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TELEPHONE JUSTICE, PANDERING, AND JUDGES WHO SPEAK OUT OF SCHOOL

*Randall T. Shepard**

As Americans we pride ourselves on the rule of law and its sine qua non, an independent judiciary. In *The Federalist No.* 78, Alexander Hamilton described judicial independence as "an essential safeguard against the effects of occasional ill humors in the society."[1]

In the course of reaffirming the special role of judicial independence in our own society, we routinely decry the "telephone justice" practiced in some parts of the world.[2] Before the Berlin Wall came down, crimes such as "infringing on the activities of the state" served as "the fig leaves of a system that didn't disguise its real purpose: executing the wishes of the state's Communist Party leadership and their secret police."[3] Even as the world enters the twenty-first century, there are still nations where a judge can expect to receive a call from a party boss or security officer with orders on how to decide a case.[4]

While most would agree that such overt interference is the antithesis of judicial independence, these are the easy cases. The es-

* Chief Justice of Indiana. A.B., Princeton University, 1969; J.D., Yale Law School, 1972; LL.M., University of Virginia Law School, 1995.

1. THE FEDERALIST NO. 78, at 428 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Id.

2. Justice Breyer defined telephone justice as when "the party boss calls you up on the telephone and tells you how to decide the case." *Frontline: Justice for Sale* (PBS television broadcast, Nov. 23, 1999) [hereinafter *Justice for Sale*] (transcript on file with the Fordham Urban Law Journal).

3. Nina Bernstein, *Righting Wrongs, Case by Case*, NEWSDAY, May 12, 1991, at 18.

4. Stephen G. Breyer, *Comment: Liberty, Prosperity, and a Strong Judicial Institution*, 61 LAW & CONTEMP. PROBS. 3, 3 (1998); *Issues of Democracy: Protecting Judicial Independence: A Global Effort*, 18 ELECTRONIC J. OF U.S. INFO. AGENCY 1, (Dec. 1, 1998), (interview with Cynthia Hall), *at* http://www.usinfo.state.gov/journals/itdhr/1296/ijde/pitts.htm.

sence of telephone justice is decision-making on grounds external to the judge's own assessment of the law and the facts of a case. This evil may appear in many subtle guises. Judges must resist outside influence to maintain the uncompromised impartiality our offices require. There is more to looking outside the case and the law for direction then waiting for a call from the KGB or the Stasi. Judges face external pressures every day.

The temptation to pander to these external influences has never been greater. Federal judicial nomination and confirmation proceedings are openly political.[5] Judicial races are more expensive and hotly contested than ever before.[6] Media attention to court decisions has increased to the point where judges may attain celebrity status virtually overnight.[7]

The siren call of celebrity and career advancement (or, for that matter, simple preservation) is difficult to resist. The need for resistance is acute, however, against a backdrop littered with fakers—"Judge Judies" who are not constrained by the code of judicial conduct; people who tarnish the judiciary's standing with the public for purposes of financial gain.[8]

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5. *See* Bruce Fein & Burt Neuborne, *Why Should We Care About Independent And Accountable Judges?*, 84 JUDICATURE 58, 58 (2000)

> [A] growing array of voices seem to measure judicial appointments and performance by applying outcome-determinative litmus tests. . . . In the years since the contentious confirmation hearings that resulted in the rejection of Judge Robert H. Bork, it has become common practice for Senators to seek to extract commitments from nominees to the federal bench about how they would vote on particular issues.

Id; *see also* Brannon P. Denning, *Reforming the New Confirmation Process: Replacing "Despise and Resent" with "Advice and Consent"* 53 ADMIN. L. REV. 1, 10 (2001) ("In addition to concerns over the ideology of particular nominees, members of the Senate have held up the Administration's nominees in hopes of securing judicial nominations for their allies.").

6. *See* Sheila Kaplan & Zoë Davidson, *The Buying of the Bench*, NATION, Jan. 26, 1998, at 11.

7. *See, e.g.*, Daniel M. Kolkey, *Point/Counterpoint: Should Cameras Be Banned From California's Courts?*, CAL. B.J., Feb. 1996, at 14 ("Can anyone dispute that televising the O.J. Simpson trial during the day led to the parodies of Judge Ito during the night? How many 'Dancing Itos' will it take to recognize that cameras can become a cancer that gradually gnaws away at our courts' dignity?"). *See also* Joan Biskupic, *Has Public Interest in Trials Become Public Pressure on the Justice System?* WASH. POST, Nov. 12, 1997, at A01.

8. *See* Mike Farrell, Editorial, *There's Disorder in the Court—and Television Stands Accused*, L.A. TIMES, May 31, 2000, at B9.

> [T]he public regularly submits complaints about Judge Judy and other TV judges to the [California] Commission on Judicial Performance. Obviously, many people don't understand that Judge Judy and most of her cohorts are not current members of any judiciary. . . .[T]o preside in TV courts, you don't even have to be a lawyer. All they have to be is brazen enough to put

The first four sections of this article identify four permutations of telephone justice: pandering for confirmation, pandering to political pressure, pandering for votes, and pandering to the cameras. The final section tells the extraordinary tale that should perhaps go into the reporters as *Judge Thomas Penfield Jackson v. Microsoft.*

I. Pandering for Confirmation

When the Senate considered the nomination of Thurgood Marshall in 1967, the popular consensus was that candidates for the Supreme Court should not disclose their positions on substantive law. As Senator Edward M. Kennedy then said, "We are not charged with the responsibility of approving a man to be associate justice of the Supreme Court only if his views always coincide with our own."[9] Senator Kennedy has since adopted a different approach to the proper role of the Senate,[10] and the nature of Senate confirmation itself has changed.

Federal judicial selection entered the modern media era in 1981, when Justice Sandra Day O'Connor's confirmation hearings were covered live by radio and television.[11] When pressured by the media to state her position on certain issues, however, Justice O'Connor demurred:

> I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Suprem[e] Court decisions presenting issues which may well come before the Court again. To do so would mean that I have prejudged the matter or have morally committed myself to a certain position. Such a statement by me as to how I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter. This would result in my inability to do

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> on a robe and pick up a gavel, and obnoxious enough to draw attention to themselves.

Id.

9. James S. Robbins, Editorial, *Apply Marshall's Principles to Clarence Thomas*, WALL ST. J., Sept. 10, 1991, at A20.

10. Commentary, *Sen. Kennedy's Confirmation Conversion*, WASH. TIMES, Sept. 18, 1991 (reporting that Senator Kennedy had begun paying closer attention to the Supreme Court candidates' political views in determining their propriety for office).

11. Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1213 (1988).

my sworn duty; namely, to decide cases that come before the Court.[12]

Five years later, Supreme Court nominee Antonin Scalia was similarly circumspect. When Senate Judiciary Committee chairman Strom Thurmond asked Scalia if *Marbury v. Madison* "required the President and the Congress to always adhere to the Court's interpretation of the Constitution," Scalia answered, "I do not think I should answer questions regarding any specific Supreme Court opinion, even one as fundamental as *Marbury v. Madison*."[13]

Two years later, however, nominee Robert Bork's confirmation hearings became the high-water mark for the grilling of a Supreme Court candidate.[14] In his effort to counter tough questioning by simplifying responses and speaking directly to the public, Bork ended up softening his previously stated positions so much that his credibility suffered.[15] Ultimately, he moderated his previous views so significantly that Senator Patrick Leahy described him as having experienced "confirmation conversion."[16]

In the years following the Bork inquisition, the Senate has been less effective in its efforts to pin down Supreme Court candidates' views on contentious subjects. Justices Ruth Bader Ginsburg and Stephen Breyer "felt free to decline to disclose their views on controversial issues and cases . . . . Justices Kennedy, Souter, and

12. *Nomination of Sandra O'Connor: Hearings Before the Senate Comm. on the Judiciary on the Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States*, 97th Cong. 57-58 (1981).

13. Totenberg, *supra* note 11, at 1219 (quoting *Nomination of Judge Antonin Scalia to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. On the Judiciary*, 99th Cong. 33 (1986)).

14. Denning, *supra* note 5, at 2 (describing the confirmation process as "contaminated by the toxic levels of partisanship produced by the battle over the nomination of Robert Bork to the U.S. Supreme Court in 1987").

15. ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 221 (1989). "Bork had spent a quarter century assailing liberal, rights-oriented constitutional decisions in the harshest possible terms. Now, however, he withdrew into a lawyerly cautious shell on the stand. His statements were measured and often seemed inconsistent with what he had been saying for decades." *Id.*

16. Arthur N. Eisenberg, *Repaid in the Coin of a Controversialist: The Bork Confirmation Process*, 58 U. CIN. L. REV. 1319, 1328 (1990) (book review). Senator Leahy has apparently found a solution to whatever danger such conversions represent: stop doing confirmations. *See Leahy Doctrine Ensures Judicial Gridlock*, WASH. TIMES, Oct. 22, 2001, at A20 ("To date, only eight of the president's nominees have been confirmed. This works out to a measly 15 percent confirmation rate for the president – not too good compared with his predecessors' success rates of 93 percent and up.").

Thomas . . . rebuffed all attempts to explore their opinions of important principles and cases."[17]

Although the Senate tempered its attacks in the latest Supreme Court confirmation hearings, we cannot assume that this comparatively restrained approach will continue. Recent presidential elections have focused heavily on each candidate's likely Supreme Court nominees,[18] and other federal judicial appointments have been the subject of much political gamesmanship.[19] As Justice Ruth Bader Ginsburg said, recent congressional attacks on judicial independence "can fairly be described as political hazing of federal judicial nominees."[20] Those who aspire to the federal bench cannot help but fear that every public statement will be philosophically scrutinized by political parties.

The extent to which federal judicial candidates should disclose their views on legal issues has long been the subject of debate. At one end of the continuum are commentators who believe that the Senate's "advise and consent" function should be limited to determining that the nominee is of an acceptable moral character.[21]

At the other end of the continuum are those who view confirmation by the Senate as the people's last chance to ensure that a potential judge-for-life is responsive to prevailing popular sentiment on important areas of law.[22] National Public Radio commentator Nina Totenberg argues that the Senate Judiciary Committee should require nominees to answer issue-specific questions as a condition of confirmation. Further, she lauded the Bork hearings as "a good example of effective questioning and informative discourse" in

17. Elena Kagan, *Confirmation Messes, Old and New*, 62 CHI. L. REV. 919, 920 (1995) (book review).

18. *See, e.g.*, Neil A. Lewis, *The 2000 Campaign: The Judiciary; Presidential Candidates Differ Sharply on Judges They Would Appoint to Top Courts*, N.Y. TIMES, Oct. 8, 2000, at 28.

19. *See* Denning, *supra* note 5; Fein & Neuborne, *supra* note 5.

20. *Ginsburg Recalls Florida Recount Case*, N.Y. TIMES, Feb. 4, 2001, at 25.

21. *See, e.g.*, Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 687 (1989) (arguing that inquiry into a nominee's judicial philosophy is illegitimate and that the Senate should focus its investigation solely on whether a nominee is "tainted by cronyism, corruption or crass political partisanship").

22. *See, e.g.*, Michael Stokes Paulsen, *Straightening Out the Confirmation Mess*, 105 YALE L.J. 549, 552, 567 (1995) (book review) ("The President and the Senate may, and should, undertake full, substantive review of a judicial candidate's legal views. . . . I submit that the best way to evaluate a judicial candidate's judicial philosophy is to see how the candidate would apply it to real issues in dispute."); *see also* Kagan, *supra* note 17, at 920 ("When the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce. . . .").

which "his views emerged with some clarity."[23] She claims that "[i]f . . . a nominee has fixed views on a subject of settled law, claiming propriety as a reason for not being forthright with the Senate is just a ruse."[24]

There is, of course, a middle group who would allow the Senate to explore judicial philosophy generally, but not insist upon being too specific. Proponents of such a limited senatorial inquiry agree with Justice O'Connor's position that a candidate who expresses a viewpoint on a contentious issue such as abortion or affirmative action may have prejudged future cases, at least in appearance, and possibly in reality.

This is not the only problem that arises when judicial candidates speak out on specific legal issues. If acceptable stances on particular legal issues are a prerequisite for a federal judgeship, those who hope to attain those positions must weigh their ambition against their ethical obligation to remain impartial in both form and substance:

> Case-specific litmus tests for Supreme Court and subordinate federal court appointments should be . . . assailed. Whether the test is applied by the President in searching for a nominee or by Senators in the confirmation process, it is a dagger at judicial independence. Supreme Court candidates of ordinary ambition will shade their views in order to pass political muster, and become intellectually "locked in" on a battery of controversial issues before they arise in actual cases and controversies where all sides are heard and debate ensues among the nine Justices.
>
> In sum, case-specific questioning of would-be or actual nominees is tantamount to political arm twisting to dictate the outcome of constitutional questions by the judicial branch.[25]

In a similar vein, Chief Justice William Rehnquist wrote in *Laird v. Tatum*[26] that a judicial nominee who goes beyond "any but the most general observation about the law. . . suggest[s] that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge." Two well-respected commen-

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23. Totenberg, *supra* note 11, at 1219-21.

24. *Id.* at 1227; *see also* Fein, *supra* note 21, at 676 (noting that "Totenburg's applause for the senators who interrogated Bork about his judicial views conflicts with her belief that nominees should not be asked to commit themselves on issues that may be decided by the Court").

25. Fein & Neuborne, *supra* note 5, at 62-63.

26. Laird v. Tatum, 409 U.S. 824, 836 n.5 (1972).

tators, David A. Strauss and Cass R. Sunstein, agree with Chief Justice Rehnquist:

> Whenever politics becomes strongly ideological, people who want to be on the Supreme Court have an incentive to campaign for the Court by reshaping their views. . . . It is a safe prediction, for example, that the Bush Administration will not appoint anyone who has taken an unequivocal position in support of *Roe*.[27]

Judges nominated and confirmed under such conditions are part of a stealthy form of telephone justice. Abner Mikva makes a similar point:

> [T]he Senate, as a reflector of popular will, must be circumscribed in its inquiries. What the Senate should not do is try to determine a nominee's views on emerging constitutional doctrine, or on issues likely to face courts in the near future. Why? Because these questions are really a signal to a nominee that he or she will become a judge only upon promising to be obsequious, to be a yea-person to the powers that be.[28]

This is weighty stuff for the future of the Republic as we know it. If Congress ensures that the judicial branch only contains judges who share its views of the Constitution, what can be the future of the separation of powers? Important parts of the Constitution exist for the purpose of restraining legislators.[29] How can such restraints survive the long-term abuse of the confirmation process?

President Lincoln, discussing the appointment of Chief Justice Salmon P. Chase, summed it up best: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it."[30]

II. Post-Appointment Political Pressure

Some would argue that pre-confirmation grilling is at worst harmless error, because once appointed, federal judges have life tenure and are thus free to decide cases without bending to pres-

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27. David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1516 (1992).

28. Abner J. Mikva, *Judge Picking*, 84 MICH. L. REV. 594, 599 (1986) (reviewing LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY (1985)) .

29. *E.g.*, U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion. . . .").

30. Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1162 (1988) (quoting GEORGE S. BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 29 (1902)).

sure.[31] That assumption was recently tested when Judge Harold Baer of the U.S. district court in Manhattan suppressed evidence in a drug case.[32] Four congressmen called upon President Bill Clinton to ask for Baer's resignation, and a White House spokesman implied that the President might do so unless Baer reversed the ruling.[33] In addition, Senator Robert Dole called for Baer's impeachment.[34]

Ultimately, Judge Baer reversed his ruling.[35] This about-face was widely perceived as bowing to political pressure, although Baer cited new evidence as justification.[36]

The analogy to telephone justice is inescapable when the political branches of government react to a judicial decision by sending a public threat: "We do not like that result. Change it, or get out of office." Special courage is required to avoid caving in under threat of removal, but what self-respecting alternative is there for a judge whose decisions draw political fire?

If a judge violates his or her professional ethics, the judiciary itself should undertake to enforce the code of conduct.[37] In state judiciaries, internal disciplinary action is usually a viable option for the judicial branch. The standard appellate processes are another way to set things right.

Responsible members of our political system should not, however, threaten a judge with removal simply because he or she has made an unpopular decision. A judge's role in our scheme of government is not to seek popular adoration, but to protect the rights

31. *See, e.g.*, Mikva, *supra* note 28, at 600 ("Some scholars insist that all of this handwringing about the ways and means of judicial selection and confirmation is irrelevant. Once a Justice is appointed, he or she is going to march to the Court's drummer, and the influence of the appointing drummer will wane to insignificance.").

32. Mark Hamblett, *Baer's Controversial Ruling Leads to Appeal on Recusal*, N.Y. L.J., June 28. 1999, at 1; *see also* Am. Judicature Soc'y Ctr. for Judicial Independence, Judges Under Fire, *at* http://www.ajs.org/cji/fire.html#new%20york [hereinafter Judges Under Fire]).

33. Judges Under Fire, *supra* note 32.

34. *Id.*

35. *Id.*

36. *See* Laurie Asseo, Editorial, *Federal Judges Fending Off More and More "Political" Attacks*, PLAIN DEALER, Jan. 4, 1997, at 11B; Mark Hamblett, *Judge Gave In to Pressure, Lawyer Claims*, LEGAL INTELLIGENCER, June 29, 1999, at 4; R. Eugene Pincham, Editorial, *A New Tyranny Against Judiciary*, CHI. TRIB., May 23, 1996, at 30.

37. *See generally* MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT pmbl. (1994); MODEL CODE OF JUDICIAL CONDUCT pmbl. (1990).

of all citizens, particularly members of unpopular minority groups.[38]

III. Pandering for Votes

In thirty-nine states, judges must run for office or at least stand for retention.[39] Elected judges face formidable challenges in maintaining their independence.[40] In these states, a hue and cry over a particular ruling is often driven by the ulterior motive of replacing the incumbent judge with a more politically preferable candidate in the next election.[41] This brings us to our third form of telephone justice—pandering for votes.

Elected judges face a tough situation. They cannot promise to decide certain cases in a certain way[42] despite many interest groups

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38. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; or whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. Pitt. L. Rev. 231, 258 (1998) (arguing that the framers of the Constitution intended that judicial review be a protection against tyranny by the majority); Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 Mich. L. Rev. 657 (discussing the role of judges in protecting interests of all citizens); *see also* Gerald A. Rosen, Remarks at Institute for Continuing Legal Education, MSU Management Education Center (Apr. 16, 1998), *at* http://www.icle.org/sections/labor/judindep.htm ("[O]ur role as Judges is to protect against the excesses of the majority where those excesses violate our fundamental freedoms and civil liberties.").

39. Kaplan & Davidson, *supra* note 6, at 1.

40. Wainwright v. Witt, 469 U.S. 412, 459 (1985) (Brennan, J., dissenting) ("When prosecutors and judges are elected, or when they harbor political ambitions, such pressures [of maintaining independence] are particularly dangerous."); *see also* Patti Waldmeir, *Judge Jackson Puts Law's Image of Impartiality in Jeopardy: The Microsoft Judge Could Be Accused of Bias in Speaking out Before the Case Has Completed Its Journey Through the Appeal Process*, Fin. Times, June 15, 2000, at 4 ("With over 40 states electing at least some judges—and money-in-politics becoming ever more of a problem—the law's image of impartiality is in jeopardy."). *See generally* Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. Rev. 973 (2001) (discussing the pressures that elected judges face).

41. *See* Kaplan & Davidson, *supra* note 6 ("The campaign fundraising scandal has drawn new attention to the way moneyed interests buy political favors in Washington. But far from the nation's capital, many of these same donors operate unchecked in a venue that may prove more disturbing than the Lincoln Bedroom: the state courts.").

42. *See* Model Code of Judicial Conduct Canon 5(A)(3) (1990) ("A candidate for a judicial office: (a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary . . . ."). The accompanying commentary states that "Section 5A(3)(d) prohibits a

who take extraordinary efforts to extract precisely such promises.[43] Their opponents, on the other hand, have the luxury of selecting "sound bites" that may tell less than the whole truth. For example, opponents of Louisiana Chief Justice Pascal Calogero charged that he "voted in favor of business only 3 percent of the time"—a statistic Calogero disparaged as "highly selective and distorted," noting that he had voted over 50,000 times during his twenty-five years on the court.[44]

Elections create a powerful incentive for judges to push the envelope of judicial conduct. Additionally, elections create a risk that the public will perceive that justice is for sale.[45] In 1988 the Texas Medical Association's Political Action Committee succeeded in filling five of nine state supreme court seats with TEXPAC-supported judges. In a TEXPAC video, one of the justices openly acknowledged, "I wouldn't be on the Texas Supreme Court if it wasn't for the help that the medical community gave me."[46] How could that judge then expect the public to believe that he would approach medical malpractice cases without bias? In discussing Texas' situation, former State Supreme Court Justice Bob Gammage recalled the old political saying, "You dance with them what brung you."[47]

Popular election of judges presents a dilemma because the judicial candidate's desire to say things that might win votes unavoidably clashes with his or her obligation to due process.[48] Whenever judges allow the voting booth to affect their decisions, they are practicing telephone justice. The same problem occurs when a judge who is subject to popular vote declares or intimates with a wink how he or she would likely rule in prospective cases. Not only is subservience to public opinion unnecessary, it also per-

candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court." *Id.*

43. *See, e.g.*, George Lardner Jr., *Speech Rights and Ethics Disputed in Judicial Races*, WASH. POST, Oct. 8, 2000, at A13 ("The Christian Coalition has filed a federal lawsuit against the Judicial Inquiry Commission, accusing it of muzzling judicial candidates when it instructed them last month not to answer a questionnaire that the Christian Coalition of Alabama had sent to all those on the Nov. 7 ballot.").

44. *Justice for Sale*, *supra* note 2.

45. *Id.*

46. *Id.*

47. *Id.*

48. *See* Steve France, *Courting the Voters*, A.B.A. J., Dec. 2000, at 34 (describing this author's belief that the threat of popular elections to judicial impartiality is not an abstract notion to litigants and citing the example of a campaigning judge who opines that fathers often get shortchanged in child custody battles); Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO J. LEGAL ETHICS 1059 (1996).

versely puts the most principled judges at the greatest disadvantage when stumping for votes.

The solution is to shift from popular judicial election to merit selection[49] and retention systems. Such arrangements hold judges adequately accountable because judges who go outside the law or violate ethical standards face disciplinary action for judicial misconduct and appellate reversal.

IV. PANDERING TO THE PRESS

Another variation on the theme of telephone justice is the spectacle of judges pandering to the press. This problem is exacerbated by television and the media. The clearest example is O. J. Simpson's criminal trial. Trial court judge Lance Ito became an overnight celebrity. In fact, some onlookers came to view him as a caricature after *The Tonight Show* featured the "Dancing Itos" and *Saturday Night Live* impersonated him.[50]

We will never know precisely how the presence of television cameras in the courtroom influenced the way Judge Ito conducted the case. In fact, Judge Ito himself probably could not say for sure if he remained impervious to the media's presence. In the late 1920s, a group of scientific researchers undertook a study at a Western Electric manufacturing plant.[51] The purpose of the study was to measure worker productivity under various changes in working conditions such as breaks and working hours. The result was that production increased, not due to the changes in conditions, but rather to the researchers' presence.[52] This finding is known as the Hawthorne Effect: observation affects human behavior.[53] I would add an obvious corollary: broadcasting magnifies the effect.

We cannot expect judges to be immune from this phenomenon just because they sit behind benches and wear robes. Sometimes the effect may seem benign. For example, a judge may better artic-

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49. *See generally* Martha W. Barnett, *The 1997-1998 Florida Constitution Revision Commission: Judicial Election or Merit Selection*, 52 FLA. L. REV. 411 (2000).

50. Amy Fredette, *Ito to Speak at Law School Graduation*, ARIZ. DAILY WILDCAT, May 8, 1996. *See also* Kolkey, *supra* note 7.

51. *See generally* RICHARD GILLESPIE, MANUFACTURING KNOWLEDGE: A HISTORY OF THE Hawthorne Experiments (1991).

52. *Id.*

53. *See* WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF ENGLISH LANGUAGE (new deluxe ed. 1996) ("[Hawthorne effect is] a positive change in the performance of a group of persons taking part in an experiment or study due to their perception of being singled out for special consideration.").

ulate a decision to ensure that even lay observers understand it. A judge may be especially patient with litigants when the cameras are rolling, with the result that onlookers come away with increased respect for the legal system.

The influence may be more subversive when a judge consciously or subconsciously takes into account how home viewers may react to substantive and procedural rulings. As one commentator has observed, the "fact is, television leads to prominence, or at least to notoriety, and either form of fame can benefit lawyers and judges. Nothing feeds the ego as well as the comment, 'Hey, I saw you on TV last night.'"[54] Therefore, "[t]he judge may also feel constrained to orate for the hungry audience and commentators rather than simply rule. The net effect is to increase hugely the length and cost of legal proceedings."[55]

To be sure, there are advantages to permitting cameras in courtrooms. In fact, Indiana now offers online telecasts of appellate oral arguments,[56] and in one carefully tailored situation we allowed the filming of an in-depth documentary on our juvenile court system.[57] Like the federal courts, however, we have been cautious about becoming part of *Court TV*.[58] This is not to shield court proceedings from the public eye, but to ensure that entertainment never takes precedence over justice.

V. How Judge Jackson Fits In

The latest, and most blatant, example of pandering for media attention did not even involve courtroom cameras. After U.S. District Court Judge Thomas Penfield Jackson ordered the breakup of software behemoth Microsoft, we learned that on several occasions he spoke at length to reporters while the case was still in pro-

54. Rory K. Little, *That's Entertainment! The Continuing Debate over Cameras in the Courtroom*, FED. LAW., July 1995, at 28, 34.

55. *Id.*

56. *See, e.g.*, Scott Olson, *And—Action! Cameras to Begin Rolling in Appellate Courts; Media Petition for Same in Trial Courts*, IND. LAW., Sept. 3, 1997 (reporting that cameras are permitted in the supreme and appellate courts' proceedings in Indiana).

57. That film, IN THE CHILD'S BEST INTEREST (WTHR-TV Indianapolis, news documentary 2000), won the 2001 Edward R. Murrow Award for best documentary and was widely praised for offering valuable insight with great sensitivity. *Avid Congratulates Winners of Edward R. Murrow Award; News Stations Using Avid® Solutions Receive Awards in Principal Categories*, BUS. WIRE, June 27, 2001.

58. *See* David Pitts, *Issues of Democracy: Protecting Judicial Independence: A Global Effort; an Interview with Judge Cynthia Hall, U.S. Court of Appeals, Ninth Circuit* 18 ELECTRONIC J. OF U.S. INFO. AGENCY 1 (Dec. 1996), *at* http://www.usinfo.state.gov/journals/itdhr/1296/ijde/pitts.htm.

gress.[59] He compared Bill Gates to Napoleon, calling him "a smart-mouthed young kid who . . . needs a little discipline" and likened other company executives to drug traffickers and gangland killers.[60]

Judge Penfield also criticized the D.C. Circuit, describing the judges as supercilious and lacking trial experience, and accusing them of making up facts and embellishing the law with superficial scholarship.[61] He justified his astonishing public remarks by noting the great public interest in the Microsoft case and saying, "I thought it would be useful to give some sense as to who I am and what I have done."[62]

The D.C. Circuit took the extraordinary step of ordering two days of oral argument en banc.[63] Although Microsoft did not ask to argue the issue of whether Judge Jackson should be removed from the case due to bias, the court allocated three hours for the parties to address that point.[64] During the argument the judges did not mince words in conveying their displeasure over Jackson's behavior.[65] Chief Judge Harry Edwards summarized their collective concerns by saying, "[T]he system would be a sham if all judges went around doing this."[66]

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59. *Excerpts from Second Day of Arguments in Appeal of the Antitrust Case*, N.Y. TIMES, Feb. 28, 2001, at C6 [hereinafter *Excerpts from Second Day of Arguments*]; Stephen Labaton, *Judges Voice Doubt on Order Last Year to Split Microsoft*, N.Y. TIMES, Feb. 28, 2001 at A1, A6. Judge Jackson spoke to half a dozen reporters about the case and spent ten hours reviewing a journal he maintained during the trial in tape-recorded discussions with *New Yorker* reporter Ken Auletta. Judge Jackson also talked about the merits of the case in at least five public speaking engagements. *Id.* The D.C. Circuit determined that Judge Jackson's earliest interviews occurred after the parties had presented all evidence, but two months before the court issued its findings of fact. United States v. Microsoft Corp., 253 F.3d 34, 108 (D.C. Cir. 2001).

60. *Microsoft Corp.*, 253 F.3d at 110; Labaton, *supra* note 59.

61. James V. Grimaldi, *Microsoft Judge Lashes Out; Jackson Says Panel That Will Hear Appeal 'Made Up' Facts*, WASH. POST, Jan. 9, 2001, at E11.

62. Waldmeir, *supra* note 40.

63. Michael Brick, *U.S. Appeals Court Overturns Microsoft Antitrust Ruling*, N.Y. TIMES, June 28, 2001; James V. Grimaldi & Carrie Johnson, *Once More Before the Bench: As* U.S. v. Microsoft *Resumes on Appeal, a Guide to the Proceedings*, WASH. POST, Feb. 25, 2001, at H01.

64. Labaton, *supra* note 59.

65. *Id.*

66. *Excerpts from Second Day of Arguments*, *supra* note 59. Judge Edwards preceded this comment by saying, "There are lots of things that we think and feel about advocates and parties during the course of a proceeding. That doesn't mean . . . we're going to run off our mouths in a pejorative way, because there is an appearance problem." *Id.* He later said "It's beyond the pale . . . how can anyone assume anything other than the worst?" *Id.*

Even this remarkable scenario did little to dampen Judge Jackson's zeal for bashing Microsoft. A month later, he recused himself from a discrimination case against the company, but took the opportunity for further assaults against it.[67] In his order, he described Microsoft as "a company with institutional disdain for both the truth and for rules of law" and its top managers as "not averse to offering specious testimony to support spurious defenses."[68]

The D.C. Circuit had the last word. On June 27, 2001, it issued an opinion concluding that Judge Jackson had violated at least three principles of judicial conduct[69] and that the violations were "deliberate, repeated, egregious, and flagrant."[70] It disqualified him retroactive to the imposition of the remedy, saying, "Judges who covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media."[71]

Judge Jackson was playing at telephone justice. He was not holding out for a call from the KGB, but he was hoping for a few fawning newspaper pieces. Fortunately, this was a judicial aberration and the D.C. Circuit expressed sufficient outrage to make other judges think hard before granting media interviews on open cases.

CONCLUSION

Justice Hugo Black wrote that the judiciary has authority and responsibility to "stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[72] Chief Justice Rehnquist has expressed similar sentiments regarding the obliga-

67. Carrie Johnson, *Microsoft Judge Is off Bias Case*, WASH. POST, Mar. 13, 2001, at E03.

68. *Id.*

69. United States v. Microsoft Corp., 253 F.3d 34, 106 (D.C. Cir. 2001) ("Canon 3A(6) which requires federal judges to "avoid public comment on the merits of . . . pending or impending" cases; Canon 2 which orders judges to "avoid impropriety and the appearance of impropriety in all activities," and Canon 3A(4) which forbids "*ex parte* communications on the merits of pending or impending proceedings.").

70. *Id.*

71. *Id.* at 117-120 (describing "this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire. . . .") (quoting LEARNED HAND, THE SPIRIT OF LIBERTY 132-33 (2d ed. 1953)).

72. Chambers v. Florida, 309 U.S. 227, 241 (1940).

tion of a good judge, saying that he or she must constantly strive to do what is legally right, especially when the result is not the one the Congress, the president, or "the home crowd" wants.[73]

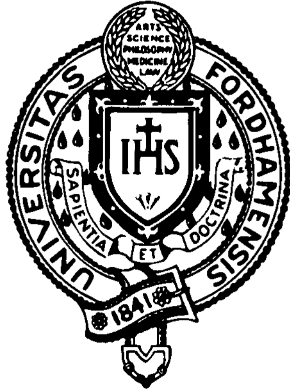
Judges set standards for the way law is practiced, and we must strive to be models of integrity and professionalism.[74] Judges who succumb to telephone justice threaten the judicial independence that underlies the rule of law.

Plutarch, in *The Roman Republic*, described this downward spiral of events: "The abuse of buying and selling votes crept in, and money began to play an important part in determining elections. Later on, this process of corruption spread to the law courts and then to the army. And finally, the Republic was subjected to the rule of emperors."[75] We cannot compromise our commitment to judicial independence by allowing external influences, however subtle or apparently benign, to creep into judicial decision-making.

73. William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 PEPPERDINE L. REV. 227, 229-30 (1980).

74. Randall T. Shepard, *What Judges Can Do About Legal Professionalism*, 23 WAKE FOREST L. REV. 621, 622 (1997).

75. *Justice for Sale*, *supra* note 2.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