

Fair & Impartial Judiciary Symposium

Saturday, October 26, 2019

Remarks by David F. Levi

“What Does the Fair and Impartial Judiciary Mean and Why is it Important?”

It is a great honor to be with you today to speak about the importance of fair and impartial courts and the role of judicial independence in achieving that goal. Thank you, Judge Rendell, for convening this discussion.

I begin with two brief stories. Some years ago my wife Nancy and I took a river kayaking course on the American River in Sacramento. The course turned out to be nothing short of terrifying, and I have tried to forget most of that experience – especially the part where the novice kayaker hangs upside down about to drown or sustain a concussion. I did learn one thing on that trip that I have carried to this day: if there is a large boulder that you must avoid, never look at it. If you do, your body will turn and you will collide with the very thing you wish to avoid. In this conversation, there is one boulder I particularly wish to avoid, at least as we begin our trip down river: that boulder, if you will, is the United States Supreme Court. If we even start to discuss the Court, the Justices, and the confirmation process, it will attract all or most of our attention and we may flip, or at least lose the possibility of a larger view. After all, the Court decides fewer than 75 cases a year out of the nearly 360,000 federal criminal and civil cases, and nearly half of the Court’s cases are decided unanimously, or nearly so, and with little controversy. And, if we consider that over 100 million cases are filed in the state courts each year, a different focus for our inquiry starts to take shape. This is a staggering number of interactions between our fellow Americans and their judges and court systems, interactions that dwarf in number, and sometimes personal consequences, their experience of the Supreme Court and the entire federal court system.

I acknowledge that the Court is important to this discussion because of its leadership role, because of the enduring salience of certain questions that appear on the Court’s docket, like abortion, and because it is easy to forget that the Supreme Court is unique in many ways and is not characteristic of most judging in this country.

My second story is about a debate I had with Judge Richard Posner a few years ago at Northwestern Law School. He had published his book “How Judges Think,” and I had reviewed it somewhat critically. At the end of our debate, he turned to me and asked: “Does Dean Levi seriously think that it would make any difference if Republican appointed judges wore red robes and Democratic appointed judges wore blue robes?” I said: “It would make a huge difference. And it would be terrible.” He responded: “That just doesn’t cut it.” He got the last word, but I don’t think he was right. Judge Posner was probably thinking of the Supreme Court, possibly of the federal appellate courts, and I think his point was that everyone already knows the party of the President who appointed the judge so that the color of the robe should not add any information or have any additional effect.

My point was that for judges to consider or present themselves as of different political teams by wearing the team's jerseys, and for the experience of parties and lawyers to see judges so arrayed, would be highly destructive of the reality and appearance of fair and impartial, non-partisan courts. The reality and the appearance are in a constant feedback loop, and we need to consider both in any discussion of independent and fair courts.

Here is how I have organized my talk this morning. I begin by addressing why fair and impartial courts are important. I look back at the Framers and distill certain postulates about what makes for fair and impartial courts. Spoiler alert: the Framers were right. I then explore three related topics that bear on the discussion: judicial discretion and judgment, the assertion that judges are no better than politicians in black robes, and the complexity added to the discussion of judicial decision-making by judicial analytics and legal realism. I then turn to three threats to judicial independence and to fair and impartial judging. Each of these threats is mainly to the independence of our state courts and state judges. Each of these threats runs directly counter to the vision of the Framers as they structured the federal courts.

Let's start at the beginning and with first principles. Maybe it is too obvious to even ask the question, but why are fair and impartial courts important and how does judicial independence figure in?

If you are an originalist, the answer is easy. The Framers and the ratifiers considered that a fair and impartial judiciary — one that followed the law and was not biased, partisan, intimidated or seeking preferment — was central to a republican form of government. They believed that judicial independence was critical to fairness and impartiality. They thought of judicial independence in its two facets: the decisional independence of the judge from outside pressures or inducements when deciding a case, and the independence of the judicial branch as a whole, as a separate branch of three.

The Declaration of Independence prominently featured the King's attacks on both the judicial branch and the individual judge in its bill of particulars: "He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers." And: "He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries."

The founders were steeped in Montesquieu and other thinkers of the late 17th and early 18th century, and they came to believe that a "fair and impartial" judiciary was only possible were it embodied in a separate judicial branch and were the judges protected in their tenure and compensation.

Article III of the Constitution reflects this view: it provides for a separate branch of judges who themselves are insulated from pressure by lifetime tenure during good behavior and by a guaranteed livelihood. The framers did not provide that the judges would be entirely divorced from the ebb and flow of political life. They could be impeached, and their initial appointment was through the political branches. Nor were they autonomous. They were confined by law and by the assent of the other branches. Moreover, for much of their activity, they would be

sharing the judicial power with citizens through the jury trial, which has such a prominent place in the Bill of Rights and our traditions.

Federalist 78 celebrated the separation of powers and the independent judiciary in language well known to this audience. Hamilton famously said: “The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” And, he said: “as liberty can have nothing to fear from the judiciary alone, [it] would have every thing to fear from its union with either of the other departments” which is why separation and independence were so important.

Hamilton’s comments speak to us even now. Judges should not by party or for any other reason be united to the other branches. Nor should they be involved on their own initiative and authority in the redirection of the wealth of the society. Hamilton understood that the judicial spirit of independence, the judicial culture, would be essential to the arduous task of resisting encroachments by the other branches. He also understood that judges would exercise discretion, but that there was a distinction between the exercise of judgment and the guided exercise of discretion, on the one hand, and the imposition of personal will and preference, on the other. He saw the importance of courageous judges to the preservation of individual liberty and to the amelioration of oppressive legislation. Judges in this Republic, protected by life tenure, would unite integrity and fortitude to wisdom and knowledge of the law. And this knowledge of and fealty to the law, gained through practice and study, would be the bulwark against judicial over reaching.

Even if the authority of the founding generation were not enough, it seems that, in fact and over time, their beliefs have proven themselves: indeed, it is not possible to have a successful democracy without a fair and impartial judiciary, and it is not possible to have a fair and impartial judiciary that lacks independence in both of its aspects. Are there examples of successful democracies where the judicial function is dependent or subsumed in the other branches such that the judicial branch lacks institutional independence? Are there successful democracies where the judges lack decisional independence but are routinely subject to pressure or external command or inducement? The answer is “no.”

Americans need to have faith in the independence, fairness and impartiality of our judges because they look to our courts as the place where they can get a fair shake whether their complaint is with the government or a business or a neighbor. That is a huge entrustment, which brings us here today.

I draw the following principles or assertions from what I have covered so far:

- First, fair and impartial courts are essential to a successful democracy;
- Second, judicial independence is not for the personal benefit of the judicial officer but so that the judiciary may be fair and impartial;

- Third, there are two primary aspects to judicial independence: decisional and institutional;
- Fourth, the selection, compensation, and tenure of judicial officers is important to their independence;
- Fifth, the judicial culture, the independent spirit of the judiciary, is critical. Judges must be careful to guard the culture and be true to it;
- Sixth, the judiciary must not be in league with either of the other branches and must not supplant the role of those branches or be supplanted by them;
- Seventh, while there must be separation, there must also be collaboration. The judiciary depends heavily on the other branches for its support, the execution of its orders, and the substance and procedures of the law itself. We consider that judicial independence serves the rule of law, but this is only the case if the judiciaries' rulings command assent and respect and if the substance of the law and the prescribed procedures are consistent with our common sense of justice and fair play. In other words, the ecology of judging is important and depends mostly on the other branches;
- And finally, we acknowledge that the appearance of fairness and impartiality is almost as important as the reality, and the two are not easily separated.

Much flows from these principles and when we depart from them we put ourselves at risk.

There are three further aspects to this discussion that deserve elaboration — judicial discretion and judgment, the distinction between policymaking and partisanship, and the impact of legal realism and academic studies of judicial decision-making on the perception of judging. I begin with judicial discretion and judgment. I use the terms together to encompass the kind of judicial decision, such as the imposition of a sentence, where the law gives the judge a range of options and choices, or relies on the judge's assessment of the circumstances in drawing further conclusions. As well, the terms "discretion and judgment" encompass the law-making and law-clarification that occurs when judges apply existing rules and precedents to new fact situations or re-evaluate and refine precedents in the light of subsequent cases and circumstances.

If judges had no discretion and no call for the exercise of judgment, then much of this discussion would be unnecessary. If the law were so specific and determinate that any of us would reach the same conclusions and quickly, on any point of law or exercise of judicial power, then a computer could now do the job of the judge even without further advancements in artificial intelligence. We would not need judges who are learned, or courageous, or blessed with powerful intellect, or common sense, or humility, or integrity, or a deep commitment to equal justice. None of that would be relevant. Nor would judges be criticized or find themselves under attack were they merely applying matrices and highly specific rules and codes.

But that is not our system or aspiration: our judges, state and federal, trial and appellate, exercise discretion and judgment, and the American people know it, and, let us hope, appreciate it, at least some of the time.

But, and this is my second topic, the exercise of some degree of discretion and judgment, inevitably opens up the judiciary to the criticism that judges are partisans or politicians in black robes. Some critics of the courts conflate the kind of restrained policy making that judges must do with partisanship or the practice of politics. This criticism fundamentally misunderstands what it is that judges do.

When judges exercise discretion and judgment they will often find it necessary to consider practical consequences and the overall context of a matter. These considerations may affect any number of decisions, from case management to specific fact-findings to development of the law through its application. But the consideration of practical consequences and policies inherent to the law or a situation is not the same as partisanship or the practice of politics. As our distinguished colleague Judge Michael Boudin has explained so well:

Leeway is often present in cases in which public policy issues are at stake... Judges ought to put aside personal preferences, but they can hardly avoid bringing a worldview to the choices that many such cases present.

[T]o call judges' subsequent choices in public policy cases "political" is mere provocation. One can reply blandly that these decisions are political in the sense that they relate to public policy, but few lay readers (or judges) will take it that way. Policy often matters in deciding cases, but it is usually policy attributable to Congress or to public policy reflected in case law, common sense, and the values of the community.

Judge Boudin calls upon all us to be more careful in how we describe what judges do and how we use the term "political." The challenge is to make clear the distinction between the proper and improper exercise of discretion and judgment, between appropriate policy considerations and inappropriate partisanship. This explanation, and now I move to my third topic, will be somewhat complicated by the new era of judicial analytics in which there is such a focus on the tendencies and track records of individual judges or of groups of judges, grouped by some characteristic of the judge, such as age, race, education, or the political party of the appointing President or Governor.

How do we explain that judges are fair, impartial, and open-minded when, for example, the academic study of judicial decision-making has found persuasive correlations between the political party of the appointing authority and the judge's decisions on certain issues?

Of course, we should not find such correlations surprising. Presidents and Governors often openly look for lawyers to appoint as judges who have had certain kinds of experiences, for example as prosecutors, or who have expressed certain views on matters of legal policy. Voters in judicial elections will sometimes choose a judicial candidate who, for example, presents as "tough on crime." But then why would we expect that judges chosen for

those reasons, once in office, would be identical to other judges in outlook or judicial philosophy who were chosen for different reasons? And there will be other factors that academic studies will show significant in some group of cases — for example, the gender or age or education of the judge. The hard part is to explain why judges may be considered fair and impartial even though in some cases they will decide differently than other judges according to criteria, like appointing authority, or gender, that we can track and which are immutable.

In the new era of judicial analytics which has dawned, all of us, including judges, will be painfully aware of every statistic for every judicial officer, from how long the judge takes to resolve a certain type of motion to how different law firms seem to fare before the judge, from how the judge sentences for particular crimes to whether the judge sentences men more severely than women. The list goes on and on. One may hope that this kind of data will assist judges, but it is not hard to see pitfalls. For example, will judges start to curate their data and be influenced in the decision of future cases? Perhaps for this reason, earlier this year France made it a felony to publish judge specific analytics for “the purpose or result of evaluating, analyzing or predicting their actual or supposed professional practices.” This law is shocking but the underlying problem is real enough and has been of concern to others, including the United States Sentencing Commission.

While we must defend our judges against the charge that they are nothing but “politicians in robes,” we must and should acknowledge that judges are human beings in robes, selected by political actors, and they will exercise discretion and judgment in different ways. Perhaps this may seem “unfair” to particular litigants in particular cases even though the different judicial perspectives benefit the system as a whole. We should not shy away from addressing this topic which must cause some uneasiness.

I turn now to what I identify as the three most pressing threats to judicial independence and to fair and impartial judging: first, the commandeering of our local courts by local police and revenue authorities, second, the possibility that judges will get drawn into partisan battles thereby losing their detachment and the appearance of impartiality, and third, the election of state court judges in so many of our states.

We begin where the rubber meets the road at the lowest levels of our state courts, in the local and municipal courts. This is where most of our fellow citizens experience their justice system. The riveting and appalling Department of Justice report on the police department of Ferguson, Missouri highlighted that in Ferguson the municipal court had been commandeered by the city and the police and turned into a vehicle of oppression.

According to the report, the municipal court’s primary purpose was to generate revenue for the City. It did so by adopting procedures that made it difficult for the defendant to pay a fine or traffic offense, requiring personal appearances during the work day, prolonging the cases, and stacking additional fines and fees for failure to meet these unduly oppressive procedural requirements. Arrest warrants and drivers’ license suspensions automatically followed upon the failure to pay enhanced fees and fines, leading to yet additional fees, fines, missed days at work, and violations of court orders. By these means, the courts colluded in the creation of a

destitution pipeline for many people, many of whom are poor and minority. Ultimately, the court system entirely lost the confidence of the people it served, forfeiting its role as an administrator of justice for that of a revenue collector.

Many of our states have this same problem. In Texas, \$1 billion in revenue is raised by lower courts in this regressive fashion. In California, the figure is \$2 billion. Recall that Hamilton explained that it is not the business of the courts to redirect the wealth of the community. It is not the job of the courts to balance City budgets on the backs of the poor. Surely all government bounty systems, by which government agencies fund themselves through fees, fines, and forfeitures, ultimately lead to over reaching and due process violations whatever the level of government. But I highlight this issue today not as a problem of good government or of particular penalties gone awry or of mandatory penalties causing injustice in particular circumstances. I highlight it because our municipal officials, by depriving our local court systems of their independence and separateness have created the very unfairness that Hamilton warned about so long ago. This estrangement of whole communities from their courts is happening across the country.

I would be remiss if I did not mention that the response of the State Chief Justices to this problem, once visible, has been extraordinary and a powerful example of judicial leadership. The Conference of Chief Justices formed a national task force which has developed principles and model statutes that local courts and administrators may use to address the issue of fees, fines, and money bail. The problem has by no means been solved but thanks to these judicial officers, it will no longer be ignored.

My second threat begins with the observation that many institutions that strive to neutrality and principled decision-making are under pressure and attack right now. Foundations, Universities, professional associations, the Federal Reserve, and the courts find themselves drawn into controversies, mostly symbolic, that seemingly blow up overnight.

Of course, judges should not complain of thoughtful criticism whether of particular opinions or of court services and performance. But much of the criticism is not of this purpose or content or tone. And we are in a new era of social media in which interlocking networks may be mobilized and on the march in an instant.

I have had some experience in responding to these kinds of attacks through my association with several well established institutions, and the line "do not try this yourself at home" comes to mind. Most of us have no experience or expertise in this kind of communications and crisis management. There is a whole field of professionals who handle this kind of thing and can help guide the response. And the first response is just the beginning. The entity wishes to explain and put the controversy to rest; but the opponent's goal is just the reverse. It will churn out emails, blog posts, fundraising appeals, and generally wear out the exclamation mark and all caps keys.

Against this background, I read with some concern that an ABA committee I formerly chaired, the Standing Committee on the American Judicial System, held a conference on judicial independence at which several esteemed judges, state and federal, exhorted their judicial colleagues to speak out and defend themselves when attacked by political figures and other groups for particular decisions. I do not agree with this approach. Judges are neophytes and innocents in this harsh world of social media combat.

There are significant dangers here. Because judges do not have crisis managers and communications specialists, they are at risk of saying the wrong thing, in the wrong way, and in the wrong place. They even risk offending some of their own colleagues and creating rifts within a court if they say too much or too little or in not quite the right language or tone. And, there is the appearance: when a judge squares off outside the courtroom against a President or a Governor or other political person or entity, may the public be forgiven if it sees a partisan judge? But more subtle and equally important is the risk to their own heart and soul, to their spirit of detachment, moderation, fairness and impartiality. Responding to criticism can become a full time preoccupation. A judge's response may engender an even more bitter and unfair response, motions to recuse, and the like. This kind of conflict is distasteful to most judges but not so the critics. If judges enter the ring, they risk changing who they are. They may deprive themselves of the detachment and equanimity that are necessary to good judging.

I know this situation is frustrating and deeply disturbing to many judges. The possible threats to family members are frightening. It does take courage and restraint in this environment to carry on without bitterness and with a steady adherence to equal justice. Fortunately, we have great examples of judges doing just that, now as before. At least for those judges who have life time tenure and guaranteed compensation, the framers foresaw the likelihood of conflict and strove to protect our judges from the corrosive effects of partisan competition. But they knew that it would still require courage to be a judge in our raucous republic.

Now it is up to us. The profession must put in many more resources to explaining what judges do and defending them from unfair and political attacks. While judges don't have crisis managers and social media experts, other groups do. It is distressing that in recent years we have seen the demise of two leading organizations most devoted to judicial independence — the American Judicature Society and Justice at Stake — as well as the defunding of the one American Bar Association committee dedicated to judicial independence. Our bar associations should realize that one of the main reasons lawyering is a profession is precisely so that an independent bar may defend the independence of the judiciary.

We can do much better and keep our judges out of the fray.

This doesn't mean that there is nothing judges can do. They can do so much, but not by responding to specific attacks. It's too late by then. Judges can and do connect with their communities by holding court in high schools and other places and by giving talks on the rule of law, how judges decide cases, and the importance of judicial independence. They can speak about how they do their own work and what their aspirations are, how they became a judge and how they try to keep the public's confidence. They can articulate their rulings so that a

person of reasonable education and intelligence can understand the reasoning. Every opinion is an opportunity for civic education on the role of the judge. This kind of important work is happening every day by judges inside and outside of the courthouse. Justice Kennedy and Judge Rendell are such inspirational examples of what a justice or judge can do to explain the judicial role in preserving the rule of law.

My third and last threat to address is the challenge to fair and impartial courts presented by state judicial elections. I defer to the next speakers on this topic and will say just a few words. For state court elections, the problem is not that the process ends up with unqualified or substandard judges. We have many wonderful state court judges who have been chosen and retained through election systems. There are also some benefits to judicial elections. For example, they are opportunities for civic education and outreach. But the negatives are many. First, when one of the occasional contested and nasty elections occurs, a lot of damaging and misleading accusations will be made about judges, the judicial role, and the courts. Second, academic studies demonstrate that judges facing re-election will be affected in their judicial decisions in the time period running up to the election. State trial judges sentence more severely, appellate judges are less likely to overturn a conviction, and Supreme Court justices are less likely to overturn a death penalty. Third, partisan judicial elections are utterly inconsistent with our effort to convince the public that our judges are not partisan. Even if it is possible to run as a Republican or Democrat Judge, wearing the team's jersey, and then become a nonpartisan judge in a black robe until the next election cycle, the electorate may not believe in this alchemy.

Finally, judicial campaigns require money and organization, and judges naturally turn to lawyers and their business clients for assistance — lawyers and clients who may appear before the very same judge.

Surely we can ameliorate some of these negative consequences even if we cannot convince the American people to get rid of judicial elections.

I reflect in closing that more than anything we must preserve the judicial culture in this country. If the judicial culture is strong then, whatever the threats, we will have fair and impartial judges animated by the spirit of independence. They will aspire to be wise, courageous, open minded, thoughtful, and considerate. As Learned Hand explained some 75 years ago: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it." The same may be said of judicial independence, fairness and impartiality.

I marvel today, as I have my entire legal career, at the excellence of our judiciaries, state and federal. Despite low salaries, threats to judicial independence, and burdensome caseloads, our state and federal judges are among the unsung heroes of the Republic, jewels in the crown of our democracy. There is some miracle at work here, difficult to explain but wonderful to behold.

May it always be so.