index.htm.

[25] *Id.*

[26] *Federal Judicial Independence: A Review of Recent Issues and Arguments, Decisional Independence Issues*, REP. OF THE A.B.A. COMMISSION ON SEPARATION OF POWERS AND JUD. INDEPENDENCE, *at* http://www.abanet.org/govaffairs/judiciary/rdecind.html (last visited Apr. 10, 2003).

[27] *See id.*

[28] *Id.*

[29] *Id.*

[30] American Judicature Society, *supra* note 18.

[31] *See id.*

[32] *Id.*

[33] *Id.*

[34] *See* MARLA N. GREENSTEIN, AMERICAN JUDICATURE SOCIETY, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS 65-66 (1984).

[35] COLO. CODE OF JUD. CONDUCT Canon 1 (2002).

[36] *Id.* at Canons 2-3, 5, 7.

[37] *Id.* at Canons 3(A)(4), 3(A)(6).

[38] *Id.* at Canon 5(B).

[39] *See* Robert F. Copple, *From the Cloister to the Street: Judicial Ethics and Public Expression*, 64 DENV. U. L. REV. 549, 558 (1988) (explaining that judges are "the best source available to the public for thoughtful insights into the legal process").

[40] Colorado is ranked among the top five states in the area of judges' impartiality. *See* U.S. CHAMBER OF COMMERCE, STATE LIABILITY SYSTEMS RANKING STUDY, FINAL REP., at 9 (2002), *available at* http://www.litigationfairness.org/pdf/liabilities_survey.pdf.

[41] COLO. CONST. art. X, § 2.

[42] Pena v. Dist. Ct., 681 P.2d 953, 956 (Colo. 1984) (citing Smith v. Miller, 384 P.2d 738 (Colo. 1963)).

[43] *Id.* at 957.

Justice Rebecca Love Kourlis is an Associate Justice for the Colorado Supreme Court. Justice Kourlis received her Bachelor of Arts degree, with distinction, from Stanford University, 1973, and her Juris Doctor degree from Stanford University School of Law, 1976. Prior to her appointment to the bench, Justice Kourlis was in private practice. Justice Kourlis was appointed as a District Court Judge for the Fourteenth Judicial District of Colorado in 1987, and served as Chief Judge from 1991 to 1994. In May 1995, Justice Kourlis was appointed by the Governor to the Colorado Supreme Court. Justice Kourlis serves on various judicial committees, including as Chair of the Supreme Court's Committee on Family Issues and the Committee on Jury Reform. Justice Kourlis has received numerous awards during her distinguished career, among which include the Rocky Mountain Children's Law Center's Champion for Children Award; the Academy of Matrimonial Lawyers' Judicial Excellence Award; and the Colorado Women's Bar Association's Mary Lathrop Award, as well as an Honorary LL.D. from the University of Denver College of Law.