

Who judges our Judges? An Ethics Dilemma

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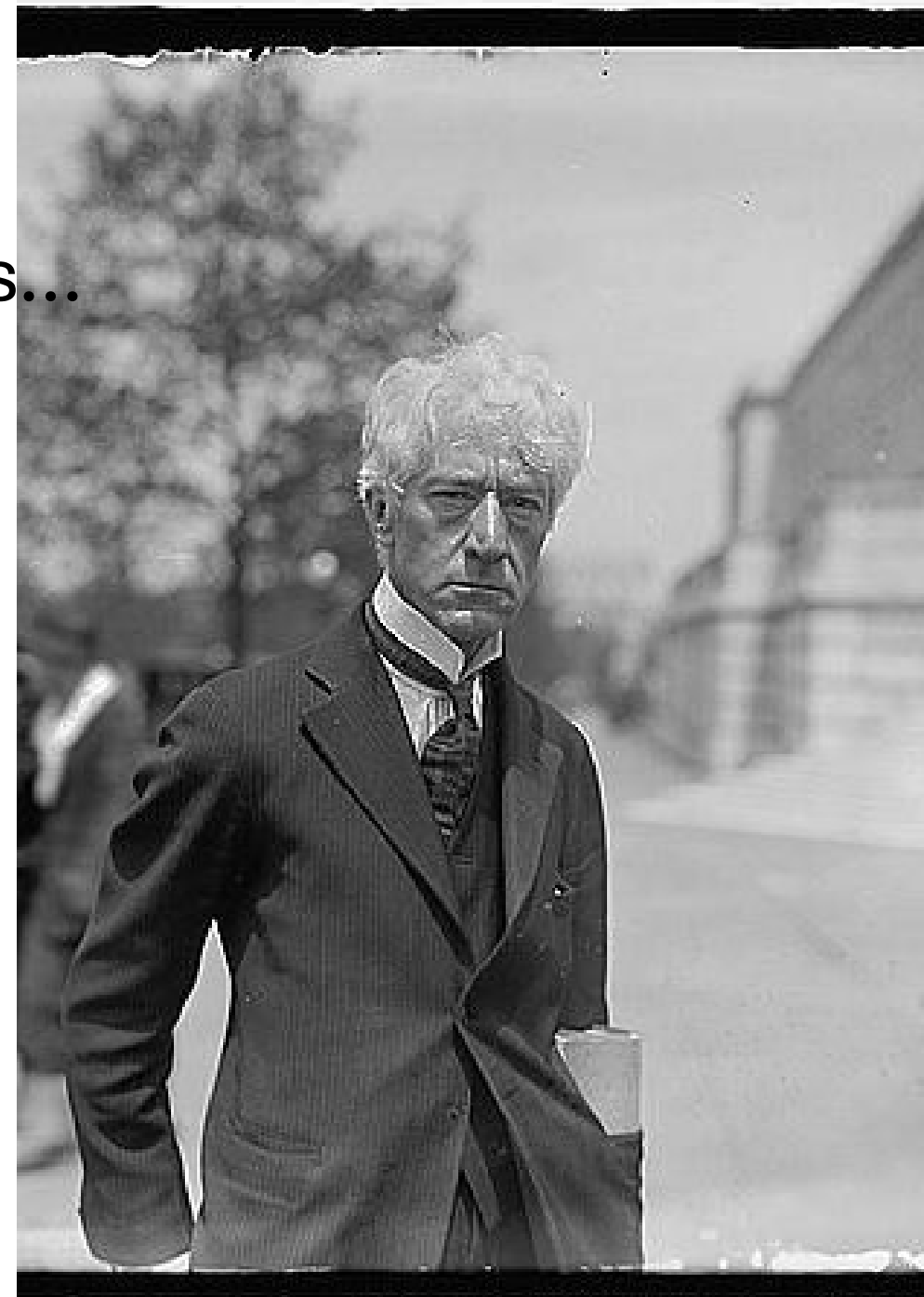
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Ethics of Federal Judges and Disclosures

- Federal Canons on Judicial Ethics, Codes and Ethics Rules, early 20th Century to today.
- Case law on ethics violations for judges.
 - Federal and state examples of judicial misconduct being judged by fellow judges.
- SCOTUS self-exemptions and self-application from federal ethics rules.
 - Legitimacy Problem: Issue opinions charging others with ethics violations when they engage in same conduct?
 - Self-policing vs federal enactments to regulate?

Early 20th Century: District Judge Landis...Commissioner of Baseball Landis...

- Federal judge in Chicago, salary \$7500.
- Took baseball commissioner job at \$42k salary, refused to step down from bench.
- No ethics or bar rules to control the behavior.
- Congressional impeachment effort was the only regulatory mechanism, besides ABA “censure.”
- House: “What is to prevent [baseball owners] from going into the Supreme Court now and hiring every member on the bench? I think it affects the very soul of this government.” (Rep. Benjamin Welty (D-Ohio), House Judiciary Committee hearing in 1921.)
- AG said Landis was within his rights.
- Based on political pressure he resigned after 14 months of doing both jobs.
- Led to first set of judicial ethics codes



Judges Judging Judges: The Judge who hated Germans.

- Chicago, 1918. *Berger v. United States*, 255 U.S. 22, 28 (1921)
- Facts: World War I espionage case against German Americans.
- District Judge Landis' statements:
 - “One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans" because their "hearts are reeking with disloyalty.”
 - “If anybody has said anything worse about the Germans than I have I would like to know it so I can use it.”
 - “You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safeblower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safeblower.”
- Held: prejudice required recusal.

Pre-1990

- No uniform federal code of canons.
- State-by-state codes that judges were supposed to adhere to.
- 1908 ABA adopted first model codes for lawyers.
- 1926 ABA finally proposed model ethics code for judges.
- 1972 ABA updated codes.
- By 1980s, still state-by-state.

Post-1990 – Adoption of Federal Judicial Ethics Code by Judiciary

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities

(A) Respect for Law. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) Outside Influence. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

(C) Nondiscriminatory Membership. A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

Canon 2A. An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges, including harassment and other inappropriate workplace behavior. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

Federal Ethics in Government Act

- Judges file disclosure statements listing financial entanglements and holdings that could trigger need to recuse. No review process for accuracy. 28 USC § 455.
- Lower federal judges can be challenged and judges or higher judges can address charge.
- But Canons Code not directly applicable to SCOTUS & SCOTUS has no one empowered to review it, has not created a mechanism to regulate it under the Code, so it is all self-reporting without a basis to challenge.

SCOTUS & 455?

- Proclaim they follow voluntarily the same rules lower federal judges must follow, but that they are different so should not be scrutinized.
- But here is The Courts' Letter to Congress:

“A recusal consideration uniquely present for Justices is the impairment of a full court in the event that one or more members withdraws from a case. Lower courts can freely substitute one district or circuit judge for another. The Supreme Court consists of nine Members who always sit together. Thus, Justices have a duty to sit that precludes withdrawal from a case as a matter of convenience or simply to avoid controversy. *See United States v. Will*, 449 U.S. 200, 217 (1980) (28 U.S.C. § 455 does not alter the rule of necessity); ABA, Model Code of Judicial Conduct § 2.11 cmt. (“The rule of necessity may override the rule of disqualification.”). ***Individual Justices, rather than the Court, decide recusal issues. If the full Court or any subset of the Court were to review the recusal decisions of individual Justices, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.***”

“Code of Conduct for U.S. Judges. The Code of Conduct for U.S. Judges applies by its terms ***only to lower court federal judges***. *See* Code of Conduct for U.S. Judges, Introduction. The Court nonetheless takes guidance from the Code.”

(https://www.washingtonpost.com/documents/70adb490-28c6-4065-b929-6e2e9ab5b9a8.pdf?itid=lk_inline_manual_2)

- Point: We are special and different.

Sotomayor/Gorsuch & Penguin Random House

- Received over 3 million from her publisher Random House, in royalties and advances. He has a book deal too and has received over 500k.
- Declined to recuse themselves in appeals to Court for review from the entity in copyright cases: *Nicasio v. Viacom & Penguin Random House*, 19-560.
- Is there any question that a lower federal judge who received \$3 million in royalties from Penguin House could not be the judge in their copyright cases?

United States v. Wolff, 263 Fed. Appx. 612 (9th Cir. 2008)

- Facts: Indictment charged Deft with a corporate fraud scheme involving the inflating of his company's publicly reported revenue figures. He was convicted on all eighteen counts. Judge refused to recuse himself even though he owned stock in a company that was connected to the scheme.
- Rule: “455(b)(4) provides that a judge “shall . . . disqualify himself [where] . . . [h]e knows that he . . . has a financial interest in the subject matter in controversy. . . .” A “financial interest” includes “ownership of a legal or equitable interest, however small.”
- Held: “Based on the unique facts that are before us, we conclude that the judge did have a financial interest... According to the SEC, AOL aided and abetted securities fraud by Homestore and “improperly inflated its online advertising revenue based on the Homestore-related transactions by at least \$ 1.5 million in the fourth quarter of 2000 and \$ 7 million in the first quarter of 2001... In this case, the judge's rulings could potentially have had a financial impact on AOL.”
- *But see: United States v. Rogers*, 119 F.3d 1377 (9th Cir. 1997) (although the judge, “as one of millions of stockholders in Bank of America, held a limited financial interest in the purported victim of a crime,” it “cannot be deemed a financial interest in the subject matter in controversy” because defendant’s sentencing has no possible financial impact on judge (defendant could not pay any restitution)).

Barrett & Americans for Prosperity

- Entity spent over \$1 million to help get her confirmed.
- Then appeared before the Court: *Americans for Prosperity Foundation v. Bonta*, 19-251..
- Case issue: “To solicit contributions in California, charitable organizations must disclose to the state Attorney General’s Office the identities of their major donors. The State contends that having this information on hand makes it easier to police misconduct by charities. We must decide whether California’s disclosure requirement violates the First Amendment right to free association.”
- *Held*: California’s demand that identities be given is unconstitutional.

Ethics Hypocrisy? *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009).

Facts: Multi-million donation to lower judge's candidacy. Judge then has case with entity who donated. Refused to recuse.

“the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances “in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”

“The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief.”

Ethics Hypocrisy? *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009).

“Whether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry. Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion. This is particularly true where, as here, there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias.”

Held: Constitution requires recusal, let alone bar rules, because of bias risk.

Ethics Reform for SCOTUS?

SUPREME COURT ETHICS, RECUSAL, & TRANSPARENCY ACT of 2023

- Politics: “There are good reasons Americans are losing confidence in their Supreme Court: special interests are spending millions to try to rig the judiciary in their favor, and the justices continue to shrug off their own self-imposed ethics crises,” said Senator Whitehouse, Chairman of the Senate Judiciary Courts Subcommittee. “Every other major decisionmaker in the federal government is subject to these kinds of ethical guardrails. It’s clearer than ever that it’s time to bring a fair and transparent set of rules—and procedures to enforce the rules—to the highest court.”
- Proposed Law: Create Code of Conduct and Develop a Process for Enforcement
 - Require the Supreme Court to adopt a code of conduct within 180 days;
 - Require the Supreme Court to publish its code of conduct and any other rules or procedures related to ethics, financial disclosure, and judicial misconduct;
 - Require the Supreme Court to create a transparent process for the public to submit ethics complaints against the justices, and for a random panel of chief judges from the lower courts to investigate and make recommendations based on those complaints.

Ethics Canons for Judges

- Canon 1
 - An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, 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.
- Canon 2A
 - “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary”
 - “avoid impropriety and the appearance of impropriety in all activities.”

Ethics Canons for Judges

- Canon 3
 - The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased.
 - (1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.
 - (2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.
 - (3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

Ethics Canons for Judges

- Canon 4
 - A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.
 - Point: do not engage in conduct that gives the impression judge may favor certain people.
 - ...(G) Chambers, Resources, and Staff. A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon.

Judges Judging Judges: The judge who handcuffed the defendant's teenage daughter in court.

- San Diego, 2023. Federal district judge Benitez held a hearing in a criminal case over whether bail was to be revoked for the defendant who had served his sentence but had violated the terms of supervised release and was about to face another jail term. The defendant expressed concern that his daughter, who was in attendance, was hanging out with people who might "lead her into the same path I went down."
- Judge to Marshal: "You got cuffs?"
- Marshall then at Judge's direction cuffed the 13-year old girl in the jury box, she started crying.
- "After allowing her to be released, Benitez told the girl she was "an awfully cute young lady" but that if she did not avoid drugs she would "wind up in cuffs" and be "right back there where I put you a minute ago.""
(<https://www.reuters.com/legal/legalindustry/california-federal-judge-faces-review-handcuffing-13-year-old-2023-03-01/>)
- Case reassigned, Ninth Circuit has opened a Judicial Misconduct case, No. 23-90037 (February 2023), ruled in 2024....

Judges Judging Judges: When the Judge goes on vacation with the prosecutor at the end of a trial.

- *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985)
 - In the case of the defendant bribing judge, the federal judge himself, Judge Kocoras, confronted his own ethics dilemma. He was a close friend of the federal prosecutor, indeed best of friends. Right after the judge sentenced the corrupt judge-defendant, the judge then went on vacation with the prosecutor. Indeed, the sentencing hearing was advanced to be done so he could get to his group vacation.
 - Held: that level of friendship “unusual” and objective test required DQ. “Most people would be greatly surprised to learn that the judge and the prosecutor in a trial of political corruption had secret plans to take a joint vacation immediately after trial. An objective observer might wonder whether the judge could decide the case with the requisite aloofness and disinterest.” (1538).
 - Avoided disqualification because defense knew and filed late...the defense lawyer also hung out with the judge...

Remedies: Just Can't Make It Up

- *In re Judge Dow*, 19-3JC-012 (Utah Sep. 13, 2019) (judge who texted photo of a man's scrotum to court clerks--reprimand). <https://graphics.thomsonreuters.com/data/judges/1420.pdf>
- *In re Judge Robison*, No. 18-0510 et al. (Texas Feb. 20, 2019) (judge entered jury deliberations and told jury that God had told him not to convict—public warning). <https://graphics.thomsonreuters.com/data/judges/3037.pdf>
- *In re Judges Adams, Jacobs & Bell*, (Ind. S. Ct. 2019) (judges were drunk in public, the strip club was closed, so they went to White Castle; ended up in a verbal and physical fight where they fought with one Kaiser, kicking Kaiser in the back, who then shot two of them—judicial misconduct finding and 30-60 day suspensions). <https://graphics.thomsonreuters.com/data/judges/3016.pdf>
- *In re Judge Thompson*, 194 P.3d 1281 (Okl. 2008) (judge used sex gadget penis pump while on the bench in trials and exposed himself to others while doing it—disbarred and led to criminal convictions). https://www.ncsc.org/_data/assets/pdf_file/0022/39442/SexualActivityinCourthouse.pdf (p.12)