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GOLDEN GATE UNIVERSITY SCHOOL OF LAW

INTEGRITY AND ETHICS IN WESTERN ADJUDICATORY SYSTEMS:

TOWARD A STANDARD

RUTH S. ASTLE, J.D.

SUBMITTED TO THE GOLDEN GATE UNIVERSITY SCHOOL OF LAW,
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Foreword

“Democracy is good. I say this because other systems are worse.”¹

There are some assumptions that go into this dissertation. There is an assumption that Democracy is a positive institution; the Rule of Law is good; Judicial Review is essential to a functioning democracy; and the Independence of the Judiciary is required for a fully functioning democracy. The Government must obey the law and all persons have the obligation to respect and obey the law provided the law is democratically instituted. Fairness is good and determined by an unbiased and independent application of the law. Liberal Constitutionalism is good and leads to a fair and impartial judiciary.

The philosophical concepts of the Age of Reason are the underpinnings of the ideas of fairness, impartiality, and independence that are advocated in this dissertation.

While other concepts are recognized and respected, the policy recommendations and concerns in this dissertation are based on the Western principals of ethics, integrity and the rule of law.

¹ Nehru, Jawaharlal, The New York Times, January 25, 1961 – Indian statesman and First Prime Minister (1947 – 1964). He was educated in England and became a lawyer.

Integrity and Ethics in Western Adjudicatory Systems

Toward a Standard

Introduction:

“We hold these truths to be sacred and undeniable; that all men are created equal and independent, that from that equal creation they derive rights inherent and inalienable, among which are the preservation of life, liberty, and the pursuit of happiness.”²

As a global community comes closer to a reality in which there is an international rule of law, a borderless standard of ethics and integrity in adjudication must be developed. Since the beginning of structured adjudication of disputes, ethics and integrity have been an integral part of the process. Even in biblical law, ethics and integrity are emphasized³. Now, that many legal disputes, especially in the commercial arena including business and trade disputes, are being adjudicated between and among many different states and individuals from many different states, with many different formal and informal adjudicatory systems, the need for ethics and integrity in those systems is essential for the world community to have confidence in the adjudicatory outcome. Those engaged in multi-national business and trade want to be sure that disputes will be fairly and impartially judged. This document will discuss the essential elements in designing and evaluating an adjudication system that

² Thomas Jefferson 1743 – 1826 Rough Draft of the American Declaration of Independence, in J. P. Boyd et al. Papers of Thomas Jefferson vol. 1 (1950), p 423.

³ Moses acted as an inspired lawgiver and judge of Israel (Exodus 18:13). In the time of the elders of the Hebrew people became the “judges”. In the book of Judges, the title: Shophitim is applied to the leaders of Israel, and would seem to indicate that their right to judge was given as divine (Judges 10:2, 3). The Holy Bible, Revised Standard Version, 1962, World Publishing Company, 1 Kings 3:16 to 3:27.

will promote ethical conduct and integrity in both the system and in the individuals that adjudicate, administer and use the system. If we go forward without an agreement on what is necessary to assure ethical conduct, world citizens can not be assured that their rights will be protected. Corruption and decay clearly undermine the confidence of the world community when a system of adjudication cannot assure its participants that judgments reached are free of such negative elements. Ethics and integrity are fundamental to the concept of fair judgment. Ultimately, faith and trust in adjudication promotes world peace and free commerce.

The Copenhagen criteria⁴ are the rules created by the European Union that establish whether or not a nation is eligible to join the European Union. The criteria require that a state have institutions to preserve democracy, human rights, a market economy and that these institutions are sustained by the rule of law.⁵ The rule of law sets forth the criteria that governmental authority may only be exercised through written laws that are adopted through an established procedure so that there are no arbitrary actions or rulings in individual cases. In order to satisfy this requirement, a number of central European states have had to drastically change their judicial procedures. They have had to make governmental actions public and introduce accessible appeal procedures⁶.

⁴ These membership criteria are a result of the June 1993 European Council in Copenhagen, Denmark.

⁵ From the Copenhagen Presidency conclusions, June 1993.

⁶ Constitutional Amendment re: Judiciary, Parliament and Financial Decentralization in Bulgaria September 21, 2006 www.government.bg. Candidate county Macedonia reported on February 12, 2008 that 46 newly elected judges were sworn in. The Court Council elected the new judges to build a judicial

At the Madrid European Council, December 1995, the European Union agreed that membership criteria also must include the integration through the adjustment of the state seeking accession of its administrative structures so that the requirements of membership are effectively implemented through appropriate administrative and judicial structures.

While using the European Union Copenhagen criteria as a starting point, the elements of integrity and ethics discussed here should serve as a basis for any adjudicatory system that seeks to have the confidence of the world community as well as the confidence of those who are subject to it.

system of judges that are independent, accountable and aimed at realizing civic rights and freedoms. The criteria for electing these judges was that they would act legally, conscientiously, and honestly. This action is a herald of European judiciary in Macedonia toward NATO and EU accession and aimed to overcome the long procedures and court proceedings that existed in the past.
www.vlada.mk/english/News/February2008/ei_2-2-2008.htm.

Definitions:

Many concepts and words are associated with the ethical conduct of judges and what makes a good judge. Words such as patience, tolerance, respect and temperance are often used. Sometimes words like accuracy, informed, mature and analytical are also used. But the words most often associated with judges are: ethics and integrity.

Ethics:

Ethics is generally defined as the principal of right or good conduct, or a body of such principles. It is the study of the general nature of morals and of the specific moral choices to be made by the individual in his relationship with others; the philosophy of morals ... The moral sciences as a whole including moral philosophy and customary, civil and religious law. Ethic is any set of moral principles or values. Ethical is generally defined as: in accordance with accepted principles of right and wrong governing the conduct of a group.⁷ The word is derived from the Greek *ethike/ethos*, meaning moral custom. In Latin, *ethica* and *ethice*, had the same meaning.⁸

⁷ The American Heritage Dictionary of the English Language, William Morris, Editor, Houghton Mifflin Company, Boston.

⁸ Ibid.

The legal definition of ethics⁹ is: usages and customs among members of the legal profession, involving their moral and professional duties toward one another, toward clients and toward the courts; that branch of moral science which treats the duties which a member of the legal profession owes to the public, to the court, to his professional brethren and to his client.¹⁰ What is generally called the "ethics" of the [legal] profession is [created] by consensus of expert opinion as to necessity of professional standards.¹¹

Integrity:

Integrity is the rigid adherence to a code of behavior; probity. A synonym is honesty. The word is derived from the Latin, *integritas*, completeness, purity.¹²

The legal definition of integrity¹³ is: soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with probity, honesty and uprightness.¹⁴

⁹ Black's Law Dictionary, Revised Fourth Edition, West Publishing Co. St. Paul, Minn. at pages 1039 and 1040.

¹⁰ *Kraushaar v. La Vin*, 42 N.Y.S. 2d 857, 859.

¹¹ *Cherry v. Board of Regents of University of State of New York*, 289 N.Y. 148.

¹² Black's Law Dictionary at pages 653 and 654.

¹³ *Id.*, at page 947.

¹⁴ *In re Bauquier's Estate*, 88 Cal. 302; *In re Gordon's Estate*, 142 Cal. 125

Democracy

Democracy was born in Greece in about the 5th Century BCE. The dictionary definition is government by the people, where the supreme power is vested in the people or the people's representatives (representative democracy) selected under a free electoral system. Modernly, with the complexity of society, direct democracy where everyone has the opportunity to participate directly in the process is no longer viable. Abraham Lincoln's Gettysburg address is often quoted to define democracy as a government "of the people, by the people and for the people. Democracy has been described as the institutionalization of freedom. Modern democracy includes constitutional government, civil and human rights, and equality and due process before the law. The majority rules with legal limits to protect the minority.

Constitutionalism

Constitutionalism is key to a fair, impartial and reliable judicial system. Constitutionalism requires a written document of law by which a nation's citizens agree to live¹⁵. The structure of a Democratic Constitution requires an accountable

¹⁵ Actually, the United Kingdom does not have an integrated written constitution, however, it is agreed that it has a constitutional Government. The documents that make up the constitutional government include the Magna Carta (1215), Bill of Rights (1689), and the Act of Settlement (1701). See Satori, Giovanni (1987) *The Theory of Democracy Revisited*, Chatham, New Jersey, Chatham House.

government with limits on its power. Giovanni Satori (1987)¹⁶ and Louis Henkins (1996)¹⁷, both recent scholars discussing liberal constitutionalism include judicial (constitutional) review and an independent judiciary as requirements for a democratic government. An independent judiciary allows citizens to challenge laws or government actions that are not in accord with the constitution and affords remedies to citizens. In the United States, *Marbury v. Madison* (1803) 5 U.S. 137 established the supreme court's right to judicial review of congressional action based on constitutional requirements of separation of powers.

Civil Law Legal System

The Civil Law Legal System is the predominant system of law in the world. It is prevalent in most of Europe (including Spain), Central and South America, parts of Asia and Africa. In the United States, Louisiana, and in Canada, Quebec, are civil law jurisdictions. Civil law primarily involves deductive reasoning¹⁸. It starts with abstract rules and codes and judges must apply these abstract rules and codes to the various cases before them.¹⁹

¹⁶ Ibid. Satori, Giovanni, *The Theory of Democracy Revisited*.

¹⁷ Henkin, Louis, *Foreign Affairs and the United States Constitution* (1996) 2nd Edition Oxford and Clarendon Press, New York.

¹⁸ Deductive reasoning is defined as "the process of reasoning that starts from statements accepted as true and applied to a new situation to reach a conclusion. mdk12.org/instruction.

¹⁹ Apple, James G., Chief, Interjudicial Affairs Office, Federal Judicial Center and Deyling, Robert P., Judicial Fellow, Administrative Office of the United State Courts (1994-1995) *a Primer on the Civil-Law System*.

The roots of the Civil Law Legal System are in Roman law, Canon law and the ideas of the Enlightenment.²⁰ In the 17th and 18th centuries, the civil law system was based on expressions of humanism²¹, natural law²², democracy and the rule of law. As the concept of the nation-state developed, so did a need for certainty, and unity in the law. The need for certainty was influenced by a mercantile society that required a rational approach to organization and structure of the law.²³ The French Napoleonic Code (code civil)²⁴, the German Code (Burgerliches Gestzbuch of 1900), and the Swiss Codes were the most influential forms of the civil law systems.

Civil Law Legal Systems are inquisitorial²⁵ (not adversarial). The judge has the role of supervising the collection of evidence, which is primarily submitted in writing. There are no civil juries, so the judge is the finder of fact.²⁶ Civil Law judges do not interpret the law, they follow predetermined legal rules.²⁷

²⁰ Ibid.

²¹ Humanism as a philosophy grew up in 16th Century Italy and France with an emphasis on rational thought and the potential for individual achievement. Cambridge Encyclopedia edited by David Crystal, Cambridge University Press.

²² Natural law is the law which prescribes how people ought to behave, the source of which is supposed to be nature itself, independent of and superior to human legislation.

²³ Id., at page 14

²⁴ Ibid. The comparable code in Spain is theCodigo Civil.

²⁵ An inquisitorial system is a legal system where the court or part of the court is actively involved in determining the facts of the case as opposed to an adversarial system where the role of the court is solely that of an impartial referee between parties. en.wikipedia.com.

²⁶ Id., at pages 26, 27, and 28.

²⁷ Id., at page 6.

Judges in civil law systems are part of civil service. Service as a judge is selected as a career with attendance at a special training institution.²⁸ Civil law judges (generally) study law at a faculty of law following graduation from High School with no intermediate education in liberal arts and no exposure to other subjects taught as University.²⁹

The civil law system divides that law into “public” and “private” law. Public law is the effectuation of public interest by state action and usually includes Constitutional law, Administrative law and Penal (criminal) law³⁰. Private law is the enforcement of private rights including property rights, contracts between individuals, and the rights of successors.

Common Law Legal System

If the Civil Law Legal System can be called science, then the Common Law Legal System can be called an art. The Common Law Legal System is the legal system in the United Kingdom, United States Federal Law and all states except Louisiana, Canadian Federal Law and all provinces except Quebec, New Zealand,

²⁸ Id., at page 37.

²⁹ Id., at page 38.

³⁰ John H. Merryman, *The Civil Law Tradition* p 92 (2nd edition 1985).

Australia (both federal and individual states), South Africa, and India.³¹ The Common Law Legal System involves inductive reasoning³². A decision in a case currently pending depends on decisions in previous cases and affects the law to be applied in future cases.³³ When there is no authoritative statement of the law, common law judges have the authority and duty to “make” law by creating precedent. The body of precedent is called “common law” and it binds future decisions.³⁴ This concept is called *stare decisis*.³⁵ Of course, in actuality, the common law legal system is more complex with applicable statutory law, constitutional law, and regulatory law coming into play.

The common law legal system is rooted in custom and developed before written law. Common law judges rely on precedent to create legal norms. Sometimes

³¹ en.wikipedia.org.

³² Inductive reasoning is defined as “a type of thinking in which we begin with example(s) and move to a rule in order to come to a conclusion. www.edsn.net.”

³³ Eric Engle, Introduction to Common Law Lexnet.bravepages.com.

³⁴ en.wikipedia.org.

³⁵ *Stare decisis* is from the Latin for “to stand by that which is decided.” Lectlaw.com An appeal court’s panel is “bound by decision of prior panels unless an en banc decision, supreme court decision, or subsequent legislation undermines those decisions.” *United States v. Washington*, 872 F.2d 874, 880 (9th Cir. 1989). However, the doctrine of *stare decisis* does not prevent reexamining and, if need be, overruling prior decisions, “It is . . . a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy . . . ‘is based on the assumption that certainty, predictability, and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.’ ” (*Moradi-Shalal v. Fireman’s Fund Ins. Companies* (1988) 46 Cal3d 287, 296). A party urging overruling a precedent faces an onerous task. Some factors that dictate how onerous include the age of the precedent, the nature and extent of public and private reliance on it, and its consistency or inconsistency with other related rules of law.

statutes embody the rules developed through the judicial decision-making process.³⁶ Cases are reported and inductive reasoning is used to apply the "rule of the case" to the matter pending. The jury system was influential in creating the common law system. The right to a jury trial was immortalized in the Magna Carta in 1215.³⁷ The inn of court³⁸ grew up as an institution to train lawyers in the art of adversary practice and advocacy.³⁹

Common law judges are selected as part of a political process for a specific judicial post and their position is for life or for a specific term with no system of advancement to higher courts as a reward for service. Common law is studied as a post graduate subject for a specific degree that allows the person to practice law.⁴⁰

The common law judge grabs for the case book, the civil law judge grabs for the code book. The common law judge searches for a creative answer deciding which

³⁶ Dainow, Joseph, *The Civil Law and the Common Law: Some Pointes of Comparison* 15 *Am J. Comp Law* 419 (66-67).

³⁷ Apple, James G., Chief, Interjudicial Affairs Office, Federal Judicial Center and Deyling, Robert P., Judicial Fellow, Administrative Office of the United State Courts (1994-1995) *a Primer on the Civil-Law System*. P. 33.

³⁸ The Inns of Court are the professional associations to which every English barrister (and those judges who were formerly barristers) must belong. They have supervisory and disciplinary functions over their members. Each Inn of Court is a self-contained precinct within London, where barristers traditionally train and practice. Each Inn trains students to become barristers. There are four basic Inns of Court, Schools of Law: Lincoln's Inn, Middle Temple, Gray's Inn, and Inner Temple. In the 1970's United States Chief Justice Warren Burger let a movement to create Inns of Court in the United States. The United States Inns of Court are groups of judges, practicing attorneys, law professors, and students who meet regularly to discuss and debate issues relating to legal ethics and professionalism. en.wikipedia.org.

³⁹ Apple, James G., *Id.*, at page 34.

⁴⁰ *Id.*, at page 36..

precedents to apply to the specific facts in a case;⁴¹ the civil law judge applies the law as codified.⁴²

⁴¹ Id., at page 37.

⁴² Id., at page 36-37.

Contents

This document will cover the following topics:

- I. An historical analysis and overview of western philosophical and political thought will introduce the problems and issues in the area of ethics and integrity in adjudication of disputes.

- II. An analysis of what exists now through the examination of the existing literature in this area will be accomplished.

- III. An independent research project will target a comparison of existing solutions in both common law and civil law systems to the considerations of ethics and integrity in a variety of western adjudicatory systems including adjudication in Spain, and the United States.

This independent research project supports the guidelines that are proposed and discussed herein. One of the unexpected findings is that many adjudicators in the United States do not know the contents of the written code of ethics to which they are subject or where to find the code if they want to consult it. Much of this information is decentralized. This clearly makes the education of judges, especially in the United States, a greater priority than first expected.

All of the interviews from Spain are transcribed and relevant parts are included and referred to in the text. A number of Interviews with interesting anecdotes from the United States are transcribed and referred in the text.

IV. The major substance in this dissertation will be a discussion of what needs to be included in an adjudicatory system to insure the rule of law and ethics and integrity in the adjudication of disputes. A discussion of the required elements in any adjudicatory system will be included. The required elements are listed below, including independence, education, disclosure and disqualification, economics and enforcement.

Required elements:

There are a number of required elements needed to achieve a common standard in western multinational ethics and integrity for adjudication. There are many alternative ways within those requirements that will reach the ultimate goal of assuring ethics and integrity in a given adjudicatory process. Some flexibility can be afforded to reaching these goals based on local socio-political conditions. However, there are essential elements that must be addressed in some meaningful way. These include the following:

1. Independence: Administrative (and judicial) adjudication involve governmental actions effecting commercial and personal interests, often taken by

agencies or ministries. The independence of the decision maker (judicial independence) is key to a system that operates ethically and with integrity. How adjudicators are selected is also important to insure independence. A limit on participation in political activity must also be examined.

Political Interference in the Courts is discussed as part of the element of Independence.

2. Qualifications and Eligibility: There are various qualifications and eligibility requirements for becoming a judge. As a part of the discussion of qualifications, different ways to become a judge are discussed including American Indian Tribal Judges and non lawyer judges.

3. Enforcement and Misconduct: A written code of ethical conduct and appropriate penalties for violating that conduct is required. In Spain, the code of conduct is centralized and essentially enforced by The General Council on Judicial Power under the New Organic Law of Judicial Power, which has criminal sanctions associated with misconduct. In the United States, the code (usually designated as canons) are decentralized and enforced by the jurisdiction in which the judge presides.

4. Disclosure: In order to insure ethical conduct, a system for disclosure should be included. This involves disqualification and recusal of adjudicators to

adjudicate a particular case when it would be inappropriate for that adjudicator to participate in a particular matter (e.g. A matter in which the adjudicator has an interest in the outcome). Disclosure, either general disclosure or specific disclosure in a matter before the judge, should be required to keep the process transparent to the public. A system of disclosure and disqualification has not been developed in Spain. There are circumstances where a judge in Spain is required to disqualify him/herself, but because of the strict prohibitions against extra-judicial activities, disclosure is not required.

5. Fair Process: The system must incorporate fair dealing, access, predictability, consistency and transparency. These goals can be accomplished in a variety of ways, many of which will be examined.

6. Education: The adjudicator, the participants and the public must be educated in the value and use of the system. The education of adjudicators in Spain is centralized and accomplished, in most cases, before the person takes a position as a judge. The education of adjudicators in the United States is decentralized and accomplished after the person takes a position as a judge.

7. Economics: Another consideration for creating an independent and ethical adjudication process is economics. This includes funding the system, paying the adjudicators and other economic considerations.

8. Participants' Bill of Rights: The participants in the system must have written guidelines that assure an impartial adjudication of their matter.

9. Judicial Immunity - Civil and Criminal Liability: Some form of limited immunity for activities directly related to adjudication must be included and discussed.

10. Adjudicators' Bill of Rights: In order to insure adjudication without corruption, the adjudicators must have some minimal standards to which they adhere in their work.

V. Conclusion: Policy recommendations for both the United States and Spain will come out of the analysis of the material examined.

A Brief History of Adjudication

“We can chart our future clearly and wisely only when we know the path which has led to the present.”⁴³

The first time a third person was vested with the authority to decide a dispute, a judge was created and adjudication began. One of the most famous Bible stories illustrates this concept. King Solomon lived from 970 to 928 BCE. It was the practice for people with disputes to come before the king and the king would decide the issue brought before him. When two women got into a dispute as to who had the live baby and whose baby had died, they came before King Solomon and asked him to decide who should get the live baby. King Solomon said, “Bring me a sword.” Then he declared, “Divide the living child in two, and give half to the one, and half to the other.” One of the women agreed to this outcome, but the other told the king that she would rather give up her claim than to see the baby killed. The king then awarded the child to the woman who was willing to give up her claim, because he knew she was the mother. “And all Israel heard of the judgment which the king had rendered; and they stood in awe of the king, because they perceived that the wisdom of God was in him, to render justice.”⁴⁴ This passage has a number of lessons associated with it. One of the primary lessons is that justice and fairness requires wisdom. King

⁴³ Stevenson, Adlai, from a speech given in Richmond, Va., September 20, 1952 – United States Democratic politician. He was educated at Princeton, became a lawyer, and took part in several European Missions for the State Department (1943 – 45). He was elected Governor of Illinois (1948), and helped to found the United Nations in 1946. He served as the United States Delegate to the United Nations from 1961 to 1965. (Cambridge Encyclopedia)

⁴⁴ The Holy Bible, Revised Standard Version, 1962, World Publishing Company, 1 Kings 3:16 to 3:27.

Solomon found himself as the judge by virtue of his position as king. Tribal leaders are often found in the position of judges.

The Old Testament of the Hebrew Bible contains the Book of Judges. Here the judges were chief magistrates and tribal heroes such as Deborah, Gideon, and Samson whose acts of leadership are described.⁴⁵ There was no modern separation of powers. These heroes were unelected non-hereditary leaders who once in office acted more like a king than strictly as a judge. There is an attempt in the Book of Judges to draw moral lessons based on good and bad examples of leadership including judicial acts. Judges are considered leaders and leaders are often considered judges.

Socrates is reputed to have said, "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and decide impartially."⁴⁶ This statement was quoted in an article in the California Lawyer magazine, April 2006. The article, entitled Judicial Misconduct; Judges Behaving Badly, by Michael Paul Thomas discusses the types of judicial misconduct under the California Code of Judicial Ethics. They include discourtesy or intemperance; bias or prejudice; impairing examination of witnesses; improper comments on evidence; partiality and prejudging; receiving evidence out of court; coercing waiver of rights; *ex parte* communications; coercing or improperly communication with the jury; and public comments about pending matters. These more modern standards were set forth in

⁴⁵ Id. Holy Bible Revised Standard Version 1962 Judges 2:10 – 3:6.

⁴⁶ No actual reference can be found.

People v. Black (1957) 150 Cal. App. 2d 494. The court stated that “A judge should be temperate, attentive, patient, [and] impartial. A judge should be courteous to counsel, ... and also to all others appearing or concerned in the administration of justice in the court.” “In exercising the firmness necessary to the dignity and efficient conduct of court proceedings, a judge’s attitude should not reflect undue impatience or severity toward either counsel, litigant, or witnesses.” And, maybe most importantly, “Justice should not be molded by the individual idiosyncrasies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his [or her] judgments, or spectacular or sensation in the conduct of the court.”

Marcus Tullius Cicero, the Roman lawyer, jurist, political leader, great orator and brilliant writer, is a foundational scholar for the English, American, and European judicial systems (*jus civile*). However, Roman judges were essentially finders of fact. The Roman legal system had two types of civil judges: magistrates (*praefor*) that determined what law would apply to a particular case and judge of the trial (*judex*). A magistrate was elected for one year and served as form of public service without pay⁴⁷. A magistrate was an upper class citizen with prestige. The judge of the trial was a paid position. Roman judges did not make law and a judge’s decision had little precedential value. Roman judges had no special juristic training and there is a

⁴⁷ Apple, James G., Chief, Interjudicial Affairs Office, Federal Judicial Center and Deyling, Robert P., Judicial Fellow, Administrative Office of the United State Courts (1994-1995) a Primer on the Civil-Law System.

debate as to whether or not they even knew the law.⁴⁸ The tradition of judges as fact-finders remains in civil law systems through the magistrates and in common law systems through courts of equity and administrative courts.

In the 6th Century CE Emperor Justinian ordered a manuscript prepared of the Roman Laws (*Corpus Juris Civilis*). This was the foundation of Civil Law Legal Systems in Europe and European based legal systems through colonization.

Prior to Roman Law being imposed on most of Europe through Roman conquest, the Ancient Irish had judges called Brehon⁴⁹. Brehon date from before the 9th Century and their position was hereditary. They acted as arbitrators, umpires and expounders of law (law was an oral tradition). Disputes were referred to a Brehon and court was held in the open. Brehon were regarded as mysterious, half-inspired persons and a divine power kept watch over their pronouncements. They had to undergo a well-defined course of study and training. A Brehon had to be good at memorizing the law (reminiscent of civil law judges today). The Irish had great respect for Brehon and for justice. Brehon did not have immunity. A Brehon had to be very careful for he was himself liable for damages, besides forfeiting his fee for a false or unjust judgment. The Brehon, who decided a law case had to deposit a

⁴⁸ Roman Judges, Case Law and Principles of Procedure, Ernest Metzger, Law and History Review, 22.2 (2004, 39 Pars. 30m May 2006. <<http://www.historycooperative.org>>

⁴⁹ A Smaller Social History of Ancient Ireland, P.W. Joyce, MA, LLD 2nd Edition, Logness, Green and Co. London 1908, Revised 1997, Chapter IV.

pledge of five ounces of silver in case of dispute with his judgment.⁵⁰ The intention was clearly to give a dissatisfied litigant some leverage if he wished to get a judge's verdict re-examined. A judge who refused to give a pledge for his judgment was barred from further practice in the territory.⁵¹

Kings and Nobles had to follow the law just like other members of the community, but could have their own Brehon.⁵²

Courts in the Middle Ages were divided among church courts, manor courts, and royal courts.⁵³ Judges in church courts were specially appointed clergy who heard cases involving other clergy and church matters. In general, only literate citizens could appear in church court. The church courts were seen as more lenient⁵⁴. Manor courts were the most plentiful in continental Europe and England.⁵⁵ The Manor court, a secular court, was presided over by the Lord/Baron⁵⁶ or his

⁵⁰ Kelly, Fergus, *A Guide to Early Irish Law*, Dublin Institute for Advanced Studies, 1988.

⁵¹ *Ibid.*

⁵² *Ibid.*, also a lecture by Catherine Duggan, Esq. *Ancient Irish Law: An Enlightened Approach to Dispute Resolution*, January 25, 2008, for the Irish Literary & Historical Society, San Francisco, California.

⁵³ *History of Civilization in France* by F. Guizot, *The Prime Minister of France*, Translated by William Hazlett, Vol. III, New York, D Appleton & Co. 1877.

⁵⁴ Inquisitors as judges were to hear matters of excommunication and salvation.

⁵⁵ *Cambridge Medieval History*, Vol. 3 pp. 458 – 484 – Feudalism by Paul Vinogradoff 1924.

⁵⁶ A literary reference to a manor court can be found in Shakespeare's *Much Ado About Nothing*. The character Dogberry (the constable in charge of the watch) brings Don John (the bastard brother of Don Pedro) before Lionato, (the Governor of Messina) to be judged for his treachery and deceit. William Shakespeare, *The Complete Works of Shakespeare*, edited by Wells, Stanley and Taylor, Gary, The Oxford Shakespeare, Oxford University Press, 1988, at page 542 et seq.

representative such as a steward. There are historical vestiges of this system even now in horseracing. Horse races are judged by stewards whose decisions are subject to appeal. Royal courts were reserved for the most serious crimes and civil matters. Only the Royal courts could impose death as a sentence. Later ecclesiastical franchises were granted to laymen who acted as police masters (magistrates) as well as judges. They became *jugeurs* or bailiffs and studied law and precedent.

More modernly, a judge is defined as a public officer with authority to adjudicate disputes. In some jurisdictions, such as the United States, this authority is limited to a single branch of government (e.g. Administrative Law).

During the Age of Reason (Enlightenment) many of our modern social and political concepts were born. During the French and American revolutions in the 1700's intellectuals began to think about and examine standards by which rulers governed. Baron de Montesquieu⁵⁷ (1689 – 1755) wrote *On the Spirit of Laws*. He discussed the rights of individuals and proposed a three part government – legislative, executive and judicial in order to separate the powers of the government. He was preceded slightly by John Locke⁵⁸ (1632 – 1704) whose ideas were used by Thomas

⁵⁷ Charles-Louis Montesquieu de Secondat, Baron de la Brede et de was a French philosopher and jurist, born near Bordeaux. He was educated at Bordeaux; he became an advocate, but turned to scientific research and literary work. He lived in Paris beginning in 1726, then spent some years traveling and studying political and social institutions. His best-known work is the comparative study of legal and political issues, *De l'esprit des lois* (1748, *The Spirit of Laws*), which was a major influence on 18th century Europe. See *The Cambridge Encyclopedia* edited by David Crystal, Cambridge University Press 1990.

⁵⁸ John Locke was an English empiricist philosopher, born at Wrington, Somerset. Educated at Westminster School and Oxford, in 1667, he joined the household of Anthony Ashley Cooper, later first Earl of Shaftesbury, and became secretary of the Board of Trade, lived in France for health reasons from

Jefferson⁵⁹ (1743 – 1826) in writing the Declaration of Independence. According to Locke, individuals had natural rights including life, liberty and property. He averred that the government was required to protect those rights and that citizens had the right to rebel against an unjust government.

As a result of the philosophy of the Age of Reason, Thomas Jefferson proposed that legal checks be put in the hands of the judiciary.⁶⁰ This resulted in three parts of government that were to balance one another.

Ethics

In philosophy, ethics is the theoretical study of human values and conduct.⁶¹ There are two main branches: normative ethics and meta-ethics. Normative ethics deals with such topic as what sort of life we should live, and what things have ultimate value. This dissertation will deal primarily with normative ethics. Meta-ethics asks whether or not the values set forth in normative ethics are objective and

1675 to 79, then moved to Holland. He returned to England in 1689, and became a commissioner of appeals, retiring in 1691 to Essex, where he died. His major work, the *Essay Concerning Human Understanding* (1690), accepted the possibility of rational demonstration of moral principles and the existence of God, but its denial of innate ideas, and its demonstration that 'all knowledge is founded on and ultimately derives itself from sense . . . or sensation', was the real starting point of British empiricism. His treatises *On Government* (1689) were also influential, and his sanctioning of rebellion was an inspiration for both American and French revolutionaries. See *The Cambridge Encyclopedia* edited by David Crystal, Cambridge University Press 1990.

⁵⁹ Thomas Jefferson was a United States statesman and third President (1801-1809) of the United States. He was born in Virginia, educated at the College of William and Mary, and became a lawyer (1767). He joined the revolutionary party, took a prominent part in the first Continental Congress (1774), and drafted the Declaration of Independence. He was Governor of Virginia (1779 – 81), Minister in France (1785), and Secretary of State (1789), Vice President under Adams (1797 – 1801), and then became president. Events of his administration included the Louisiana Purchase from France in 1803, and the prohibition of the slave trade. *Cambridge Encyclopedia*.

⁶⁰ Thomas Jefferson to James Madison 1789 ME 7:309.

⁶¹ *The Cambridge Encyclopedia* edited by David Crystal, Cambridge University Press 1990.

investigates what types of justification normative judgments might have. The objectivist claims that there are some ultimate principles of rightness and wrongness which should govern the behavior of all societies, independent of what a society might believe. The relativists claim that nothing is absolutely right or wrong, even if all cultures believe the contrary. The subjectivists claim that because many moral disputes appear irresolvable, there is no objective justification in ethics.

The objectivist position has infiltrated international law in its position that slavery, genocide, piracy, torture, and significant war crimes are universally wrong (*jus cogens*/peremptory norms). In adjudicating disputes, as an objectivist, this dissertation takes the position that there are some basic rules of ethics and integrity that are required to hear disputes fairly and to gain the confidence of society in the resolution of those disputes. Deontological ethics refers to any normative ethical theory that emphasizes principles of rightness and wrongness independent of good and bad consequences, in contrast to teleological⁶² or consequentialist theories. So, a deontological theory might imply that slavery is unjust even if it might maximize a particular society's welfare. Deontologists usually ground moral judgments in notions such as natural rights or personal dignity.

⁶² Teleological ethics is any normative ethical theory which takes the goodness or badness of the consequences of an action as fundamental in determining whether or not it is right or wrong. Teleologists also typically provide a theory about what sorts of things are in fact good. They claim that an action is right if it produces at least as much goodness as any alternative. Egoists such as Thomas Hobbes (1588 – 1679) maintain that one ought to produce maximum goodness of oneself. Utilitarians such as John Stuart Mill (1806 – 73) insist that the right action must produce maximum goodness on balance for everyone affected, even if that requires choosing less goodness for oneself. See: The Cambridge Encyclopedia edited by David Crystal, Cambridge University Press 1990.

Basic Ethical Constructs

James Madison wrote in the Daily Advertiser, The Federalist No. 10 (Thursday, November 22, 1787) that “No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” This is a clear statement about the responsibility of a judge to recuse him/herself when there is a chance that the judge has an interest in the outcome of a matter. Madison goes on to state that “With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time;” . . . Madison is arguing for a way to keep partisan factions from controlling the government. The solution was to divide the power into three branches of government under a constitution that reflected and respected individual rights. Both the French and American Revolutions were fought to guarantee that the government would act in the best interest of its people.

Review of the Existing Literature

There is not much in the literature that treats integrity and ethics in western adjudication in this comprehensive manner. However, there is significant literature in many of the subsections of the dissertation.

Overview:

Two books that began the consideration of ethics, the rule of law and history were *On the Rule of Law: History, Politics, Theory*, by Brian Z. Tamanaha, Cambridge University Press, Copyright 2004, printed in the United Kingdom and *Ethics and the Rule of Law* by David Lyons, Cambridge University Press, Copyright 1984, printed in the United States. These two books are a foundation for the ideas surrounding the rule of law and discussions of the nature of law and its relationship to social morals and norms.

Lyons covers basic philosophy concerning moral judgment and the law. It includes law as social fact; morality; welfare, justice and distribution; legal coercion and moral principle; liberty and law; and the rule of law. He makes the distinction between the justice of laws and the justice of law to application of specific cases. That is why fair process is important to discuss and why fair process is the foundation to acquire respect and compliance for the law. Fair process tends to yield fair results.

Tamanaha observes that when the rule of law is understood to mean that the government is limited by the law, it is a universal good. Everyone is better off, no matter where they live, if government officials operate within a legal framework. He further posits that it is necessary to maintain a balance that requires self-restraint to respect legal limitation on the government. Both the United States and Spain adhere to the rule of law. Although both countries have problems reconciling theory with practice, the rule of law is a generally accepted cultural value and tradition.

Spain:

The main book that put the Spanish legal system into context⁶³ was Shetreet, S. and Deschenes, J. (eds.). *Judicial Independence: The Contemporary Debate*, copyright 1985, Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster. Printed in the Netherlands. Chapter 26, entitled: Spain by Professor A. Beltran Pelayo was the framework for the material on how the Spanish judicial system is constructed.

The chapter starts with a general introduction and overview about the new Spanish constitution ratified in 1978 and the Organic Law of Judicial Power under the new Organic Law 1/1980 and how the new Organic Law implements the new Spanish constitution. Each statement is connected to a specific Article of the Constitution or a section of the New Organic Law.

⁶³ Many of the interviews with judges and attorneys in Spain supplied the same or similar information, but not in a comprehensive framework.

Then there are sections on Judges and the Executive, Judges and the Legislative Order, Duration and Nature of Judicial Appointments, Removal, Transfer and Discipline of Judges, The Press and the Courts, and Standards of Behaviour. These sections served as the basic information concerning the structure of the Spanish Judicial system and the role of judges in Spain.

Ways to Become a Judge:

There is a Law Journal article entitled: Appointing judges the European Way. (Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges) by Mary L. Volcansek, Fordham Urban Law Journal, January 1, 2007, which takes a very provocative position. This article looks to some of the same philosophical underpinnings of judicial power as this dissertation. However, it advocates a civil service model for selection of judges as found in France.⁶⁴

The article finds that the virtue of the civil service model is its focus on judicial training. Also, that in the tension between independence and accountability, the European civil service model comes down firmly on the side of independence.

⁶⁴ And of course, Spain, as well as Austria, Finland, Germany, Greece, Italy, the Netherlands, Portugal, and Sweden.

While it is practically impossible to disagree with this well documented and well reasoned article, it has two problems. One is that it does not target the election of judges, which is the biggest threat to the independence of the judiciary in the United States, and it does not tackle the problem of the cultural bias in the United States toward the idea that election and democracy are synonymous.

Economics:

Another important paper is from the University of Chicago, The Law School, John M. Olin Law & Economics Research Paper Series, Paper No. 376; and Duke University Law School Legal Studies Research Paper Series, Paper No. 178: entitled: Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate by Stephen J. Choi, Murray and Kathleen Bring Professor of Law, New York University School of Law, G. Mitu Gulati, Professor of Law, Duke University School of Law, and Eric A. Posner, Kirkland and Ellis Professor of Law, University of Chicago School of Law, copyright 2007 by Choi, Gulati and Posner. This paper systematically studies judicial salaries, prestige, and other benefits of the position against such variables as quality of decisions and quantity of decisions. While the paper concedes that judges are generally paid less than attorneys in private practice of law, it suggests that salary does not dictate quality or quantity. In fact quantity seems to be related to whether or not a judge has job security with those judges with less job security producing more decisions and disposing of more cases. The paper also finds that there is no evidence

that higher salaries helps improve independence. However, the empirical results provide some support for salary increases in states where judges face a meaningful risk of termination (through election). This gives some support to the contention that judicial elections do not yield the best judicial officers when evaluated by quantity and quality of decision making.

Judicial Misconduct:

The Georgetown Journal of Legal Ethics: Judicial Misconduct by Alex Brauer, Summer 2001 is a survey of cases from the previous four years where judges have violated one or more of the Canons of Ethics and have been disciplined as a result of the violation. The article is divided into four parts: 1. Campaign Misconduct; 2. *Ex Parte* Communications; 3. Inappropriate Behavior; and 4. Corruption and Theft. The author gives us an overview of the various types of misconduct and the possible consequences of that misconduct over a number of states and jurisdictions.

Another important article is Corruption within the judiciary: causes and remedies by Mary Noel Pepys, Comparative analysis of judicial corruption, www.Transparency.org. The author is a US-based senior attorney, with a specialization in the rule of law, specifically international legal and judicial reform. She categorizes the different factors that contribute to judicial corruption, including undue influence by the executive and legislative branches; social tolerance of corruption; low judicial and court staff salaries; fear of retribution by political leaders and other powerful

individuals, and the public and the media. She then does an comparative analysis of judicial corruption. She ranks the United States as relatively high on perceived corruption scale and Spain as relatively low. However, the author concludes that the public often views its judiciary as more corrupt than it actually is.

Judicial Recusal:

Amanda Frost, an assistant professor of law at the American University Washington College of Law wrote a law review article published in the *Kansas Law Review*, Vol. 53, 2005 titled: *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*.⁶⁵ She argues that the laws governing judicial recusal have failed at protecting the reputation of the judiciary. She points to Justice Antonin Scalia's failure to recuse himself from hearing a case involving a named plaintiff (Richard Cheney, Vice President of the United States) in spite of the fact that Scalia had vacationed with Vice President Cheney shortly after the Supreme Court agreed to hear the case. She proposes reforms including requiring judge to respond to recusal motions and requiring judges to make a written statement why he or she has decided to recuse him or herself. This analysis is well reasoned and well documented and points out that recusal is an important part of maintaining impartiality in the judiciary.

⁶⁵ Frost, Amanda, Assistant Professor of law at the American University Washington College of Law, *Kansas Law Review*, Vol. 53, 2005 titled: *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*

Independent Research Project

“There must be, not a balance of power, but a community of power; not organized rivalries, but organized peace.”⁶⁶

Scope of Inquiry

This project attempted to discover the experiences of judges in the United States and other countries, such as Spain, in the areas of ethics and integrity. This project is valuable because it recognizes that real life experiences may be different than what is codified in statutes or ethical canons. While most jurists would deny that political considerations are part of the adjudication process, political considerations are actually an integral part of the adjudication process based primarily on the way the systems are created and operated. Political pressure is built into adjudication, albeit to different degrees based on the construct of the system. While there are safeguards in place, they may not be adequate to protect the integrity of the process. Personal integrity, while sometimes a problem, is less of a factor when it comes to systemic decision-making.

⁶⁶ Wilson, Woodrow, Address to the United States Senate, January 22, 1917 – United States statesman and 28th President (1913 – 1921). He became a lawyer, university professor, and president of Princeton University. He was elected governor of New Jersey in 1911. His presidency saw World War I, Prohibition (of alcohol), and women’s voting rights. He was a champion of the League of Nations (the predecessor of the United Nations. (Cambridge Encyclopedia)

Methodology

The initial methodology was to create an instrument (questionnaire)⁶⁷ that is designed to direct a personal "interview" so as to illicit information about both ethical rules of the system and issues of personal integrity. The information is anecdotal and not intended to have any statistical significance⁶⁸. The questionnaire was used to make sure that each person was asked the same or similar questions. The interviews were conducted with judges in systems where the rules were familiar and with judges in systems where the rules are not as familiar.

After a number of interviews were completed, guided by the questionnaires, both by person to person interviews and mailed or emailed questionnaires, a decision was made to continue only with person to person or telephonic interviews⁶⁹.

16 judges from the United States⁷⁰, one from Israel⁷¹, and two from Spain⁷² were interviewed in this manner, using the questionnaire as a template for the questions asked at the interview⁷³.

⁶⁷ The questionnaire was developed in English and Spanish. A copy of the questionnaires follows this section.

⁶⁸ The respondents to the questionnaire were not randomly selected and do not represent all possibilities. Mainly they were chosen based on access to the respondents and their willingness to answer the questions openly and honestly.

⁶⁹ Many of the interviews are transcribed and attached as Appendix 1 A (Barcelona) and B (United States).

⁷⁰ Judges in the United States were from several different jurisdictions including the Office of Administrative Hearings General Jurisdiction and Special Education units, Public Utilities Commission,

Initial results in the interviews with judges in the United States revealed an unexpected result. A surprising number of judges in the United States were incorrect in their answers concerning what governs their conduct. Many adjudicators were very vague about the ethical codes and canons to which they were subject. They knew that there were such codes and canons, but could not state where those codes and canons could be found, or the specific wording of the codes or canons. From this information, the conclusion can be drawn that the education of judges in the United States, concerning the ethical obligations of a judge, need to be emphasized in an educational forum.

Four attorneys from the United States and eight from Spain were also interviewed based on the questionnaire (The actual sample questionnaires follow). The perception of the ethical issues by the Spanish attorneys are included in the discussion of the Spanish system of adjudication and the problems that exist for them in the civil law legal system model.

Fair Employment and Housing Commission, United States Immigration Court, Unemployment Insurance Appeals Board, and San Francisco and Nevada County Superior Court.

⁷¹ This interview was not used in this dissertation.

⁷² The interviews with the judges in Spain are included *Infra* at page 179 et seq. Appendix 1 A.

⁷³ Two judges and eight attorneys were interviewed in Spain. One judge was interviewed from Israel. Sixteen judges and four attorneys from the United States were interviewed. The sixteen judges came from various jurisdictions including: California Office of Administrative Hearing (both the general jurisdiction judges and a special education division judge), Unemployment Insurance Appeals Board, Public Utilities Commission, Commission of Fair Employment and Housing, San Francisco County and Nevada County Superior Court bench, Juvenile Traffic Court and United States Immigration Court. The attorneys were familiar with court proceedings, including one family law attorney, one criminal and civil litigation attorney, one law professor, and one workers' compensation attorney.

The interviews also revealed that judges are subject to subtle political pressure as opposed to direct pressure or offers of bribes. Analyzing subtle political pressure is clearly more difficult and vague than analyzing direct attempts to influence the outcome of a case.

16 judges and four attorneys from the United States were interviewed. Five of the judges either did not know where to find the code of ethics or were wrong about where to find the code of ethics. Two others were unsure and gave answers like: "they are on my desk somewhere." All of the judges and attorneys knew that there were sanctions for not following code of judicial ethics that applied to them, but only one gave the correct range of possible disciplinary action.

Only one judge reported an attempted bribery. Judge #5 is the only judge that reported an attempted bribe. The judge was hearing a Bureau of Automotive Repair case in December 2004. It involved "cleanpiping"⁷⁴ and other misconduct concerning improper smog tests. The Bureau did three days of video taped surveillance, and cleanpiping occurred on all three days. The only defense the respondent's offered was that he "did not believe the tape." Judge #5 was on vacation the week before Christmas 2004. While the judge was gone, a Christmas card came in the mail addressed to the judge. The return address was from a woman in Fresno.

⁷⁴ Cleanpiping is the use of a vehicle that can pass a smog check in lieu of the vehicle that needs to be tested.

One of the clerical staff opened the top of the envelope, which is the practice for all mail sent to the office for any one of the judges. The clerical staff person glanced inside the envelope and saw what appeared to be checks. The envelope also contained a Christmas card and a note. The clerk immediately brought the matter to the attention of the Director of the Office of Administrative Hearings and the Presiding Judge of the Sacramento Office. Then the legal Department for the Department of General Services⁷⁵, the Director of the Department of General Services and the California Highway Patrol⁷⁶ were all consulted. It was decided not to tell Judge #5 until the decision in the matter was completed and mailed. The judge ended up revoking the respondent's Smog Station Certificate as well as his personal "ADR" registration. Respondent's smog business was shut down completely. After the decision was signed by Judge #5, the judge was informed of the attempted bribe⁷⁷. The Director then sent a letter to the parties (respondent was represented by counsel) informing them of the events and letting them know that the card, note and checks were turned over to the authorities for possible prosecution. The note and card purported to be from respondent's sister. The envelope contained two money order for \$500 each with a promise of "9 more" within two months if they got a good "Christmas present".

⁷⁵ The Department of General Services is the parent agency of the Office of Administrative Hearings.

⁷⁶ The California Highway Patrol is the law enforcement agency invested with the responsibility for protecting the judges and other state employees.

⁷⁷ Originally there was a question from the Highway Patrol, whether or not the judge had solicited the bribe. The idea that the judge (especially this judge) would solicit a bribe was quickly discarded.

Only three judges reported attempted direct political interference. These stories are anecdotal, but represent real attempts at political pressure.

Political pressure was put on the judges as a group by the powerful speaker of the California House of Representatives.⁷⁸ He wanted a particular person hired as a Superior Court Commissioner, a position hired by the judges. The judges decided to give the position to another candidate. The Speaker threatened to hold up an appropriation bill for an additional judge's seat that the court needed to lessen the work load of the judges. When the court did not hire the person he wanted, he did, in fact, hold up the appropriations bill for several months.

Judge # 2 reported an incident of direct attempted political pressure. A State Assembly person's aid attempted to contact Judge #2 by telephone to demand that a respondent in a Department of Insurance disciplinary matter be granted a continuance. The continuance was requested untimely (at the hearing), the Attorney representing the Department of Insurance objected, and there was no good cause as required by law to grant the continuance request. The hearing proceeded and the Department proved cause for disciplinary action and the respondent's license to conduct insurance business in California was revoked. The Assembly person put her demand in writing that the matter be reheard, with an implied threat. The letter was forwarded to the Director of the Office of Administrative Hearings, who handled the matter. It was

⁷⁸ None of the stories told by any of the judges or attorneys has been independently verified. They meant as anecdotal experiences of the person interviewed and not presented or represented as true.

shocking to Judge #2 that an elected official would get involved in trying to influence the outcome of a case.

Judge # 10 reported that there was an incident of attempted political pressure when the judge received a phone call from the mayor's office requesting that a traffic citation be pulled. The judge never got the citation.

Fourteen judges reported experiences with *ex parte* communications. Judge #11 was involved in an *ex parte* communication from a family member while acting as a general jurisdiction judge for the Office of Administrative Hearings. Judge #12 was hearing a case involving the licensing of an elder care facility. The matter did not finish in the time allotted so a continued hearing date was scheduled. During the hiatus, Judge #12 was contacted by the judge's nephew who left a voice message inquiring whether or not Judge #12 was acting as the judge in the Department of Social Services matter. Judge #12 did not return the nephew's call. Judge #12's nephew grew up in Orange County California and was in college in Boston at the time of the communication. Judge #12 was unaware of any relationship the nephew may have with the respondent's in the case or the case, for that matter. Judge #12 wrote a letter to the parties disclosing the communication. Judge #12 indicated in the letter that the judge could provide a fair and impartial hearing, but was required to

disclose the communication and make it part of the record.⁷⁹ It turns out that the judge's nephew was going to college with a relative of the respondents.

There is a problem with *ex parte* communications with *In Propria Persona*⁸⁰ (In Pro Per) litigants. Four judges reported that *ex parte* communications from In Pro Per litigants were an ongoing problem. Help for In Pro Per litigants in Family law matters and small claims matters is available at the court house in some jurisdictions.

Nine judges reported that they were the subject of a recusal motion or recused themselves. A few examples follow:

Judge #10 had to recuse him/herself when a friend from high school called the judge at home to discuss the friend's child's traffic citation. When the judge realized that it was a citation that would come before the judge, Judge #10 cut off the conversation and recused him/herself from hearing the matter.

Judge #2 had to recuse him/herself once when the respondent was a friend's brother, once when the attorney for the judge's son in a civil matter, was representing a respondent, and once when a physician who offered an expert opinion in a case had been the subject of a prior disciplinary hearing.

⁷⁹ Judge #12 was required to disclose the communication and make it part of the record pursuant to Government Code section 11430.10 et seq.

⁸⁰ An *In Propria Persona* litigant is one that attempts to represent him/herself. This is fairly common in family law and in administrative law, very seldom occurs in criminal law or complex civil litigation.

There was a situation where Judge #13 had heard testimony from a number witnesses in a case, when respondent's attorney asked a police officer who was testifying if the officer knew a certain lawyer. After the witness finished, Judge #13 asked respondent's attorney why the question was asked. Apparently there were going to be allegations concerning the competency of that attorney. Judge #13 had been involved in a case prior to becoming a judge that gave him knowledge that the attorney was in prison. The respondent asked Judge #13 to recuse him/herself. Judge #13 denied the motion, stating that the judge could be fair and since he knows the attorney to be a crook, knowledge of that fact was in the respondent's favor. However, after considering the matter further, Judge #13 did recuse him/herself and granted a continuance in the matter.

Five judges and two attorneys were the subject of personal threats. Most of the threats were from angry parties. Judge #9 was threatened in a hearing when a "loud, angry, hostile, confrontational, large, aggressive guy" refused to calm down and disrupted the hearing. Two were in writing after a decision⁸¹.

Attorney #16 felt threatened by a judge, when the judge, in a settlement conference, told her to settle for a very low amount and when she would not agree to do so, he unilaterally terminated the settlement conference. However, that is a "legal threat" not a personal threat.

⁸¹ One threatening letter was reported by Judge #2, and one was reported by Judge #19. The letter to Judge #19 referred to the fact that she was pregnant during the hearing.

Two judges were offered inappropriate gifts. Judge #10 was offered a gift of "worry beads" from a grateful father. The judge politely declined. Judge #2 along with one or two other judges in the office received a Christmas card from a respondent's attorney who fairly regularly appeared in cases heard by the office, with an insert that indicated a goat and three rabbits had been donated to a charitable organization in the judges' honor. This is a violation of the Judicial Canons, since gifts of this kind are not allowed. Judge #2 wrote a letter to the attorney acknowledging the kind thought, but declining the donation in the judge's honor.

One judge and two attorneys reported experiencing biased statements. All of the biased statements had to do with being a female. One attorney was essentially ignored and called "the Lady in the blue dress," and placed at the end of the calendar even though she had been the first to arrive.

Another attorney was treated rudely by a judge, as if she was inexperienced (she was not), and did not know the value of her case. One of the judges referred to the same judge and reported that he is biased against women, and has been rude to her in judges' meetings. Neither the attorney, nor the judge reported this conduct to the appropriate disciplinary commission for fear things might get worse. The attorney did testify at State legislative hearings on bias against women in the courtroom.

Questionnaire

Name (optional):

Court:

Appointing Authority or Election:

Term of Office:

Who pays your salary?

Is employment dependent on any type of review?

Who makes final decision?

Is there an appeal?

To whom is the appeal directed (Who decides the appeal)

What are the general grounds of appeal?

Are you subject to a code of ethics or conduct?

Are there sanctions for violating the code? What?

Is there a rule against *ex parte* communications?

Have you ever experienced an incident of political pressure?

Explain:

Have you ever experienced an improper communication?

Explain:

Have you ever experienced an offer of a favor or bribe? (Quid pro Quo)

What action did you take?

Have you ever had to *recuse* yourself from hearing a matter?

Explain.

Have you ever heard a case in which you had an interest, monetary or otherwise?

Explain:

Are there any rules in place that insure objectivity? Impartiality?

Is there any method in place to assure consistency?

May I contact you for more specific information?

Cuestionario

Nombre (opcional)

Juzgado:

Autoridad que le eligió para el cargo o fecha de elección:

Legislatura de su puesto:

Quien paga su nómina?

Depende su puesto de trabajo de algún tipo de control o evaluación?

Si es así, quien toma la decisión final?

Se podría recurrir?

A quien sería dirigido éste recurso?

Cuales podrían ser motivos para que fundamentar dicho recurso?

Existe un código ético al cual Vd. esté sujeto?

Existen sanciones por infringir dicho código? Cuales son?

Hay alguna norma que prohíbe las comunicaciones *ex parte* ?

Alguna vez ha experimentado algún incidente de presión política?

Explique:

Alguna vez ha experimentado algún incidente involucrando comunicaciones indebidas?

Explique:

Alguna vez se ha encontrado en una situación en la que se le ofrezca un favor o un soborno? (Quid pro Quo)

Si se dio el caso, que es lo que Vd. Hizo?

Alguna vez ha tenido que retirarse de algún proceso?

Explique:.

Ha sido Vd el juez en algún caso en el que haya tenido algún interés, financiero o de algún otro tipo?

Explique:

Existe algún reglamento que para asegurar su objetividad? Imparcialidad?

Existe algún método para asegurar la coherencia de sus decisiones?

Le importaría si le contactáramos en caso de que se necesitara más información?

Independence of the Judiciary

“A friend to everybody and to nobody is the same thing.” Spanish Proverb⁸²

Independent and professional adjudicators are the foundation of a constitutionally guaranteed fair and impartial judicial system. Independence does not mean that judges can make decisions based on personal preference or bias, but that judges are free from political pressure to make decisions under the law, precedents, and constitution, even if those decisions contradict the government or powerful parties involved in the case being heard or public opinion.

An essential element of democracy is that judges are independent from political pressure of elected officials and legislatures. This guarantees the impartiality of judges. Judges rulings must be impartial, based on the facts of an individual case, legal arguments and relevant law without any restraints or improper influence. These principles ensure equal protection and due process for all.

The power of judges to review public laws and declare them in violation of the nation's constitution serves as a protection against government (executive and legislative) abuse of power, even if the government is elected by a popular majority. Judges must rest their decisions on the law, not on popular or political considerations.

⁸² The International Thesaurus of Quotations, compiled by Tripp, Rhoda Thomas, Thomas Y. Crowell Company, New York 1970, 453, Impartiality, 8.

Judges' decisions must be subject to review by other judges and final decisions can rely on a panel of judges.

There are a number of ways that judges are selected. In the United States most judges are appointed or elected. In Spain and the civil law legal systems most judges are selected through an examination process.⁸³ No matter how a judge becomes a judge, he/she must have job security or tenure, guaranteed by law, so that decisions can be made without concern for pressure or attack by those in positions of authority. This also requires professional judges with adequate education, training and wages. Public trust in the court systems independence and impartiality is a principal source of legitimacy. Unlike the legislative and executive branch, party politics should not have a place in judicial decision making.

A nation's courts are not immune from public commentary, scrutiny and criticism. Freedom of speech belongs to all – judges and critics of judges as well. However, there are limitations to a judge's freedom of speech.

To insure impartiality, judges are bound by a written ethical code. A judge is required to step aside (recuse themselves) from deciding a case in which they possess a conflict of interest.

⁸³ See Different Ways to Become a Judge and Independence of the Judiciary, *Infra* at pages 125 to 133.

Judges in a democracy cannot be removed for minor complaints, or in response to political criticism. Instead, they should only be removed for serious crimes or serious and intentional acts in violation of ethical codes through an independent process such as impeachment or disciplinary proceedings.

An independent judiciary assures citizens that court decisions are based on laws and constitutions, not shifting political power or the pressure of a temporary majority. An independent judiciary must make decisions rooted in the constitutional protection of the minority and the individual. The independent court system serves as a safeguard of people's rights and freedoms.

In the United States the appointment process of federal district judges, appellate court justices and Supreme Court justices commence with a political process. The president of the United States, on the recommendation of his advisors, nominates a candidate for a specific position. That nomination has to be voted on by the Senate. When a Supreme Court justice retires or resigns, an opening on the court gives the president an opportunity to appoint someone who shares his views politically. When Supreme Court Justice Lewis F. Powell, Jr. resigned in 1987, President Ronald Reagan had an opportunity to appoint a judge to the highest court who shared his conservative agenda.⁸⁴ Such an appointment to the Supreme Court has an impact long after the presidency has transferred hands to others, with other

⁸⁴ Bork Confirmation Battle, A historic document from September 15, October 9 and 13, 1987. www.cqpress.com.

political agendas. President Reagan's first choice, Robert H. Bork, was rejected by a Senate vote of 42-58. Bork had been a judge on the United State Court of appeals for the District of Columbia.⁸⁵

In an opening statement to the Senate Judiciary Committee, Bork summarized his "philosophy of judging" as neither liberal nor conservative. However, Bork's record revealed that he was a conservative.⁸⁶ The Supreme Court had been equally divided among justices who supported an activist role in matters of social policy such as affirmative action and women's rights (including a woman's right to choose abortion) for a number of years before Justice Powell's resignation and those justices that favored strict construction of the constitution.⁸⁷ Justice Powell had been considered the pivotal justice in decisions affecting social policy, siding frequently with the activists.

Bork's statements on abortion and his decisions on the appeals court suggested he would have tilted the court toward the conservative strict constructionist side. Bork spent four years as United States solicitor general. In 1973, he fired special Watergate prosecutor Archibald Cox following President Nixon's order after Attorney General Elliot L. Richardson and Deputy Attorney General Will D. Ruckelshaus had resigned rather than carry out the order. The incident was dubbed

⁸⁵ Id., at page 717.

⁸⁶ Id., at page 718.

⁸⁷ Ibid.

the “Saturday Night Massacre” and prompted the introduction of impeachment proceedings against President Nixon.⁸⁸ Bork left the justice department in 1977 to teach at Yale University. He returned to Washington D.C. to practice law until President Reagan appointed him to the United States Court of Appeals in 1982. Bork liked to be in the public eye. He gave interviews, wrote extensively and gave testimony before congress. At a 1981 appearance before the Senate Judiciary subcommittee, Bork stated that the Supreme Court’s 1973 decision in *Roe v. Wade*⁸⁹, which established a woman’s right to choose abortion based on privacy, was “an unconstitutional decision, a serious and wholly unjustifiable usurpation of state legislative authority. [The decision] is by no means the only example of such unconstitutional behavior by the Supreme Court.”⁹⁰ Bork rejected the right of privacy in a 1984 decision upholding a Navy policy prohibiting homosexual activity.

In 1977 Bork criticized the Supreme Court under Chief Justice Earl Warren for historic civil rights advances and new protections for criminal defendants.⁹¹

A battle over Bork’s confirmation ensued. Civil Rights groups launched a campaign against confirmation.⁹² A lobbying effort began by both liberal and

⁸⁸ Id., at page 718 – 719.

⁸⁹ *Roe v. Wade* 410 U.S. 113 (1973) – A women’s right to choose abortion (at least in the first trimester) is protected by the United States Constitution implied right to privacy.

⁹⁰ Id., at page 718.

⁹¹ See *Miranda v. Arizona* (1966) 384 U.S. 436. *Miranda* Warnings were developed as a reaction to police abuse of defendants’ Fifth Amendment constitutional rights.

conservative groups. A vigorous opposition to Bork's nomination was conducted by such groups as the American Civil Liberties Union, Common Cause, the AFL-CIO, and the Leadership Conference (an umbrella group of some 180 civil rights organizations.)⁹³

The Senate confirmation hearings took on harsh political overtones when Senate Majority Leader Robert Dole (Republican from Kansas) accused Judiciary Chairman Joseph R. Biden, Jr. (Democrat from Delaware) of stalling the nomination. The debate on Bork's appointment had become a partisan political matter.

The hearings gave the public an opportunity to witness a debate over legal philosophy.⁹⁴ The right of privacy, equal protection, freedom of speech, and due process of law were the subjects of debate. While Bork tried to defend himself and President Reagan's administration tried to support him, Bork's nomination was defeated on the floor of the Senate after the Judiciary Committee voted 9 – 5 to send the nomination to the floor of the Senate with a recommendation against confirmation.⁹⁵

⁹² Id., at page 719.

⁹³ Ibid.

⁹⁴ Id., at page 720.

⁹⁵ Id., at pages 720 and 717.

After a second nomination of Douglas H Ginsburg, was withdrawn because he confirmed that he had smoked marijuana in college and as a law professor, President Reagan nominated Anthony M. Kennedy, a judge on the United States Ninth Circuit Court of Appeals for twelve years. Justice Kennedy was an experienced judge and a moderate (mainstream) conservative. His nomination was passed by the Senate easily.⁹⁶

In the United States the judicial branch is seen as balancing the legislative and executive branches. Once the judge is appointed to the federal bench, the appointment is for life. That fact is what protects the judiciary from further political interference. But the process of appointment is clearly political.

Spain

Spain experienced a shift from a state whose institutional system conformed to the principles of unity of power under a dictatorship (of Franco) to a state that embraced social and democratic law under a form of parliamentary monarchy⁹⁷. In 1978, Spain adopted a new constitution. The Spanish Constitution⁹⁸ instituted the General Council of Judicial Power. The Spanish Constitution affirms that justice

⁹⁶ Id., at pages 720 and 721.

⁹⁷ Pelayo, Beltran A. Spain Chapter 26, p 314 Judicial Independence: The Contemporary Debate, edited by Shetreet, S. and Deschenes, J. Copyright 185 Marinus Nijhoff Publishers, Dordrecht/Boston/Lancaster.

⁹⁸ Article 122 sections 2-3 of the Spanish Constitution and Organic Law 1/1980 promulgated January 10, 1980.

emanates from the people and is administered in the name of the King.⁹⁹ Judges and magistrates are the embodiment of judicial power.¹⁰⁰ Judges and magistrates are independent, immovable and responsible for, and subject only to, the rule of law.¹⁰¹ Judges and magistrates cannot be suspended, transferred or retired except in conformity with the causes and guarantees afforded by the law.¹⁰² Exclusively attributed to the courts is the exercise of the jurisdictional power commanding the execution of judgments.¹⁰³ Judges and magistrates are prohibited from becoming active in the discharge of other public offices, or from belonging to political parties or syndicates.¹⁰⁴ Jurisdictional unity forms the basis for the organization and functioning of the courts.¹⁰⁵ Judicial proceedings are public.¹⁰⁶ The courts control jurisdiction and the legality of the administrative proceedings.¹⁰⁷ The President of the Supreme Court is appointed by the King after nomination by the General Council of Judicial Power.¹⁰⁸ Judicial power is exercised in accord with the constitution and

⁹⁹ Spanish Constitution Article 117, section 1 *Id.*, at footnote 2.

¹⁰⁰ *Id.*, at endnote 3.

¹⁰¹ *Id.*, at endnote 4.

¹⁰² *Id.*, at endnote 5, Article 117, section 2.

¹⁰³ *Id.*, at endnote 6, Article 117, section 3.

¹⁰⁴ *Id.*, at endnote 7, Article 127, section 1.

¹⁰⁵ *Id.*, at endnote 8, Article 117, section 5.

¹⁰⁶ *Id.*, at endnote 9, Article 117, section 5.

¹⁰⁷ *Id.*, at endnote 10, Article 106, section 1.

¹⁰⁸ *Id.*, at endnote 13, Article 123, section 2.

statutes.¹⁰⁹ The Council acts with full independence within its own sphere. It is a constitutional organ that assumes governance over judicial power. None of its powers can be transferred to autonomous committees. It is not a political organ and cannot alter the impartiality of the judges and magistrates; it is an organ of the law, for the law¹¹⁰. The new principles established by the 1979 Spanish Constitution strengthened and emphasized judicial independence in all its aspects. Its principles include: Independence of judicial power from other powers; functional independence of judges and magistrates; independence of the judges and magistrates from the (litigating) parties; independent discipline of judges and magistrates; economic independence; the principle of judicial non-transferability; the apolitical status of judges and magistrates, civil and criminal responsibility of judges and magistrates when exercising their functions; and the introduction of an examination system for entry into the judiciary and civil service status for judges.¹¹¹

¹⁰⁹ Id. at page 315.

¹¹⁰ Id., at end note 15 See, Mario Soaz de Robles Rodriguez, Speech in the Ferrel Bulletin of Information of the Ministry of Justice (December 25, 1980) Madrid.

¹¹¹ Id., at page 316.

Disclosure

“We are so accustomed to disguise ourselves to others, that in the end we become disguised to ourselves.”¹¹²

A system for disclosure should be included in an adjudicatory system to insure that an adjudicator does not have an interest in the outcome of the matter before him/her. The ability to recuse oneself or for a party to challenge a judge for cause or use a preemptory challenge helps to insure that the decision maker can make a fair and impartial decision and that there is an appearance of fairness and impartiality.

This requires a method of disclosure. In California, judges are subject to filing Conflict of Interest statements (Form 700) every April with the Fair Political Practices Commission¹¹³. The law requires that every April each judicial officer must fill out and file a form listing all gifts, travel payments, income and spouses income, investments and ownership interest in businesses including stocks and bonds, interests in real property and rental income, loans and other financial information. The public has access to this information.

¹¹² Duc de la Rochefoucauld, Francois, Maxims (1665) – Duc de la Rochefoucauld (1613 – 1680) French moralist. He was born in Paris and was considered a cynical observer of King Louis XIV’s court. (See Charon.sfsu.edu)

¹¹³ Fair Political Practices Commission www.fppc.ca.gov

There is also an incompatible activity law that spells out what is an incompatible activity with government employment. This statute also applies to judges employed by the State of California.¹¹⁴

This disclosure system works in conjunction with the right to challenge a judge for cause, preemptory challenges and the responsibility under the ethical canons for a judge to recuse him/herself to avoid impropriety and the appearance of impropriety¹¹⁵.

Federal law requires the automatic disqualification of a Federal judge under certain circumstances. In 1994, the U.S. Supreme Court held that "Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." *Liteky v. U.S.*, 114 S.Ct. 1147, 1162 (1994). Courts have repeatedly held that positive proof of bias or prejudice is not required. The appearance of partiality is all that is required. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1988)

¹¹⁴ California Government Code section 87100.

¹¹⁵ Canon 2 of the Model Code of Judicial Conduct Canon 2B states that "A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge . . ."

Canon 3 requires a judge to "hear and decide matters assigned to the judge except those in which disqualification is required."

New Mexico Judicial Branch¹¹⁶ requires recusal if impartiality might reasonably be questioned. The advisory opinion lists six situations that require recusal. They include personal bias, prior representation, judge or family has a financial interest, prior judge, personal or business relationship, and public statements that commit to an opinion as to the issue presented.

Utah also has a statutory scheme for disqualification of judges¹¹⁷. Judges are generally not allowed to hear cases in which they are an interested party, closely related to a party, or acted as an attorney for a party. Rule 63, subdivision (b) of the Utah Rules of Civil Procedure provide for a motion to disqualify a judge. The judge is required to either grant the motion and transfer the case to a different judge or certify the motion and affidavits to a reviewing judge. If the review judge finds that the motion is timely, filed in good faith and legally sufficient, the case is assigned to a different judge.

Utah's Judicial Conduct Canons¹¹⁸ requires a judge to "enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned."

A number of cases in Utah have dealt with this issue. Prior rulings of judges are not grounds for disqualification¹¹⁹. Anger toward the parties is not grounds for

¹¹⁶ University of New Mexico, Judicial Conduct Advisory Opinion 21-400.

¹¹⁷ Utah Code Ann. 78-7-1 (2002).

¹¹⁸ Utah Judicial Conduct Canon 3 (E)(1).

¹¹⁹ *In Re Inquiry Concerning a Judge* (Utah 2003) 81 P.3d 758, 759.

disqualification because it does not demonstrate a personal bias toward a party¹²⁰, even though a public reprimand was imposed against this judge because of an improper communication with a party. The Utah court found that a judge did not have to recuse himself because his nephew had served as an incorporator and board member. The court commented that the shareholders in the company did not stand to gain anything by the court case, but that nevertheless, the judge should “disclose a family relationship whenever it arises.”¹²¹ The parties after full disclosure can waive the disqualification.¹²²

Some jurisdictions allow for a peremptory challenge.¹²³ Even though this is a peremptory challenge, the party making the challenge must file an affidavit that states that the judge is prejudiced against the party or the interest of the party so that the party, attorney, or representative of record cannot or believes that he or she cannot have a fair and impartial hearing. Each side gets only one peremptory challenge.

¹²⁰ *In Re Inquiry Concerning a Judge* (Utah 1999) 984 P.2d 997.

¹²¹ *Gardner v. Madsen* (Utah Ct. App. 1997) 949 P.2d 785, 791-92 and 792 n.5.

¹²² Utah Code of Judicial Conduct Canon 3(F).

¹²³ California Government Code section 11425.40, subdivision (d) allows the Office of Administrative Hearings and other state agencies governed by the Administrative Procedure Act that conduct contested hearings, to adopt rules and regulations to provide for preemptory challenge of the presiding officer. The rules and regulations that govern this procedure for the Office of Administrative Hearings are found at 1 California Code of Regulations section 1034.

Examples in the United States

Unfortunately, not all individual judges take their responsibility seriously to disclose information that would demonstrate that they might not be able to be fair and impartial.¹²⁴ Recently, the chief justice of the West Virginia state Supreme Court agreed to remove himself from a pending case involving Massey Energy Company. Chief Justice Maynard stepped down from the matter “despite the fact that I have no doubt in my own mind and firmly believe I have been and would be fair and impartial in this case.” But it became an issue of public perception and public confidence in the courts when photographs of the judge and the CEO of Massey Energy Co. surfaced. They were photographed in Monaco together. The friendship between the judge and the CEO had been known for a long time and was the subject of a disqualification motion in 2004.

The photographs depict the pair in a café along the Rivera and posing by the seaside. Other photographs show the men with two female companions. A special judge was assigned to hear the renewed disqualification motion when the judge recused himself.

It is hard to believe that the judge could not see how his friendship affected his ability to sit on this case. He was responsible for a swing vote of 3-2 in November

¹²⁴ San Francisco Chronicle Saturday, January 19, 2008 Nation A4 by Messina, Lawrence Associated Press

2007 that overturned a multimillion-dollar judgment against Massey (his friend's company). The appearance of propriety is as important as actual propriety.

Another interesting case involving the refusal of a judge to disqualify himself involved Justice Rehnquist. Justice Rehnquist testified before Congress as an expert when he was an Assistant Attorney General that government surveillance of citizens was constitutional. In 1972, Rehnquist refused to recuse himself from voting on *Laird v. Tatum* (1972) 408 U.S. 1. Civil rights and anti-Vietnam War groups had sued the Department of the Army for conducting secret and unconstitutional surveillance of citizens. Rehnquist had clearly stated his views when he testified before Congress. This surely demonstrates that his impartiality is in question. Rehnquist was the swing vote in a 5-4 decision against the plaintiff. Rehnquist was severely criticized about not disqualifying himself and for his views on race when he came up for conformation before the Senate for confirmation as Chief Justice.¹²⁵

In 2003, Justice Antonin Scalia and Vice President Chaney spent time duck hunting together at a private camp in southern Louisiana. This occurred just three weeks after the Supreme Court agreed to hear Chaney's appeal in a lawsuit over his handling of the administration's energy task force (December 15, 2002).^{fn} A lower court had ruled that Cheney must turn over documents detailing who met with his task force. Federal law states that a justice or judge must disqualify himself in any

¹²⁵ Supreme Court Justice Rehnquist Dies, Associated Press, September 3, 2005.

proceeding in which his impartiality might be questioned. Justice Scalia rejected any concerns about his impartiality stating that he did not think his “impartiality could reasonably be questioned.”¹²⁶

This case was not about routine matters of Cheney’s office as Vice President, but rather the plaintiffs in this lawsuit contend that Cheney and his staff violated the open-government measure known as the Federal Advisory Committee Act by meeting with lobbyist for the oil, gas, coal, and nuclear industries behind closed doors. While it is understood that judges and lawyers have friendships. However, if that person has a case pending before that judge, it would be prudent not to socialize until the matter is completed.

Professor Steven Lubet, who teaches judicial ethics at Northwestern University Law School in Illinois, indicated that it was not clear whether or not Scalia was required to recuse himself, but it is clear that there are not separate rules for long time friends. It was observed that Cheney is not the attorney in this matter, but a party and the entire purpose of the disqualification rules is to ensure the appearance of impartiality in regard to the litigants before the court. The Code of Conduct for Federal judges says that a judge should not “permit others to convey the impression that they are in a special position to influence the judge.” Going hunting with the judge that will decide a matter, in a small group over several days does convey the impression that Cheney is in a special position to influence the judge.

¹²⁶ CBS News Scalia-Cheney Trip Raises Eyebrows, Washington, January 17, 2003.

Another instance of questionable judgment of a judge involves Judge Ginger Berrigan, United States District Court Judge.¹²⁷ In 2000, Judge Berrigan taught a one-credit course for Tulane University in Greece as part of Tulane's summer study program offered by the law school. She was paid \$5,500 for teaching a course called The Judicial Protection of Human Rights: In Theory and in Practice. Judge Berrigan was not alone in accepting this position. In the past United States Court Justices Antonin Scalia, Harry Blackmun, William Rehnquist and Ruth Bader Ginsburg had the prestige and honor of this invited professorship.¹²⁸

During the same period of time, Judge Berrigan presided over a case against Tulane University where the plaintiff claimed discrimination, defamation, and retaliation. Judge Berrigan dismissed the lawsuit, which precluded a trial on the merits. Judge Berrigan did not disclose her teaching engagement to plaintiff's counsel. Plaintiff's counsel found out about the teaching position through independent source. In April of 2000, plaintiff's counsel sent a letter to Judge Berrigan seeking her recusal.¹²⁹ Judge Berrigan ignored the recusal request and on April 18, 2000, she ruled against the plaintiff, dismissing the case without a trial.

¹²⁷ Should Judge Ginger Berrigan Be Censured? Tulanelink.com/tulanelink/impeach.

¹²⁸ *Id.*, at page one.

¹²⁹ *Ibid.*

On May 2, 2000, the plaintiff filed a formal motion requesting Judge Berrigan reconsider her recusal, and/or amend her judgment, and/or allow a trial on the merits. Judge Berrigan refused to disqualify herself or alter her decision against plaintiff/in favor of Tulane University. Judge Berrigan then granted Tulane legal costs.

On September 6, 2000, Judge Berrigan's ruling was appealed to the United States Fifth Circuit Court of Appeals. All appellate courts affirmed her decision and the United States Supreme Court denied Certiorari.¹³⁰

Judge Berrigan has recused herself in the past in cases involving the American Civil Liberties Union because of past involvement with that organization. However, Judge Berrigan has refused to recuse herself from lawsuits involving Tulane University, even though she continues to have a relationship with the University.

The question arises as to whether or not judges should accept honors, awards, academic titles and paid travel from an institution, even an educational institution that appears before that judge.¹³¹ While it may not be a direct conflict of interest, it has the appearance of impropriety. While censure may be uncalled for, better judgment

¹³⁰ Id., at page 2.

¹³¹ Ibid.

on the part of a judge that finds him/herself in that position would be to recuse him/herself.¹³²

Spain

The judges and attorneys in Spain denied that a judge would be involved in a conflict of interest.¹³³

There is no disclosure system in Spain.¹³⁴ The fact that there is no disclosure system in Spain was noted in The Global Integrity Report.¹³⁵ Members of the national-level judiciary are not required to file an asset disclosure form.¹³⁶ There are regulations governing gifts and hospitality offered to members of the national-level judiciary.¹³⁷ However, there is no independent auditing of the assets because judges are not obligated to disclose their assets.¹³⁸ There are no restrictions for national-level

¹³² Model Code of Judicial Conduct, American Bar Association, Center for Professional Responsibility Canon 2A: A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities. In the comments to Canon 2A it is observed that "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

¹³³ Interview of Judge Vidal and Judge Gimeno Jubero, *Supra* at pages 180 -182 (Vidal) and 183 – 184 (Jubero).

¹³⁴ Shetreet, Shimon and Deschenes, Jules *Judicial Independent: The Contemporary Debate*, 1985 Chapter 26 written by Professor A. Beltran Relayo.

¹³⁵ Spain: Integrity Indicators Scorecard. The Global Integrity Report Globalintegrity.org/Spain/2007.

¹³⁶ *Id.*, at page 6.

¹³⁷ *Ibid.* These rules are the same for any civil servant.

¹³⁸ *Ibid.*

judges entering the private sector after leaving the government.¹³⁹ Since there are no asset disclosures, citizens cannot access the asset disclosure records of members of the national-level judiciary.¹⁴⁰ Spain does not score well in the area of regulations governing conflicts of interest or for access to asset disclosure records.¹⁴¹

Incompetence or unfitness is not grounds for removal except illness.¹⁴² Judges are required to retire at age 70. Judges in Spain are criminally responsible for their behavior. That criminal responsibility is regulated in detail. It is a crime for a judge to infringe on the exercise of his/her function.

The New Organic Law of Judicial Power fixes legitimate causes for objection to judges and magistrates (Article 419). It provides for self disqualification. There is no recourse against disqualification (e.g. no motion to disqualify). Legitimate objections to a judge include being related to a party to the fourth civil grade; kinship up to the second civil grade with lawyers of a party; accusation or denunciation by any of the parties as the author, accomplice or accessory after the fact of an offense; private accusations by the judge against the objecting party; guardianship or administrator of property of any party; tutelage or guardianship by any of the parties

¹³⁹ *Id.*, at page 7.

¹⁴⁰ *Id.*, at page 8.

¹⁴¹ *Id.*, at page 1.

¹⁴² Shetreet, at page 326.

of the judge; a suit pending with any of the parties; any interest in the matter, direct or indirect; intimate friendship; or manifest enmity.¹⁴³

Judges are strictly prohibited from participating in extra-judicial activities. They cannot exercise by themselves or through their spouse, any industry, commerce or agricultural activity. This would seem to make disclosure unnecessary. They cannot be any part of a company, or mercantile partnership as a partner or director, agent, manager or member of the board. However these prohibitions are confined within the territory of service (jurisdiction).¹⁴⁴ Resignation of the judge is required if these rules are violated. It is considered absolutely incompatible for a judge to have any employment, office, profession or activity, where compensated or not, that hinders or damages the strict fulfillment of the duties of a judge. Judges must obtain previous authorization from the General Council for any extra-judicial activity. Only teaching is an exception. Judges can be admonished if they are in debt. Judges in Spain cannot even belong to a political party¹⁴⁵. No political activities of any sort are allowed except that a judge can vote.

¹⁴³ Id., at page 328.

¹⁴⁴ Ibid.

¹⁴⁵ Id., at page 315 Also, Article 409 of the New Organic Law of Judicial Power.

Judges in Spain may publish as long as the publication is not political in nature. They can, and do, comment on judicial issues unless it is a matter still pending in the judicial system¹⁴⁶.

¹⁴⁶ Id., at page 328.

Fair Process:

Fair process in the United States is based on the Constitutional concept of due process. Due process is incorporated in the United States Constitution as part of the Fifth Amendment.¹⁴⁷ The Fifth Amendment is directed toward the federal government. Due process requirements are extended to all the states through the Fourteenth Amendment¹⁴⁸. The Supreme Court of the United States has interpreted the two clauses identically, as Justice Felix Frankfurter once explained: "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection."¹⁴⁹

Certain substantive and procedural requirements insure a fair and impartial adjudication. Procedural due process, based on the concept of "fundamental fairness", in general, guarantees the right to a fair, open and public trial conducted in a competent manner; the right to be present at the trial and rebut evidence; the right to an impartial jury or presiding officer; the right to be heard; laws must be written so that a reasonable person can understand them.¹⁵⁰ Due process also includes access to the courts, and court records; the right to prior notice of the issues and access to the

¹⁴⁷ " . . . nor be deprived of life, liberty or property, without due process of law."

¹⁴⁸ " . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

¹⁴⁹ *Malinski v. New York*, 324 U.S. 401, concurring opinion at 415 (1945).

¹⁵⁰ www.usconstituion.net.

law and procedure. Due process extends to all government proceedings that can result on an individual's deprivation of rights, including civil, criminal, parole violation, administrative hearings regarding government entitlement programs and professional licensing.

Historically due process generally referred to the regularity, fairness, equality, and degree of justice in both procedures and outcomes.¹⁵¹ The ancient Egyptians required judges to hear at least both sides of a case. The Greeks and Romans offered juries and professional orators.¹⁵²

The idea of due process in law emerged in societies that practiced accusatorial, adversarial systems.¹⁵³ The concept dates back to the Magna Carta of 1215 A.D. In Chapter 39 of the Magna Carta, the crown¹⁵⁴ agreed that "No free man shall be taken or imprisoned or disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed, not will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."¹⁵⁵

The term "due process" was first used in England during the 13th century¹⁵⁶ as the

¹⁵¹ www.faculty.ncwc.edu/mstevens, at page one.

¹⁵² Ibid.

¹⁵³ Ibid. In general, Common Law Legal Systems.

¹⁵⁴ King John of England signed the Magna Carta. See www.fordham.edu/halsall.

¹⁵⁵ The Text of the Magna Carta (1215), Chapter 39, also the Text of the Magna Carta, (1297), Chapter 29 (www.archives.gov/exhibits/featured_documents/magna_carta/translation.html)

¹⁵⁶ During the reign of Edward III of England.

definition of "law of the land." It was made part of the common law and given a natural law interpretation.¹⁵⁷ In 1704¹⁵⁸ the Queen's Bench, in the case of *Regina v. Paty*¹⁵⁹ found that all actions by the House of Commons must be by legal authority¹⁶⁰. The United States, through the colonists from Britain, used the phrase, incorporating it into the state charters and almost every document created during the American Revolution and Constitutional Convention. Due process became synonymous with fairness.¹⁶¹

Inquisitorial systems¹⁶² did not incorporate the concepts of fair process until governments were democratized and constitutionalized in the 18th century.¹⁶³

The concept of fairness incorporates not only a just and fair outcome, but everything along the line must be fair, including the gathering and presentation of

¹⁵⁷ Ibid. www.usconstitution.net.

¹⁵⁸ During the reign of Queen Anne.

¹⁵⁹ *Regina v. Paty*, 92 Eng. Rep. 232, 234 (1704.)

¹⁶⁰ The House of Commons had deprived John Paty and certain other citizens of the right to vote in an election, and committed them to Newgate Prison merely for the offense of pursuing a legal action in the courts. See Dudley Julius Medley, *A Student's Manual of English Constitutional History* (1902). This was done, ostensibly, to regulate the election of its members. Although the court found that the House of Commons had not infringed or overturned due process, John Paty was freed by Queen Anne when she prorogued (delayed) Parliament.

¹⁶¹ Ibid.

¹⁶² Ibid. In general, Civil Law Legal Systems.

¹⁶³ Ibid.

evidence.¹⁶⁴ In 1934, the United States Supreme Court held that due process is violated “if a practice or rule offends some principle of justice rooted in the traditions and conscience of our people as to be ranked as fundamental”.¹⁶⁵

Access to the courts is another issue concerning fair process. “An impartial, independent judiciary is the guardian of individual rights in a democratic society. In order for citizens to have faith in their court system, all people must have access to the courts when necessary. The author describes how this doctrine works in practice in the United States – in criminal and civil matters – and how the U.S. legal profession contributes to making “equal justice for all” a reality. He concludes the article with examples of the American Bar Association’s efforts to improve access to justice beyond U.S. borders through its international rule of law programs.”¹⁶⁶

We are reminded that when we, as citizens, relinquish a portion of our autonomy, the legal system is the guardian against abuses by the government. Citizens agree to limitations on their freedom in exchange for peaceful resolution of disputes by an independent legal system free from undue influence, which is trustworthy.¹⁶⁷ U. S. Supreme Court Justice William Howard Taft¹⁶⁸ stated in 1926

¹⁶⁴ Ibid.

¹⁶⁵ *Murray v. Hoboken Land*, 59 U.S. 272 (1855).

¹⁶⁶ Robert J. Grey, President, American Bar Association, Access To The Courts: Equal Justice For All.

¹⁶⁷ Ibid.

¹⁶⁸ United States statesman and 27th President (1909-13), educated at Yale, he became a lawyer, Solicitor-General (1890), and in 1921 he was appointed Chief Justice of the United States Supreme Court.

that "the real practical blessing of our Bill of Rights is in its provision for fixed procedure securing a fair hearing by independent courts to each individual."¹⁶⁹ One of the fundamental values of the United States system of justice is that our society depends on access to the courts, because that is where disputes are resolved peacefully.¹⁷⁰ The alternative is vigilantism and violence. While there is certainly theoretical access to the courts guaranteed by the United States Constitution and each of the 50 state constitutions, this is not enough. The practical application of the right to access is more problematic.¹⁷¹ One issue concerning access involves adequate counsel, since the court system is not easy to navigate by a citizen alone. In *Gideon v. Wainwright*¹⁷² the United States Supreme Court unanimously held that the United States Constitution required counsel be provided to indigent defendants in state felony proceedings recognizing that a fair process cannot be conducted without the aid of competent counsel. The Court has extended the indigent defendant's right to counsel to state juvenile delinquency proceedings, state misdemeanor proceedings in which actual jail time is imposed, and the first appeal to an appellate court.¹⁷³

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Id., at page 2.

¹⁷² *Gideon v. Wainwright* 372 U.S. 335 (1963).

¹⁷³ Id., at page 3.

There is also an issue concerning physical access to the courts. In 2004, the Supreme Court decided in *Tennessee v. Lane*¹⁷⁴ that the courthouse must be barrier-free and open to all. This decision has forced every courthouse and public building in the United States, including the United State Supreme Court to accommodate the disabled by installing entrance ramps, special elevators, hand rails, handicapped-accessible bathroom facility and other modifications to assure access to the courts. This also includes assistive listening devices, and sign interpreters for the hearing impaired.¹⁷⁵

Another issue involves access to legal representation for low income citizens. Nothing in the United States Constitution addresses the right to counsel in a civil case, and in fact, no such right has been implied except in a few specific kinds of cases including termination of parental rights cases.¹⁷⁶ Much of the access for the low income part of the population is serviced by public interest law organization such as the National Association for Public Interest Law (NAPIL) and pro bono services. Recognizing the importance of ensuring that low-income persons have access to the courts, beginning in the late 1800s private organizations began providing legal representation to the poor in some major cities in the United States. The Legal Aid Society of New York was founded in 1876, two legal aid organizations in Chicago

¹⁷⁴ *Tennessee v. Lane* 541 U.S. 509 (2004).

¹⁷⁵ *Id.*, at page 4.

¹⁷⁶ Andrew A. Guy, Pro Bono Representation: Providing Counsel Where It's Needed", usinfo.state.gov/journals.

began operations in 1885 and 1888, and the Boston Legal Aid Society was founded in 1914. By 1917 there were 41 legal aid programs across the United States.¹⁷⁷

These private efforts continued to gain more providers. The American Bar Association and local bar association started supporting the provision of legal services to the poor in the early part of the twentieth century. These local legal services organizations were the primary means of providing legal services to low income citizens until the mid-1960's.¹⁷⁸ In 1964, the Economic Opportunity Act was passed by Congress. It created the Office of Economic Opportunity, which in turn, created local Community Action Agencies, which were mostly nonprofit organizations, and provided direct funding for the local activities. The total funding for these offices in 1965 was four million dollars, with 400 full-time legal aid lawyers available to serve 50 million poor people. By 1966, the funding had increased to 25 million dollars, with more than 150 legal services programs, and by 1971, civil legal assistance had 2,660 staff attorneys and a budget of 56 million dollars.¹⁷⁹

In 1974, Congress created the Legal Services Corporation, an independent private corporation with an 11-member board appointed by the President with the consent of the Senate. The Legal Services Corporation provided funding for qualified

¹⁷⁷ John S. Bradway, *Legal Aid Bureaus*, Public Administration Service, 1935.

¹⁷⁸ Andrew A. Guy article at page 5, see footnote 163.

¹⁷⁹ *Ibid.*

local programs.¹⁸⁰ The funding for legal services programs has been inconsistent over the years. When budgets are cut, the poor need to go unrepresented or find other programs to get representation.¹⁸¹

One recent attempt to solve the problem of representation for the poor is Equal Justice Works. Equal Justice Works¹⁸² is a national organization that collaborates with law schools, law firms, corporate legal departments and nonprofit organizations to provide training and skills that enable attorneys to provide effective representation to vulnerable populations.¹⁸³ This organization utilizes idealistic law students to develop a culture of public service and make it possible for individuals, communities and causes to get legal representation, even if they cannot afford it. Equal Justice Works administers a large postgraduate legal fellowship program, placing new lawyers in two-year assignments at nonprofit public interest organizations.¹⁸⁴ Fellowship projects include improving access to the judicial system for children, the disabled, senior citizens, people with HIV/AIDS, battered women and racial and ethnic minorities.¹⁸⁵

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² www.equaljusticeworks.org The mission of Equal Justice Works is to create a just society by mobilizing the next generation of lawyers committed to equal justice.

¹⁸³ Equal Justice Works Fact Sheet, pages 1 and 2.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

Equal Justice Works has 100 fellows in 22 states and Washington D.C. They have more than 550 alumni who are still practicing in the public interest sector.¹⁸⁶

In 2003, Equal Justice Works also instituted a Pro Bono Legal Corps (PBLC). It is supported by a grant from the Corporation for National and Community Service. This program offers law graduates the opportunity to promote public service among laws students and law schools, while developing their own legal and professional skills.¹⁸⁷ The PBLC provides 35 law graduates the opportunity to work at 17 pro bono and legal services organizations in nine states.¹⁸⁸

Equal Justice Works has an online resource that provides a broad range of information in accessible formats to law schools to help develop public interest law school programs.¹⁸⁹ They also have established a program to address many of the legal needs of areas hardest hit by natural disasters such as hurricane Katrina¹⁹⁰.

Each year there is a conference and career fair to promote public service law that attracts more than 1000 law students and new graduates as well as 150 public

¹⁸⁶ Ibid.

¹⁸⁷ Id., at pages 2 and 3.

¹⁸⁸ Id., at page 3.

¹⁸⁹ Ibid.

¹⁹⁰ Hurricane Katrina hit the southern coast of the United States on August 28, 2005. Over 1800 people died as a result of the disaster and it is estimated that the hurricane and its aftermath caused \$81 billion dollars in damages. See www.hhs.gov/disaster.

interest employers including national nonprofit organizations, public defenders, legal aid offices and federal government agencies. There are also summer internships in public interest law. A stipend of \$1,000 is give to 350 law students for spending the summer giving their services to community-based organizations.¹⁹¹

In March 2008, Equal Justice Works opened an office in San Francisco, California to service the underserved population of California including providing programming for alumni, sponsors, law schools and host organization.¹⁹²

Of course, there are numerous organizations that also promote pro bono legal services for those who are underserved. The American Bar Association has a list of pro bono legal services for every state.¹⁹³ There are over ninety listings for California. They include numerous legal aid offices, rural legal assistance, assistance for the arts and artists, assistance for family violence victims, immigration assistance, and legal services for the disabled and ill.¹⁹⁴ There is only one listing for North Dakota: Legal Services of North Dakota.¹⁹⁵ In 1992, the Washington State Bar Association resolved that each of its member attorney should contribute to “public interest legal service” to low-income persons or to matters designed primarily to

¹⁹¹ Id., at page 3 and 4.

¹⁹² Id., at page 4.

¹⁹³ www.abanet.org/legalservices.

¹⁹⁴ Ibid. When you click on a state, a list of organizations and complete information on how to contact the organization comes up in a box at the top left of the screen.

¹⁹⁵ Ibid.

address the needs of the low-income individual in the state. A Volunteer Attorney Legal Services Action Plan grew out of this resolution.¹⁹⁶

In Civil Cases in the United States (unlike England) each party to a civil matter is responsible for paying his or her own legal fees, unless the case involves a contract that provides for a different division or statutory fee recovery statutes that provide for the losing party to pay the prevailing party's legal fees.¹⁹⁷ Also, in matters of personal injury where there is a likelihood of a recovery, plaintiffs may be able to get representation on a contingency fee basis.

Many jurisdictions do have a small claims division where civil litigants can resolve cases. There is a monetary limit to recovery. In California the limit is \$7,500.¹⁹⁸ Parties are prohibited from have attorney representation. The California Small Claims division also offers mediation services.¹⁹⁹

The Supreme Court in *Boddie v. Connecticut* (1971) also recognized the problem relating to the expense of court filing fees. The Court ruled that poor people seeking to obtain a divorce may do so without paying a court filing fee, "given the basic position of the marriage relationship in society's hierarchy of values and the

¹⁹⁶ Andrew A. Guy, Chair, Pro Bono and Legal Aid Committee, Washington State Bar Association, Pro Bono Representation: Providing Counsel Where It's Needed – usinfo.state.gov/journals at page 6.

¹⁹⁷ *Id.*, at page 4.

¹⁹⁸ www.courtinfo.ca.gov.

¹⁹⁹ *Ibid.*

concomitant state monopolization of the means for legally dissolving this relationship.”²⁰⁰ The United States Supreme Court has also held that, in cases involving the governmental efforts to terminate parental rights, appointment of counsel for indigent parties should be considered on a case-by-case basis.²⁰¹ And, when a party to a termination of parental rights proceeding cannot afford the costs of obtaining a transcript for an appeal, when the transcript is critical, there must be a process to have the costs of the transcript waived.²⁰²

There is a recognition that an unrepresented person appearing in court, especially against an adversary who has legal representation, is at a distinct disadvantage.²⁰³ Even in the criminal law arena, where a right to counsel has been established since *Gideon v. Wainwright*,²⁰⁴ there have been four main solutions to providing free legal services to indigent defendants in criminal cases.²⁰⁵ They are: Assigned Counsel where lawyers from private firms are appointed on a case-by case

²⁰⁰ *Boddie v. Connecticut* 401 U.S. 371 (1971).

²⁰¹ *Lassiter v. Department of Social Services of Durham County* 452 U.S. 18 (1981).

²⁰² *M.L.B v. S.L.J.* 519 U.S. 102 (1996).

²⁰³ Andrew A. Guy, Chair, Pro Bono and Legal Aid Committee, Washington State Bar Association, Pro Bono Representation: Providing Counsel Where It's Needed – usinfo.state.gov/journals.

²⁰⁴ *Gideon v. Wainwright* 372 U.S. 335 (1963) The Sixth Amendment to the Constitution provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” At the time the Sixth Amendment was adopted in 1791, the right to counsel did not include free, appointed counsel provided by the government. However, in *Johnson v. Zerbst* 304 U.S. 458 (1938), the United States Supreme Court held that the Sixth Amendment entitles a person charged with a federal crime to appointed counsel if the person cannot afford to hire an attorney. That was extended to states or subdivisions of states, in felony cases where, if convicted, the defendant could be deprived of life or liberty in *Gideon v. Wainwright*.

²⁰⁵ Charles J. Ogletree, Jr. and Yoav Spir, New York University Review of Law and Social Change, 2004, Keeping Gideon's Promise.

basis; Contract Counsel where the state or county enters into contracts with attorneys who agree to handle cases; Public Defender Systems where a full-time government office or nonprofit organization is responsible for handling indigent criminal defense; and Mixed Systems which usually combine the public defender approach with other methods usually because conflicts of interest arise between more than one defendant or prior representation.²⁰⁶

As of 2003, 80 percent of all criminal defendants are represented by appointed Counsel.²⁰⁷ The method of representation can change from county to county. In San Francisco County there is a Public Defender System, in San Mateo County there is an Assigned Counsel system.

Spain

Spain's constitution is about 40 years old. It was designed to insure fair process. The constitution expressly establishes that justice emanates from the people and is administered in the name of the King.²⁰⁸ Judicial proceedings are to be public.²⁰⁹ However, Spain does not have a long history of due process.

²⁰⁶ Id., at page 3.

²⁰⁷ Stacey L. Reed, A Look Back at *Gideon v. Wainwright* After Forty Years, *Drake Law Review*, Fall 2003.

²⁰⁸ Spanish Constitution, Article 117, section 1.

²⁰⁹ Id., Article 117, section 5.

Access to Spain's judicial system had been seen positively by environmental groups.²¹⁰ "Spain is significant in the powers of public participation it confers."²¹¹ The Spanish Constitution affords specific protection for the environment. There are some regional superior courts which specialize and are devoted to dealing with environmental and planning disputes²¹². Third parties including NGO's²¹³ and green groups are allowed access to any public inquiry about planning or environmental problems without legal restriction, even if there is no direct interest.²¹⁴

One specific concern has been raised in Spain regarding fair process. Public debate in Spain surrounding the arrest of 14 suspected Islamic militants in 2001, became heated. Under the Spain's anti-terrorism laws, they can hold suspects for up to four years without a trial while the investigation takes place.²¹⁵ The question of Spain extraditing some of the suspects to the United States had been discussed. This is cause for concern, not just because of the death penalty but because of the use of secret military trials. The feeling among attorneys in Spain is that the suspects will get a fair trial and fair treatment in Spain. Torture is forbidden and nobody can be declared guilty without due process. There is a belief that Spain has very high

²¹⁰ The Office of the Deputy Prime Minister www.scotland.gov.uk.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Non Governmental Organizations.

²¹⁴ Ibid.

²¹⁵ BBC News: Spanish 'superjudge' targets terror, December 10, 2001.

standards regarding due process.²¹⁶ Spain cannot extradite people to a country where they risk the death penalty, or where they risk judgment in from of a special judiciary without respect to due process.²¹⁷

Then in January 27, 2005, Human Rights Watch²¹⁸ released a 65-page report concerning Spain's counterterrorism measures. The report found that certain measures infringe on basic rights of suspects charged with terrorist acts.²¹⁹ This report analyzes aspects of Spain's criminal law and procedures. It finds that there are problematic practices such as the use of incommunicado²²⁰ detention and secret legal proceedings, limitation on the right to a lawyer during the initial period of detention, and lengthy periods of pre-trial detention.²²¹ Concerns of Human Rights Watch are related to the complex judicial case against members of an alleged al-Qaeda cell and ongoing investigations into the devastating Madrid bombings of March 11, 1004²²².

²¹⁶ Id., at page 3.

²¹⁷ Id., at pages 3 and 4.

²¹⁸ Human Rights Watch (www.hrw.org) is dedicated to the protection of human rights of people around the world. It investigates and exposes human rights violations. It is an independent, non-governmental organization supported by private individuals and foundations. It was started in 1978 as Helsinki Watch in response to and to implement the Helsinki Accords. It is based in New York, Brussels, London, Moscow, Paris, Los Angeles, and San Francisco.

²¹⁹ Setting an Example?: Counter-Terrorism Measures in Spain, Human Rights Watch, January 27, 2005.

²²⁰ Spain: Counterterrorism Measures Infringe Basic Rights (www.hrw.org/english/docs/2005/01/27/spain10066.htm). Under Spain's counterterrorism measures, suspects can be held incommunicado – without access to a lawyer or the ability to contact family members – for up to 13 days. Legal aid attorneys are assigned to suspects during this time, but cannot confer with their clients in privacy.

²²¹ Ibid.

²²² The March 11, 2004 Madrid Train Bombings consisted of a series of coordinated bombing against commuter trains (Cercanias) in Madrid, Spain, killing 191 people and wounding 1,755 people. Official

Spain addresses the threat from terrorism almost exclusively through the criminal justice system. Spain regards itself as a leader on countering terrorism while respecting human rights.²²³ Human Rights Watch agrees that Spain is correct to tackle terrorism through the criminal courts, but the government needs to ensure that terrorism suspects have the due process rights necessary for an effective defense.²²⁴ Suspects can be held for five days before they are seen by a judge. This gives rise to a greater risk of ill-treatment during detention. Also, Spanish authorities have been found to sometimes fail to conduct proper investigation into reports of ill-treatment.²²⁵

Court documents in terrorism cases are often subject to such secrecy that some defense lawyers do not know the exact reasons for their client's remand to pre-trial detention.²²⁶ The duration of permissible pre-trial detention is also cause for concern. During the four years allowed by law, they are generally subject to highly restrictive regimes that entail very limited contact with other prisoners and time outside their cells.²²⁷

investigation determined the attacks were directed by an al-Qaeda inspired terrorist group. Spanish nationals that sold explosives to the terrorists were also arrested. See *Elmundo.es* March 12, 2004 and en.wikipedia.org.

²²³ *Ibid.*

²²⁴ *Id.*, at pages 1 and 2.

²²⁵ *Id.*, at page 2.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

Human Rights Watch recommends that the Spanish government implement the following changes:²²⁸

1. Ensure that all detainees have access to an attorney from the outset of detention and the right to speak to the attorney in private;
2. Ensure that legal aid attorneys are fully empowered to intervene on their client's behalf during all police and court proceedings;
3. Limit the use of secret legal proceedings;
4. Exercise diligence necessary to ensure cases are brought to trial within the normal two-year period, particularly where the accused is in pre-trial detention, and;
5. Ensure that conditions in police custody and pre-trial detention conform to international standards.

Another problem in Spain is that of access. Spain has a problem with delay as well as complex procedures that require specialized knowledge. According to

²²⁸ Id., at page 3.

William E. Gladstone²²⁹: “Justice Delayed is Justice Denied.” Spain has a special legal position best described as an expeditor that is familiar with the process and what needs to be done procedurally.²³⁰ The judges attribute the delay to work-load. The attorneys attribute the delay to complex procedures.

As of 1986, delays averaged 18 months for minor offenses and between two to four years for serious crimes. Because of these delays, bail was established in 1980 for those defendants facing incarceration for less than 6 months.²³¹ The law was also changed so that two years was the maximum time a person can be held pre-trial for a misdemeanor and four years for a major crime.

A Spanish judge was fined 103,000 Eu (\$162,000) and suspended for a year for allowing a man to spend 455 days in prison for a crime of which he had been acquitted²³². Superior Court of Justice of Andalusia ruled on April 9, 2008, that Judge Adelina Entrena was guilty of “grave negligence” when she failed to notify the jail that defendant Jose Campy had been acquitted of purse-snatching in December 2005. It took 15 months for a clerk to detect the error. Campy had been notified by mail of

²²⁹ William E. Gladstone, Liberal British statesman and Prime Minister.

²³⁰ Interviews with Judges and Attorneys in Barcelona. See pages 179 to 196. One of the attorneys had a painting in his office of a series of men, two by two, descending a staircase into flames. The painting was titled: Attorneys and Expeditors Go Two by Two Into Hell.

²³¹ These statistics are from Spanish Criminal Justice and Penal System www.photius.com from the Library of Congress County Studies and CIA World Fact Book.

²³² International Herald Tribune, Spanish judge fined heavily for letting innocent man spend 15 months in jail, The Associated Press, April 10, 2008, www.iht.com.

his acquittal but has a long history of drug addiction and limited reading skills. Judge Entrena blamed the oversight on a backlog of work and insufficient staffing at her courthouse in Motril in the southern province of Granada.²³³

Spain's problems with delays in the judicial system were compounded in 2008 when there was a strike of ministry workers seeking pay raises. This led to even more backlogs, delaying everything from marriages to trials, until the strike ended April 7/8, 2008.²³⁴ There have been reforms promised from Prime Minister Jose Luis Rodriguez Zapatero to try to solve these problems, especially with unreasonable delays.

²³³ Ibid.

²³⁴ Ibid.

Education:

“The main part of intellectual education is not the acquisition of facts but learning how to make facts live.”²³⁵

Education of Judges Designed to Instill Ethics and Integrity

Education of judges in the United States (Common Law)

Judicial Education in the United States is decentralized. In the United States, there is a National Judicial College (NJC) in Reno, Nevada which is associated with the University of Nevada²³⁶. The NJC offers educational course to general jurisdiction judges, special jurisdiction judges, administrative law judges,²³⁷ tribal judges, and non-attorney adjudicators. Tuition and travel is generally paid for by the judges' jurisdiction.

²³⁵ Holmes, Oliver Wendell, Jr. Speech, Harvard Law School Association, November 5, 1886 – United States judge, born in Boston, educated at Harvard, he became a lawyer, and served in the Union army in the Civil War. He became chief justice of the Supreme Court of Massachusetts (1899 – 1902), and associate justice of the United States Supreme Court (1902 -1932).

²³⁶ The National Judicial College, Judicial College Building/MS 358, Reno, NV 89557.

²³⁷ Specific courses are directed toward Administrative Law Judges including such courses as Administrative Law: Fair hearing, Evidence Challenges for Administrative Law Judges: A Web-Based Course, Administrative Law: Advanced and Ethics, Bias, Mediation of Administrative Law Judges, and the ALJ: A Web-Based Courts – Analyze Aspects of Administrative Law 2008 Courses for Administrative Law Judges.

Many states have educational agencies for judges as part of the judicial council or other judicial branch agency. California judges are educated through the Judicial Council, Office of Administration of the Courts, Center for Judicial Education and Research (CJER)²³⁸. California requires judges to take a mandatory three-hour core course in ethics and earn two hours of elective credits in ethics in a three-year qualifying cycle.²³⁹ Qualifying electives include: Real Life Ethics, I, II, and III; and Disclosure and Disqualification.²⁴⁰ California judges must also complete sexual harassment training every two years.²⁴¹

The Federal Judicial Center²⁴² sponsors some State-Federal Judicial Education Programs. In 2004, the Center sponsored a program concerning Current Issues in Federal Preemption. The Judicial Education Reference, Information, and Technical Transfer Project²⁴³ has been sponsored by Michigan State University since 1989 and is supported by the National Association of State Judicial Educators²⁴⁴. They research issues and trends in judicial branch education and attempt to identify best practices. Their emphasis is on enhancing knowledge, skills and abilities of the judicial branch.

²³⁸ Education Division/Center for Judicial Education and Research, Judicial Council of California, Administrative Office of the Courts; www.courtinfo.ca.gov/cjer.

²³⁹ www.courtinfo.ca.gov/cjer/ethics.

²⁴⁰ Ibid. 2008 courses approved for elective credit.

²⁴¹ See California Government Code section 12950.1. This section also applies to California Administrative Law Judges.

²⁴² www.fjc.gov.

²⁴³ www.Jeritt.msu.edu.

²⁴⁴ www.nasje.org.

The education for judges in the United States begins after the person has been placed in that position. This is in stark contrast to the system in most civil law countries where the education system actually produces the judges and the education take place before the person is in that position. Many judges' organizations such as the National Association of Administrative Law Judges²⁴⁵ also provide periodic opportunities of education at national and regional conferences.

Most of the education for judges in the United States is practice oriented. There is not much theory. In civil law countries the education may be more theoretical, but many judges and attorneys commented that a great deal of the education involves memorization.

In England and Wales newly appointed judges must attend intensive residential induction courses and sit with an experienced judge for a week.²⁴⁶ Judges also attend annual training days run by the Judicial Studies Board and are called back for continuation training every three years.²⁴⁷ Regular training and refresher courses are also provided for existing judges.

²⁴⁵ www.naalj.org.

²⁴⁶ You be the Judge: Career Opportunities in the Judiciary in England and Wales, Department for Constitutional Affairs, October 2005.

²⁴⁷ *Id.*, at page 6.

Education of Judges in Spain (Civil Law)

The education of judges in Spain (as in France and other civil law countries) is centralized. The Escuela Judicial Consejo General del Poder Judicial (The Judicial School of the General Council of the Judiciary) in Barcelona is responsible for teaching future magistrates and judges who have already passed the public examination.²⁴⁸ The public examination tests the applicant in 438 topics.²⁴⁹ Students at the Judicial School have already completed five years of legal studies.²⁵⁰ The school is directed by a judge. An advisory body from the General Council of the Judiciary is in charge of the education and decides the curriculum. The Council also organizes the public examination for the selection of judges.

The Council was created in 1994 for the selection and training of judges. The initial training and administration is in Barcelona. Some continuing training is in Madrid. The school has 70 employees with 11 judges and 3 university professors. Subjects include civil law, commercial law, penal law, European and international law, work law, Judicial language training in English, French, German, Italian and even Spanish, and societal questions such as domestic violence²⁵¹, poverty and discrimination.

²⁴⁸ Judicial School of the General Council of the Judiciary, www.ejtn.net.

²⁴⁹ www.speaktruth.org/defend/profiles, at page 2.

²⁵⁰ *Ibid.*

²⁵¹ Domestic Violence was a major issue discussed by the judges and attorneys in Barcelona 2007.

The institution claims to take a practical approach and the use of case method to teach the judges. Judges, lawyers and experts are invited to speak during the year. Every year the school trains 250 new judges and 3500 judges participate in continuing education and training. The initial training lasts 24 months.

They also participate in international co-operative education and training of judges of the Economic Union including an exchange program. The Escuela Judicial is also a part of the European Judicial Training Network (EJTN). Established in October 2000, this institution operates under Belgian law and is dedicated to co-operative education among European Union countries.²⁵²

Of course, there are differences among the EU countries in training judges. In France, for example, judges are recruited directly from the University, then subjected to rigorous training involving some class room instruction and work in the courts and law offices. The initial training is 31 months and includes instruction on technical skills, and economic and social factors that impact the judicial environment.

²⁵² www.ejtn.net.

Public Education

Public Education Designed to Understand the Role of Judges and Instill Confidence in the Ethics and Integrity of Judges and the Legal System

In the United States, Justice at Stake,²⁵³ is an organization dedicated to a national campaign working to keep the courts fair and impartial. They are committed to protect the court system through public education and reform. Justice at Stake supports projects to keep politics and special interests out of the courtroom, and to protect democracy. They educate the public about their court system and judges through public education, voter guides, and judicial evaluation commissions. They attempt to reduce special interest pressure and improve judicial election campaigns through monitoring special interest pressure on the courts, public financing of judicial elections, merit-based selection of judges and better disclosure of campaign and interest group contributions. They protect courts and judges from partisan attacks by rapid response to intimidation and impeachment threats, educating political leaders on the unique role of the courts and protecting court budgets from political attacks. They defend the courts that defend the rights of citizens by calling attention to attacks on the power of courts to uphold the constitution, building a network of judges to speak out, and develop new messages and new coalitions to defend the courts²⁵⁴.

²⁵³ Speak to American Values, A Handbook for Winning the Debate for Fair and Impartial Courts, Justice at Stake Campaign, 717 D Street, NW, Suite 203, Washington, D.C. 20004.

²⁵⁴ *Id.*, at the inside cover.

Justice at Stake was founded because there was a belief that interest groups and political partisans were trying to weaken the authority and legitimacy of courts by painting them as the enemy of mainstream values.²⁵⁵ They were responding to decisions that they did not like by calling the judges “activist” and even “tyrants,” and by seeking to intimidate the judiciary and weaken access to justice. It is difficult, because of the ethical standards required by judges, for individual judges to respond to this type of criticism. It is believed that citizens will reject this attack on judges if they understand the role the judiciary plays in protecting the values they care about most.

Justice at Stake publishes a handbook²⁵⁶ that outlines simple and powerful communication framework for defending fair and impartial courts from political interference. It is based on one of the largest opinion research projects ever conducted in the United States on attitudes toward the courts²⁵⁷. The handbook provides effective messages available for rebutting attacks on judicial independence by reminding people why they care about strong courts that protect the people’s rights under our laws and constitution²⁵⁸.

²⁵⁵ Id., at page i.

²⁵⁶ Ibid. Speak to American Values.

²⁵⁷ Id., at page 13, Appendix.

²⁵⁸ Id., at page 1.

The handbook gives a guide on how to stand up for strong courts²⁵⁹. Their research shows that the people of the United States are ready to reject political interference with courts, if the right language is used to make the case. They suggest that the judges stick to the core message: In order to protect access to justice for all and our rights under the Constitution, we must defend fair and impartial courts from political interference; speak to core values; connect with a bipartisan majority of citizens by talking about the role of courts in protecting individual rights and ensuring everyone a day in court²⁶⁰. Describe the threat; people grow concerned when they hear about political interference with the courts, but they need to be educated about those threats (it should be noted that sometimes the politicians do not understand the impact of attempting to interfere with the judges and courts). Embrace accountability; people want courts to be accountable, but to the Constitution and the law, not to politicians and special interest groups; and don't be distracted; don't get trapped debating controversial decision or slogans like "judicial activism."²⁶¹

The survey found that values matter²⁶². Critics try to portray courts as the enemy of mainstream values. When they disagree with a decision, they accuse judges of being unaccountable. Their goal is to energize the political aspects of their position and put defenders of checks and balances on the defensive. The survey

²⁵⁹ Ibid.

²⁶⁰ Id., at page 3.

²⁶¹ Id., at pages 4 and 5.

²⁶² Id., at page 7.

found that a bipartisan majority of people treasure the role of our courts in protecting individual rights and providing access to justice. The people want courts to be fair and impartial and accountable to the law and the Constitution, not to political pressure and special interest²⁶³.

One problem with the questions in the survey is that the questions and the concepts behind the questions are very abstract. The wording of the questions is such that the answer is suggested. For instance, the survey asks the person surveyed: Please tell me if you agree or disagree with the following statement: "We need strong courts that are free from political pressure. 84 percent strongly agree with an additional 10 percent somewhat agree²⁶⁴. It would difficult for an intelligent person to answer in the negative. However, the survey also finds that the public exhibits limited knowledge about the workings of the courts²⁶⁵. Also, the survey finds that the public has a favorable but soft opinion about the courts and the public's knowledge of the courts remains rudimentary²⁶⁶. When asked: In your opinion, which one of the following is most important quality for the court system in the US to be? Guardians of Constitutional Rights, Fair and Impartial, Independent form politics, Accountable for their decisions, or Responsive to society's concerns, the reply is "Guardian of

²⁶³ Ibid.

²⁶⁴ Id., at page 2.

²⁶⁵ Id., at page 14.

²⁶⁶ Ibid.

Constitutional Rights” 33 percent and “Fair and Impartial” 31 percent²⁶⁷. These are the expected answers. But what would happen if asked an open ended question? People were asked in a focus group: Should courts be accountable to politicians or the Constitution. A conservative man in Chicago answered “I feel anyone who is held accountable will probably do a better job.”²⁶⁸ The concept of being accountable to the Constitution is extremely abstract and difficult to comprehend.

The study also indicated that the people of the United States need to be reminded of political threats to independent courts. It is not a popular idea with citizens to tamper with the court system in order to achieve a political goal²⁶⁹. If the question is put “should courts be accountable to politicians or to the constitution” the answer is “the Constitution” about 62% of the time²⁷⁰. However, again this is very abstract. How are judges accountable to the constitution? Court decisions are published at the higher court level and can be appealed (technically) to the Supreme Court as part of the checks and balances of the constitutional scheme.

Another key finding of the Justice at Stake study is that it is a waste of time to debate slogans like “judicial activism” or “controversial decisions.”²⁷¹ It is best to

²⁶⁷ Ibid.

²⁶⁸ Id., at page 4.

²⁶⁹ Id., at page 16.

²⁷⁰ Id., at page 4.

²⁷¹ Id., at page 1, and page 5.

stick to the core issue of the value of strong courts to insure protection of individual rights and equal justice for all.²⁷²

In talking to the public about the courts, this study suggests that the speaker focus on the courts, uphold the constitution and protect individual rights; that access to justice is under attack by politicians; that courts are accountable to the constitution and the law, not politicians; and respond to “hot button” issues by defending the independence of the courts.²⁷³ The suggested vocabulary is to say phrases like: fair and impartial courts; upholding the constitution; politicians, political intimidation; access to justice; courts; protecting individual rights; and checks and balances. It is suggested to use: judicial independence; interpreting the constitution; congress; individual cases or decision; or judges (as opposed to courts)²⁷⁴.

It is suggested to communicate these issues to the public through letters to the editor at newspapers, especially in response to editorials.²⁷⁵ Also writing Op-Ed pieces that can be published in local newspapers is suggested as well as electronic and print newsletters.²⁷⁶

²⁷² Id., at page 6.

²⁷³ Id., at page 7.

²⁷⁴ Id., at page 8.

²⁷⁵ Id., at page 9.

²⁷⁶ Id., at pages 10, 11, and 12.

Justice Sandra Day O'Connor (Ret.)²⁷⁷ wrote an article for Parade Magazine²⁷⁸ published on February 24, 2008²⁷⁹ titled How To Save Our Courts (Politics is threatening the rule of law in the U.S. today). She comments on her work as a United States Supreme Court Justice who was required by the United States Constitution to fairly and impartially apply the law – “not the law as I wanted it to be but the law as it was.” She expresses her concern that politically motivated interest groups are attempting to interfere with justice. She criticizes judges who ignore settled law and make decisions according to personal or public preferences. She observes that 89 percent of state (39 states) court judges go through some form of election process, which is often fueled by growing sums of money spent by judicial candidates. She questions: “when so much money goes into influencing the outcome of a judicial election, it is hard to have faith that we are selecting judges who are fair and impartial.” She advocates non-partisan elections – “to switch to merit selection ...”. She describes the system in Colorado and Nebraska where an independent commission of knowledgeable citizens recommends candidates to the governor, who appoints one of the candidates to be a judge. After several years on the bench, the judge's name is submitted to the electorate for a retention vote. She suggests that this method decreases the importance of money and politics in the process while still allowing voter input on retaining each judge. She challenges the public to educate

²⁷⁷ Sandra Day O'Connor was born March 26, 1930. She was the first woman associate justice of the Supreme Court of the United State. She served from 1981 to 2006. en.wikipedia.org.

²⁷⁸ Parade Magazine is a widely distributed news magazine included in many Sunday newspaper publications.

²⁷⁹ O'Connor Article at pages 4 and 5.

themselves. She is working with Georgetown University and Arizona State University on two programs on public education. One program is called Our Courts and will be an online civics experience for children. The other program, the Sandra Day O'Connor Project on the State of the Judiciary, she hopes will create a dialogue between experts and law practitioners on the court system and report on the best ways to safeguard its role.

A self described conservative group, Judicial Watch²⁸⁰, a public interest group that investigates and prosecutes government corruption and judicial abuse is actively opposed to what they call "judicial activism". They also target public education. Judicial Watch targets liberal judges. In 2006, the organization targeted Judge Anna Diggs Taylor, who ruled that the government's warrantless wiretapping program was unconstitutional. She serves on the board of a foundation (Community Foundation for Southeastern Michigan) that donated funds to the ACLU of Michigan. One of the named plaintiffs in the illegal wiretapping case was the ACLU (*ACLU et al. v. National Security Agency*). Certainly, Judge Taylor should have disclosed this connection to the parties. This matter underscores the necessity for judges to limit their personal and political activities. In Spain, a judge cannot participate in any extra-judicial activities without the permission of the General Council.²⁸¹

²⁸⁰ www.judicialwatch.org.

²⁸¹ Shetreet, Shimon and Deschenes, *Judicial Independence : The Contemporary Debate*, 1985 Chapter 26 page 328.

In the United States, jury service is another way that the judicial system has an opportunity to educate the public. A brochure is available in most court houses in California distributed by the Administrative Office of the Courts, San Francisco, California.²⁸² This document provides information about serving as a juror. There is a message from the Chief Justice of the California Supreme Court, Ronald M. George. He reminds potential jurors about the rule of law and that “trial by a jury of one’s peers is among the fundamental democratic ideals of our nation.”²⁸³

There was also a similar brochure at the Palace of Justice in Barcelona in the lobby of the building. This document is address to all citizens and is entitled the Rights of Citizens before Justice.²⁸⁴ It lists the rights and responsibility of citizens including protections for juveniles and immigrants.

²⁸² www.courtinfo.ca.gov Court and Community, Jury Service Information and Instructions for Respondent to Your Juror Summons.

²⁸³ Ibid.

²⁸⁴ Carta de Drets dels Ciutadans davant de la Justícia, Consell General del Poder Judicial.

Political Interference in the Courts

“An independent is the guy who wants to take the politics out of politics.”²⁸⁵

An example of political interference in matters concerning the courts given by Justice at Stake is the Terri Schiavo case²⁸⁶. Terri Schiavo entered a vegetative state in 1990 after a disastrous potassium deficiency caused irreversible brain damage. Both her doctors and her court-appointed doctors were of the opinion that there existed no hope of rehabilitation. Her husband, based on his belief of his wife’s wishes, wanted to stop her being kept alive by mechanical means. Terri’s parents opposed this, believing that she could recover someday. The matter was heard in the Florida courts more than 20 times. Every time the court ruled that under Florida law, Terri’s husband had the right to make the decision as to his wife’s right to die. Terri’s parents refused to accept this decision. The parents’ attorney admitted that his clients had had their day in court and had been given due process, but that they disagreed with the result.

Politicians inserted themselves into the fray. The Florida legislature passed a controversial “Terri’s Law” which gave Governor Jeb Bush the authority to have Terri’s feeding tube re-inserted when a court ruled that the husband could have it

²⁸⁵ Adlai Stevenson, “The Art of Politics,” *The Stevenson Wit* (1966) see footnote 43, above.

²⁸⁶ SoyLent Communications (2008) www.nndb.com.

removed. This controversy went on for years, co-opted by the pro-life movement. Finally the Governor refused to interfere.

The matter was even taken to the federal court level. The court refused to interfere with the Florida court's ruling that Terri's husband had the right to make the decision. On March 18, 2005 her feeding tube was removed and March 31, 2005 she died.

The U.S. Congress passed legislation allowing federal courts to intervene, and President George Bush signed the bill into law. Comments were made by politician concerning this matter while it was pending in the Florida courts, including House Majority Leader Tom DeLay claiming that Terri laughs and talks (this could not possibly have been the case), and Jesse Jackson, who had an opinion for the national news.

The autopsy conducted after Terri's death established that her brain damage was so severe that she could not think, feel, see, or interact in any way with her environment.

What should have been a family matter, which was decided by the courts in concert with the law, was turned into a political attack on the court. The court is required to follow the law. The law could be changed to change how end of life decisions are made and who has the right to make them and then the courts will

follow that law. If politics and politicians can interfere with lawful orders of the court, then they interfere with fundamental concepts of democracy and the checks and balances of our democratic system,

Another interesting example of an attempt to politically interfere with the operation of the United States Supreme Court was attempted by President Franklin D. Roosevelt in February 1937 after he was elected to a second term by a landslide.²⁸⁷ In 1935 the Supreme Court declared the National Recovery Administration Act unconstitutional. In 1936 the Supreme Court again ruled against part of the Agricultural Adjustment Administration. These laws were part of the New Deal measures instituted by President Roosevelt. He believed that these reform measures were essential to the economic recovery of the United States. He also was convinced that these laws were constitutional. He asked Congress to pass a law that would allow him to appoint one new judge for every sitting judge on the Supreme Court that was over 70 years old or older. That would have allowed President Roosevelt to appoint six new judges. Congress eventually voted down the proposal. This plan was denounced by many of both parties as an attempt to pack the court. The gradual retirement of older justices brought more liberal justices on the court and the Supreme Court began to uphold government regulation. By 1941, President Roosevelt had appointed eight of the nine justices on the Supreme Court including Justice Black (1937), Justice Reed (1938), Justice Frankfurter (1939), and Justice Douglas (1939). This historical incident demonstrates several “pit-falls” surrounding political pressure

²⁸⁷ The Age of Franklin D. Roosevelt, 1933 – 1945 www.eduref.org.

on the courts. Initially, it appears that the members of the court were not in line with contemporary legal theory concerning regulation of the economy. Individuals on the court do have a point of view. Because the justices are appointed for life, the political landscape can change more rapidly than the intellectual positions of the justices. Packing the court is not an especially good idea, since it only addresses an immediate political agenda. That agenda can change from day to day, month to month, year to year. The accountability to the United States Constitution is more constant and adjusts more slowly to the views of society as a whole.

More recently the California Supreme Court came under attack by political forces. This time the political forces were successful. In 1986, the voters of California voted to remove three California Supreme Court justices for their political views, not for any misconduct.²⁸⁸ At 40 years old, Rose Elizabeth Bird was appointed to the California Supreme Court in 1977, by Governor "Jerry" Brown. She did not have any experience as a lower court judge. She was the first female justice of the California Supreme Court and the first female Chief Justice. She was confirmed by the Commission Judicial Appointments by a 2-1 vote. Attorney General Younger was the swing vote. While he was reluctant to vote for confirmation, he did so. Some accused him of voting for Justice Bird in order to gain the women's vote in an upcoming gubernatorial election in which he planned to run as the Republican

²⁸⁸ Rose Elizabeth Bird: Choosing to be Just, Adrian, Erin (2002)
womenslegalhistory.stanford.edu/papers/BirdR-Adrian02.pdf.

candidate. Justice Bird was a staunch critic of the death penalty. She voted to overturn one death penalty case after another. She did not uphold a single death penalty case. She voted 61 times to vacate the penalty out of 64 death penalty cases that came before her. She narrowly won a confirmation election (52.7%) in 1978. Several recall petitions did not get enough signatures to be placed on the ballot.

Several justices, Governor Deukmejian and President Ronald Regan all spoke out against Justice Bird. She did not feel it was appropriate for her to campaign for herself based on the Canons of Judicial Ethics. Two other justices along with Justice Rose Bird, Justice Cruz Reynoso and Justice Joseph Grodin were also removed from office through the confirmation election in 1986. This process points out the danger of politicizing the judicial branch, which had not been previously the subject of political pressure because of the justices' opinions on a controversial issue, rather than any judicial misconduct. Justice Bird clearly believed that her position reflected justice and the law, but it was not a popular position. In this case, political pressure prevailed.

Spanish Law and Political Pressure

The Constitution and Provincial law in Spain is quite recent. The present Constitution was only instituted in 1978²⁸⁹ after the death of General Franco. And the

²⁸⁹ S. Shetreet, editor *Judicial Independence: The Contemporary Debate* Kluwer Academic Publishers 1985 page 314.

General Council of the Judiciary was created in 1984 to be responsible for the selection and training of judges.²⁹⁰ The judges and attorneys consistently denied any attempt at political influence on the judicial process²⁹¹. This may be attributable to the role that judges play in a civil law system. The laws are passed by the legislature and at least technically, there is no judicially created law through interpretation.

However, on an individual level, there is still some political influence on judicial decisions. Specifically, the charging judge in criminal cases can release a suspect or keep the suspect incarcerated based on political pressure.²⁹²

Judges are not politically accountable in Spain.²⁹³ There is a strong convention that has developed among political parties over the last twenty years that public deference toward judicial decision is expected, even when they are politically controversial. It is generally accepted that politicians should not criticize judicial decisions.²⁹⁴

²⁹⁰ Ibid.

²⁹¹ Discussions with judges and attorneys in Barcelona 2007.

²⁹² Report.globalintegrity.org/Spain page 4.

²⁹³ Diez-Picazo, Luis-Maria, Judicial Accountability in Spain: an Outline, Cour de Cassation 2003, at page 3.

²⁹⁴ Ibid.

Enforcement and Misconduct

“For a wrongdoer to be undetected is difficult; and for him to have confidence that his concealment will continue is impossible.”²⁹⁵

There must be some mechanism in place to enforce the ethical rules that are required to keep the judiciary independent. In the United States the enforcement of the ethical codes and canons is decentralized. Each State and the District of Columbia have State Judicial Conduct Organization established to investigate allegation of misconduct by state court judges²⁹⁶. However, each organization has various levels of oversight and various levels of power to regulate the conduct of judges. In California, the Commission on Judicial Performance has broad powers to investigate and discipline allegations of misconduct by judges.

In the Summary of Discipline Statistics (1990-1999) (Summary)²⁹⁷, the State of California Commission on Judicial Performance published a summary of statistics concerning cases in which discipline was imposed by the Commission on Judicial Performance, or imposed by the California Supreme Court on recommendation of the

²⁹⁵ Epicurus, “Vatican Sayings” (3rd century B.C.), 7, in *Letters, Principal Doctrines, and Vatican Sayings*, tr. Russell M. Greer – Greek philosopher, born at Samos. He opened a school at Mitylene (310 B.C.) and taught there. In 305 B.C. he returned to Athens and opened a successful school of philosophy, leading a life of great temperance and simplicity. He held that pleasure is the chief good, by which he meant freedom from pain and anxiety, not one who indulges sensual pleasure. (Cambridge Encyclopedia)

²⁹⁶ A list can be found at www.ancpr.org/judicial.htm.

²⁹⁷ State of California Commission on Judicial Performance, 455 Golden Gate Avenue, Suite 14400, San Francisco, California 94102, <http://cjp.ca.gov>. Summary of Discipline Statistics 1990-1999.

Commission.²⁹⁸ The Summary included advisory letters, public and private admonishments, public reprovls²⁹⁹, public censures and decisions removing judges from office during the 10 year period covered by the Summary. There were a total of 499 cases. Types of conduct covered include abuse of contempt, alcohol related criminal conduct, bias, comment on pending matter, demeanor, improper activities, and sleeping.³⁰⁰ The largest percentage (13.4 percent) of disciplinary actions was related to demeanor.³⁰¹ The major source of complaints against judges was from litigants/family or friends of litigants.³⁰²

The discipline rates were broken down by initially appointed versus initially elected³⁰³. Out of 14,049 judges from the 10 year period who were initially appointed, 418 judges were subject to disciplinary action or at a 29.8 disciplinary rate per thousand judges. Out of the 1,858 judges from the 10 year period who were initially elected, 81 were subject to disciplinary action or at a 43.6 disciplinary rate

²⁹⁸ Before 1995, the California Supreme Court was responsible for imposing censures and ordering judges removed from office. After 1995, the California Constitution was amended to vest that responsibility in the Commission, subject to discretionary review by the Supreme Court upon petition by the judge.

²⁹⁹ Public Reprovls were eliminated as a sanction in 1995.

³⁰⁰ State of California Commission on Judicial Performance, 1990 – 1999, a page 2 of Summary.

³⁰¹ Id., at page 8 of Summary.

³⁰² Id., at page 9 of Summary.

³⁰³ In California judges are elected in non-partisan elections for a term. However, in practice, the Governor appoints the vast majority of judges when a judge vacates a position during the term. The appointed judge fills out the remainder of the term and then must stand for election, but as an incumbent. It is rare when the election of an incumbent judge is contested.

per thousand judges. While the number of judges who are initially elected is small, the percentage of those judges disciplined over the 10 year period is significant.³⁰⁴

An example of judicial discipline in California involves a judge assigned to a small court in Northern California.³⁰⁵ In 2003, the judge received two “Private Admonishments.”³⁰⁶ Private Admonishments are designed, in part, to correct problems at an early stage, thus serving the California Commission on Judicial Performance’s larger purpose of maintaining the integrity of the California judiciary.³⁰⁷ For educational purposes the Commission chose to describe the judge’s misconduct in abbreviated form rather than omit them altogether.³⁰⁸ The judge made sexually suggestive gestures and comments to a court reporter, an employee of the prosecutor’s office and a courthouse visitor. The admonishment states that the judge behaved offensively in front of court staff. The judge also failed to disclose when a friend and former law partner appeared before him under circumstances that required disclosure, not recusal. The judge also engaged in *ex parte* contact with an attorney immediately prior to hearing a matter in which the attorney appeared before the judge.³⁰⁹

³⁰⁴ Id., at page 14 of Summary.

³⁰⁵ The Lehan Matter by Mark Scaramella, December 15, 2004, The Anderson Valley Advertiser. www.theava.com The Court was Ten Mile Court in Ft. Bragg, California.

³⁰⁶ Ibid.

³⁰⁷ California Commission on Judicial Performance, www.cjp.ca.gov.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

In a second admonishment, the Commission added that the judge's remarks concerning litigants in two separate matters displayed bias and offensive demeanor.³¹⁰ Complaints against this judge have continued for bias in family law cases and criminal law cases.³¹¹ This judge was elected by the voters in 2002. He will have to stand for reelection in 2008.³¹²

Judicial Misconduct can range from minor infractions of the ethical codes/canons to criminally actionable conduct. Judicial misconduct can occur based on the role of the judge as the person who presides over a trial. The judge in a jury trial must remain fair and impartial "ever mindful of the sensitive role the court plays in a jury trial and avoid even the appearance of advocacy or partiality."³¹³ The standard in the United States for reversing a jury verdict because of general judicial misconduct during trial is "stringent".³¹⁴ The reviewing court requires an extremely high level of interference by the trial judge, which creates "a pervasive climate of partiality and unfairness."³¹⁵ The issue before the reviewing³¹⁶ court is whether or not the state trial judge's behavior rendered the trial so fundamentally unfair as to violate

³¹⁰ Ibid.

³¹¹ Id., at page 2.

³¹² www.glenncourt.ca.gov.

³¹³ *United States v. Harris*, 501 F.2d 1, 10 (9th Cir. 1974).

³¹⁴ *Kennedy v. Los Angeles Police Department*, (9th Cir. 1989) 901 F.2d 702, 709.

³¹⁵ *United States v. DeLuca*, 692 F.2d 1277, 1282 (9th Cir. 1982).

³¹⁶ *Gayle v. Scully*, 779 F.2d 802, 806 (2d Cir. 1985).

federal due process under the United States Constitution³¹⁷. In every case reviewed the reviewing court found that as objectionable as some actions might be (caustic, sarcastic comments and offensive conduct), these actions do not violate due process.³¹⁸

In a 2001 review of judicial misconduct³¹⁹ the author (Brauer) examines four categories of judicial misconduct including campaign misconduct, *ex parte* communications, inappropriate behavior, and corruption and theft. The article summarizes four cases involving inappropriate campaigning. The cases involved campaigns in Ohio, Indiana, and Michigan. The Courts are most concerned with judges using misleading statements in their campaigns. The author observes that "This may be one of the problems inherent in a system which requires judges to campaign for their positions-there is a tension between the marketing aspect of political campaigns and the standards of veracity to which judges are held by the Model Code of Judicial Conduct."^{320 321}

³¹⁷ *Daye vs. Attorney General of the State of New York*, 712 F2d 1566, 1571 (2nd Cir. 1983).

³¹⁸ *Id.*, *Gayle v. Scully*, and *Daye v. Attorney General of New York*.

³¹⁹ Brauer, Alex, *Judicial Misconduct*, *Georgetown Journal of Legal Ethics*, Summer 2001.

³²⁰ *Id.*, at page 2.

³²¹ Canon 5 of the American Bar Association's Model Code of Judicial Conduct states: "A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity."

The Brauer article summarizes two cases involving *ex parte* communications, one from Ohio and one from Utah. The Ohio case involves a judge³²² who was suspended for granting an interview to a television news reporter after a reviewing court reversed and remanded a custody case. In the interview, the judge made several false statements about the parties to the custody case, including accusing one of the parties of filing bankruptcy. The judge was suspended without pay for six months from his position as a county court judge, juvenile division.

The Utah case involves a judge³²³ who presided over a case involving the expulsion of a student for bringing a gun to school. The judge issued a temporary restraining order reinstating the student and, because he could not rule on the injunction before the school year ended, the judge ruled that the remainder of the case was moot. After reading an article in the newspaper that quoted a school official as indicating that the student would be disciplined the following year, the judge called the school district's attorney, but never notified the student's attorney. After this *ex parte* telephone conversation, the judge was reassigned back to the case. He informed both parties that he thought the student's attorney should get some attorneys fees, but that he hoped the parties would settle the matter on their own. They did. The contents of the *ex parte* communication was in dispute, but the judge was sanctioned for initiating the communication, expressing his displeasure at the school district

³²² Supreme Court of Ohio: *Office of Disciplinary Counsel v. Robert Anthony Ferreri*.

³²³ Supreme Court of Utah: *In re Inquiry Concerning a Judge*, The Honorable David S. Young, District Judge.

imposing further discipline on the student, and expressing his opinion that the student's attorney was entitled to fees. The Court found that the judge interfered with a fair hearing on the attorney fee issue and the judge's conduct was prejudicial to the administration of justice. The judge received a public reprimand.

The author of the summary observed³²⁴ that judges are subject to human tendencies and even in a professional environment become friends and enemies with people and have a strong desire to see justice done. This will continue to tempt judges to engage in *ex parte* communications. There is no "malicious intent" on the part of the judge. However, there is a strict rule against *ex parte* communication in the United States and they should be avoided at all costs.³²⁵

Brauer summarizes ten cases involving inappropriate behavior. These cases come from Texas, New York, Florida, New Jersey (2), Ohio (2), Indiana (2), and Wisconsin (2). These cases involve base sexual comments to attorneys in the courtroom³²⁶; ethnic slurs³²⁷, and inappropriate comments.³²⁸ The author observes

³²⁴ Brauer, Alex, page 5.

³²⁵ American Bar Association Center for Professional Responsibility Model Code of Judicial Conduct Canon 3 (B)(7) . . . "A judge shall not initiate, permit or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . ."

³²⁶ Review Tribunal, Appointed by the Texas Supreme Court: In re James L. "Jim Barr, Judge, 377th Judicial District court of Texas – Judge Barr was removed as a judge for casting "public discredit upon the judiciary of the State of Texas as well as on the administration of justice and are thus violative of ... the Texas Constitution."

³²⁷ Kevin Mulroy, A Judge of the Onondaga County Court – Judge Mulroy was overheard making the remark, "you know how you Italian types are with Your Mafia connections." The Court removed Judge Mulroy from office for threatening "public confidence in the judiciary."

that these acts undermine the effectiveness of the judiciary and if allowed to continue in such behavior, judges become tyrants, rather than impartial protectors of justice.³²⁹

The author summarizes three cases involving corruption and theft. They are from Florida, South Carolina and Pennsylvania. These cases involved a judge accepting free tickets to baseball games from attorneys who regularly appeared before him³³⁰; collecting fees for performing marriage ceremonies³³¹; and diverting public funds for personal use³³².

These cases illustrate the tension between judicial independence and judicial accountability. While it is important not to undermine the independence of the

³²⁸ The Supreme Court of Wisconsin: In the Matter of Judicial Disciplinary Proceedings Against the Honorable Robert Michelson, Municipal court Judge - In a letter to the daughter of a woman who had appeared before him, Judge Michelson wrote "With the planet already overcrowded, my personal belief is that a young woman who finds herself unmarried and pregnant should get an abortion." The court found that the judge had violated provisions of the Wisconsin Code of Judicial Conduct requiring a judge to be patient, dignified, and courteous to litigants and others with whom the judge deals in an official capacity and to perform judicial duties without bias or prejudice. The judge was publicly reprimanded for his improper conduct.

³²⁹ *Id.*, at page 9.

³³⁰ The Supreme Court of Florida: *Inquiry Concerning A Judge*, No. 99-105, Re: John T Luzzo. The court ordered a public reprimand of Judge Luzzo.

³³¹ The Supreme Court of South Carolina: In the Matter of Harry C. Brown, Sr., Respondent. The court previously found that this practice violated the South Carolina Code of Judicial Conduct and the court previously ordered Judge Brown not to retain any further compensation for performing marriages and to disgorge any compensation previously received. Judge Brown was found to have willfully violated the previous order, and held Judge Brown in civil and criminal contempt. Judge Brown resigned from the bench and subsequently was suspended from the practice of law for eighteen months.

³³² The Court of Judicial Discipline of Pennsylvania: *In re Gloria M. Strock, District Justice*. The court found that Judge Strock was diverting funds received by her office for payment of her personal financial obligations. She would later pay the funds back when she received her monthly salary deposit. The Court of Judicial Discipline concluded that this conduct brought the judicial office into disrepute. The judge was ordered removed from office and rendered her ineligible to hold judicial office in the future.

judiciary in decision-making, judicial misconduct must be subject to some kind of oversight³³³.

Federal judges in the United States require impeachment for the removal of life-tenured judges. This process requires the House of Representatives to vote a bill of impeachment and the Senate to oversee the trial of the judge³³⁴. The grounds for impeachment are for treason, bribery, or other high crimes and misdemeanors³³⁵. The Federal Bureau of Investigation conducts a comprehensive full-field investigation of judicial candidates so as to reasonably as possible ensure sound judgments about their integrity and qualification³³⁶.

Spain

The rules involving removal, transfer and discipline of judges in Spain are laid down in a general fashion in the New Organic Law of Judicial Power and in the Organic Law of the General Council of Judicial Power. Incompetence or unfitness

³³³ Brauer, Alex page 11.

³³⁴ United States Constitution, Article III, Section 1 and Article II, Section 4.

³³⁵ United States Constitution, Article II, Section 4.

³³⁶ National Commission on Judicial Discipline and Removal (1986) was charged with investigating and studying the problems and issues related to disciplining and removing life-tenured federal judges; evaluating the feasibility of possible alternatives to current methods of dealing with judicial discipline problems and issues; and reporting to Congress, the Chief Justice, and the President its findings and recommendations.

cannot be grounds for removal of a judge (except for illness).³³⁷ Retirement for reasons of physical incapacity is set forth in the law.

Criminal responsibility of judges is regulated in detail. There is criminal liability for infringing the laws concerning the exercise of judicial function.³³⁸ Any citizen that is not unfit for exercise of a penal action may bring a complaint against any judicial officer.³³⁹ The New Organic Law does distinguish among penal, civil and disciplinary liability of judge.

A notorious case involving an “instruction judge³⁴⁰” brought a nine year prison sentence in 2005 for Barcelona Judge Luis Pascual Estevill.³⁴¹ He was also ordered to pay a fine of 1.8 million euros. He was found guilty of prevarication (obstruction of justice), illegal detention, and bribery/corruption for running an extortion racket from 1990 to 1994. Judge Estevill was in a scheme with an attorney to demand “backhanders” (kick-backs) from businesses involved in lawsuits. Judge Estevill threatened firms with prosecution unless they paid him, prosecuted people he did not

³³⁷ Pelayo, A. Beltran, Spain, Chapter 26 p 336 *Judicial Independence: The Contemporary Debate*, edited by Sheeetreet, S 1985, Martinus Nijhoff Publishers, Kluwer Academic Publishers Group, Dordrecht

³³⁸ Ibid. Also discussed in interview of Judge Santiago Vidal i Marsal, Judge in Barcelona, May 2007.

³³⁹ Ibid.

³⁴⁰ Juez de Instruccion is a judge in a civil law system that investigates and charges crimes.

³⁴¹ Barcelonareporter.com www.barcelonareporter.com.

like, and handed down unjust rulings³⁴². The extortion allowed them to accumulate hundreds of thousands of euros in bribes over a four-year period.³⁴³

Another well publicized case of alleged corruption involved Judge Blanca Esther Diez, a judge from Marbella, Spain in 1993/94. She was charged with Dereliction of duty and revealing details of a case on the complaint of Juan Ramirez. Mr. Ramirez was alleged to have ties to the Sicilian crime family. Judge Diez had Mr. Ramirez' telephone legally "bugged" in January 1993. She later ordered him jailed in "preventive detention" pending trial, on suspicion of involvement in the fraudulent sale of a casino. Mr. Ramirez was later ordered freed without bail after two months in jail. The complaint led to her suspension and trial. She was subject to two months in jail, suspension of her judicial duties for three years, and a fine of about one million dollars (converted from 100 million pesetas or nearly 500,000 British pounds).³⁴⁴ She was the target of attack because she was investigating corruption in the Costa del Sol related to the Italian Santapaola family. She was not convicted after many citizens of the area gave sworn statements in her support. As of December 2007, Judge Diez continues to investigate corruption in Marbella.³⁴⁵ This

³⁴² In fact, prior to the scandal, Judge Estevill had been removed from office by the disciplinary commission of the General Council of the Judiciary. He was banned from the judiciary for six years on the grounds of illegal arrest. However, he appealed and gained his post back.

³⁴³ Think Spain News, 4/1/05. Also discussed in interview of Judge Santiago Vidal i Marsal, Judge in Barcelona, May 2007.

³⁴⁴ The London Independent, March 14, 1994 Spain's female Wyatt Earp in the dock: Marbella's anti corruption.

³⁴⁵ 80sreborn.blogspot.com/2007.

case was an event of national importance because the judge's wiretap revealed that Mr. Ramirez and a high ranking member of Spain's General Council of Judicial Power were close friends.³⁴⁶

In 1993, Judge Blanca Diez charged Judge Pilar Ramirez with corruption and ordered her to be imprisoned. Judge Diez was accused of irregularities of form in the case and a year later, was suspended by the Andalusian Superior Court of Justice. A year after that, the Supreme Court reinstated her. Judge Ramirez also overruled the imprisonment (dictated by Judge Santiago Torres) of former mayor of Marbella, Jesus Gil, for a fraud scandal involving a Spanish football team, Atletico de Madrid (called the t-shirts case).³⁴⁷

In 1999, Judge Pilar Ramirez was declared unsuitable to be a judge by the General Council for Judicial Power and suspended for four years by the Supreme Court, accused of having failed to act in a matter relating to Marbella Town Hall and being a judge in a town of fewer than 100,000 inhabitants in which her father had important business. In fact, her father, Juan Ramirez, was a civil servant in the Marbella courts. Ramirez left Marbella shortly afterwards. However, she appealed

³⁴⁶ Independent Newspapers UK Limited, copyright 1994 European News Page 007. Jose-Luis Manzanares was vice president of the General Council of Judicial Power.

³⁴⁷ Report.globalintegrity.org/Spain, at page 5 Copyright 2007 Global Integrity.

and was reinstated in office. She became a judge in the town of Torremolinos (Malaga).³⁴⁸

Judge Jose Ramon Manzanares was removed as a judge after he was found guilty of obstruction of justice by malicious delay.³⁴⁹ Judge Manzanares was in charge of granting leave requests for prisoner. The court found that he intentionally delayed ruling on the permit requests. Originally, it was recommended that he be suspended for two years. However, the High Court of Catalonia removed him from his position as a judge.

³⁴⁸ Spain: Integrity Indicators Scorecard, at page 4.

³⁴⁹ El Mundo, Spain September 30, 1999, and interview with Jordi Oliveras i Badia, at pages 195 and 196, *infra*.

Different Ways to Become a Judge

In the United Kingdom, judges are appointed by the Crown on advice of the prime minister in the case of the Court of Appeal and House of Lords; on the advice of the Lord Chancellor in the case of High Court and circuit judges. Judges are appointed from the ranks of experienced barristers, though in England and Wales experienced solicitors may be appointed as circuit judges. Senior Judges (other than the Lord Chancellor, a government minister) can be removed only on an address presented by both Houses of Parliament; this rule is intended to secure the independence of the judiciary. Circuit judges (as Magistrates) can be removed by the Lord Chancellor for incapacity or misbehavior.

In the United States there are a number of ways to become a judge. At the federal level, pursuant to Article III of the United States Constitution, Judicial power is vested in one Supreme Court and such inferior courts as congress establishes. The office of Supreme Court judge and inferior court judges are held during good behavior and their compensation cannot be diminished. At the Federal level, judges are appointed by the President with the advice and consent of the Senate.³⁵⁰ Under Article I, section 2, the House of Representatives has the exclusive power to impeach, including judicial officers, but under Article I, section 3, the Senate has the exclusive

³⁵⁰ Article II, section 2, United States Constitution.

power to try judicial officers and a 2/3rd majority is required to remove a federal judge from office.

Each state in the United States has state court judges. These judges get to be judges in various different ways. In California judges at the Superior Court level are basically elected in non-partisan elections or appointed by the Governor in a merit selection process.³⁵¹

On the State level there is no uniform way of becoming a judge. State Court Judges can be appointed by the Governor with or without confirmation of the state legislators and/or with or without specific terms. Judges can be elected in partisan or non-partisan elections (which creates a whole set of problems related to the independence of the judiciary) with varying terms. Judges can be voted on after appointment on a periodic basis to retain or not retain on a "yes/no" vote. A list of states and the method of becoming a judge is set forth in Table 1 of the article: Are Judges Overpaid?³⁵² The Table lists 12 states where judges are appointed; 13 states where the judges are selected by a merit system and three additional states (California, Florida and Tennessee that have combination processes); 13 states that have non-partisan elections; and nine states³⁵³ that have partisan elections.

³⁵¹ Choi, Stephen J. et al. Are Judges Overpaid at page 32, Table I.

³⁵² Ibid.

³⁵³ Ibid. Those states are Alabama, Arkansas, Illinois, Mississippi, North Carolina, New Mexico, Pennsylvania, Texas, and West Virginia.

California has a mixed method of selecting County Court judges. If a position is vacated within a certain number of days before an election is scheduled then there is an open seat and any qualified person can run for that position in a non-partisan election. If a position is vacated before the time that is set for an election, the Governor gets to appoint a judge to fill that position and the appointee completes the vacated term. Candidates for appointment go through a merit based selection process, but since the Governor represents one party or another, the appointment process does have a political element built in. At the end of a judge's six-year term, the judge must run for re-election in an ostensibly non-partisan race. Any judge can be challenged by a qualified candidate. Most of the time the judges go unchallenged or the challenger is not considered a real threat. However, this June there is a contested judge's race for a position on the San Francisco Superior Court between a 12-year veteran of the San Francisco Superior Court Bench, Thomas Mellon and a County Supervisor, Gerardo Sandoval³⁵⁴. Judge Mellon is not accused of misconduct in the performance of his duties as Superior Court Judge, but is considered vulnerable because he is a white male and has a courtroom reputation for sometimes being biased³⁵⁵ and brusque. Judge Mellon is also a member of the Republican Party in a city with a large Democratic Party majority. Gerardo Sandoval's term as a San Francisco Supervisor will expire in November. He is a member of the Democratic Party. Supervisor Sandoval has raised more than \$100,000 in contributions from

³⁵⁴ San Francisco Chronicle, Monday March 31, 2008, Matier & Ross.

³⁵⁵ One judge and one attorney that were interviewed (Judge #3, and Attorney #16 mentioned Judge Mellon when reporting negative experiences. Attorney #16 reported a negative and biased encounter during a settlement conference, and Judge #3 reported poor judicial demeanor. However, neither the judge nor the attorney reported any misconduct to the Commission on Judicial Performance for fear of future problems.

organized labor, development interest and not fewer than nine City Hall lobbyists and Public Relations firms with regular business before the Board of Supervisors. Judge Mellon has reported raising \$21,000, mostly from fellow judges. Judge Mellon, however, has hired a Democratic Party political strategist to run his campaign. Now the accusations begin against Supervisor Sandoval concerning improper disclosures, campaign expenditures and fundraising (using his position on the Board of Supervisors to run for judge). Supervisor Sandoval then chides Judge Mellon's campaign strategist for being a Democrat now working for the Republican establishment. This certainly seems to put a lie to the non-partisan nature of this judges' election. Further, the idea that judges need to engage in traditional political fundraising is contrary to the ideals of independence and impartiality. While elections are an important part of the democratic process, they seem to be inappropriate in judicial selection³⁵⁶. There is no guarantee that candidates are qualified beyond the basics of age and legal education and it is unlikely that the real qualifications of impartiality, ethical conduct, and judicial temperament will be the focus of this election.

In 2002, the United States Supreme Court found that a Minnesota canon of judicial conduct, which prohibited candidates for judicial election from announcing their views on disputed legal or political issues, violated the First Amendment.³⁵⁷

³⁵⁶ Note: The framers of the United States Constitution provided for an appointed judiciary.

³⁵⁷ *Republican Party of Minnesota, et al. v. White* (2002) 536 U.S. 765.

Under the applicable strict-scrutiny test, Minnesota has the burden to prove that the restriction on speech is narrowly tailored, to serve a compelling state interest.³⁵⁸ The Court observed that a “state’s greater power to dispense with election of judges altogether does not include the lesser power to conduct such elections under conditions of state-imposed voter ignorance by restricting candidate speech.” The appellate court³⁵⁹ had found that the respondent (Minnesota) had established two sufficiently compelling grounds to justify the limitations in the judicial canons. The first was to preserve the state judiciary’s impartiality and to preserve the appearance of impartiality.³⁶⁰ The Supreme Court of the United States then goes through three definitions of impartiality: a dictionary definition of lack of bias; a legal definition of a lack of preconception in favor or against a particular issue; and openmindedness. The court does not find any of these definitions to support a compelling state interest.³⁶¹

The United States Supreme Court further states that “there is an obvious tension between Minnesota’s Constitution, which requires judicial elections, and the “announce³⁶²” clause, which places most subjects of interest to the voters off

³⁵⁸ *Id.*, at page 775. The Court cited *Eu v. San Francisco County Democratic Central Committee* 489 U.S. 214, 222.

³⁵⁹ *Republican Party of Minn. v. Kelly* 247 F.3d 854 (5th Cir. 1997).

³⁶⁰ *Republican Party of Minnesota, et al. v. White* (2002) at page 775.

³⁶¹ *Id.*, at page 776.

³⁶² *Id.*, at page 787. The clause in question is called an “announce” clause. Incumbent judges who violate the clause are subject to discipline, including removal, censure, civil penalties, and suspension without pay. Minnesota Rules of Board on Judicial Standards 4(a)(6), 11(d) (2002). Lawyers who run for judicial office

limits.”³⁶³ The United States Supreme Court finds that the “Minnesota Supreme Court’s canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment.”³⁶⁴

Judges, especially administrative judges, can be appointed through Civil Service merit systems. This is a merit based appointment process.

Judges (especially commissioners and immigration judges) can be at will employees, with no formal civil service protection.

In much of Continental Europe, there is an academic route to become a judge. After attending university and becoming an attorney, a person can apply to attend judges’ school, complete course work and probably an internship, and then get assigned to a court position.

Each of these methods has good points and bad points with regard to the Independence of the Judiciary. “Appointments for life upon good behavior” clearly

must also comply with the announce clause. Minnesota Rule of Professional Conduct 8.2 (b) (2002). There is also a separate “pledges and promises” clause that prohibits judicial candidates from making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office. That prohibition is not challenged in this decision and the Court states that it does not express any view. *Id.*, at page 770.

³⁶³ *Ibid.* The subjects at issue in the case included crime, welfare, and abortion.

³⁶⁴ *Id.*, at page 788.

take political and popular pressure out of the serving as a judge. However, there are political and popular considerations built in to the appointment process. Partisan elections are the most vulnerable to political pressure and political patronage.

The appointing power, such as the crown or the president, has a particular point of view, party affiliation and/or a particular political philosophy. Usually the person appointed will have the same or similar point of view or party affiliation.

Native American Tribal judges are often selected by the tribes Executive Committee. The tribes are considered distinct, independent political communities with natural rights in matters of self-government. Each tribe regulates its own internal and social relations.³⁶⁵ Indian Courts are significantly different from United States Federal Courts and state courts. Tribal law is still frequently based on unwritten values, mores and norms of a tribe as expressed in its customs, traditions, and practices. The laws are often handed down orally or by example from one generation to another.³⁶⁶

³⁶⁵ Getches, David H. et al. *Cases and Materials on Federal Indian Law* (4th ed 1998), at page 390.

³⁶⁶ *Nevada v. Hicks*, 533 U.S. 353 (2001).

Tribal Judges are not necessarily lawyers. They consider testimony on custom and tradition from tribal elders and historians. Sometimes there are three judge panels to hear tribal matters.³⁶⁷

For example, the Shawnee Tribe of Oklahoma³⁶⁸ has written legislation concerning their tribal court. Minimum qualification to be a tribal judge include being an enrolled member or parent, child or spouse of an enrolled member or domiciled within the territory, or an attorney or a lay advocate with special experience, or an Indian graduate of a law school or paralegal program, and a person of demonstrated moral integrity and fairness in their personal and business life, not convicted of any felony, abstain from excessive alcohol, not less than 25 years old, not a member of the Executive Committee,³⁶⁹ and non-lawyer judges must attend the National Judicial College in Reno, Nevada and take a week long course designed for tribal judges. Tribal judges are appointed for a six-year term³⁷⁰ and no reduction of pay is allowed while the judge is in office, except if there is not enough money in the budget to cover all tribal salaries, then the amount can be reduced for all people covered by the budget in equal, proportional amounts. Judges can only be removed

³⁶⁷ Galanda, Gabriel S., Reservation of Right: An Introduction to Indian Law. www.tribalresourcecenter.org.

³⁶⁸ Tribal resource center www.tribalresourcecenter.org.

³⁶⁹ The Executive Committee is the appointing power.

³⁷⁰ There is nothing in the law about being reappointed for another six-year term.

for cause and must disqualify themselves based on the usual conflict of interest considerations.³⁷¹

Spain

There are still two ways to become a judge in Spain. The vast majority of judges go through the examination process and then are selected to attend judges' college. However, a law professor or distinguished jurist can be appointed by the Judicial Commission.³⁷²

Qualifications to Become a Judge

In the United States, Justices of the Supreme Court, judges of the courts of appeals and district court, and judges of the Court of International Trade, are appointed under Article III of the Constitution by the President of the United States with the advice and consent of the Senate. Although there are no special qualifications to become an Article III judge, those who are nominated are typically very accomplished private or government attorneys, judges in state courts, magistrate judges or bankruptcy judges, or law professors. The judiciary plays no role in the

³⁷¹ Tribal resource center - www.tribalresourcecenter.org.

³⁷² www.ejth.net.

nomination or confirmation process.³⁷³ Bankruptcy judges are judicial officers of the district courts and are appointed by the courts of appeals for a 14-year term.

Magistrate judges are judicial officers of the district courts and appointed by judges of the district court for eight-year terms. There are no special qualifications for these positions either.³⁷⁴

Qualifications to be a judge in a state court are as varied as the number of jurisdictions. There is no uniform requirement. In Maryland, for example, the qualifications fall into two quite distinct categories: 1. legal; and 2. professional and personal. The Constitution of Maryland specifies those in the first category.³⁷⁵ The legal qualifications are:

1. United States and Maryland citizenship;
2. Registration to vote in State elections at the time of appointment;
3. Residence in the State for at least five years;
4. Residence, for at least six months next preceding appointment, in the geographic area where the vacancy exists;

³⁷³ Understanding the Federal Courts, United States Judges, Appointment and Compensation. www.uscourts.gov.

³⁷⁴ Ibid.

³⁷⁵ Constitution of Maryland, Article I, section 12; Article IV, section 2. Qualifications of a Judge, www.courts.state.md.us.

5. Age of at least 30 at the time of appointment;
6. Membership in the Maryland Bar;

The Constitution of Maryland also speaks generally of the second category of qualifications, by providing that those selected for judgeships shall be lawyers “most distinguished for integrity, wisdom and sound legal knowledge.”³⁷⁶

In Colorado, county court, district court, the Colorado Court of Appeals, and the Supreme Court of Colorado, a judicial applicant must apply to a nominating commission that reviews the qualifications. This is a merit selection system that was instituted in 1966 as an amendment to the state Constitution. The basic qualifications for a District Court or County Court judge is:

1. Must be a qualified elector in the judicial district, and a county court nominee must be a resident of his or her respective county at the time of selection;
2. Must have been licensed to practice law in Colorado for at least five years;

³⁷⁶ Ibid. It is worth noting that the salary for judges in Maryland as of 7/1/05 range from \$127,252 to \$181,352 per year.

3. Must be under the age of 72 at the time his or her name is submitted to the governor; and

4. In counties under a population of 35,000, a nominee does not have to be licensed to practice law, but must have graduated from high school, or attained the equivalent of a high school education and meet residency and qualified elector status.³⁷⁷

The nominating commission typically, makes three recommendations to the governor, who then appoints one of the nominees to serve as judge.³⁷⁸ A Nominee must first be a Colorado lawyer before becoming a judge, except in some rural area, a non-lawyer may serve as a county court judge.³⁷⁹ After appointment, the judge serves a two year provisional term and is evaluated by a judicial performance commission. Then, each judge must appear before the voters on a regular basis in a retention election.³⁸⁰ If successfully retained, a county court judge serves for four years, a district court judge serves for six years, a Court of Appeals judge serves for eight years and a Supreme Court Justice serves for ten years. Then each must go through

³⁷⁷ Courts in the Community, Colorado Judicial Branch, Office of the Court Administrator www.courts.state.co.us Note: Supreme Court justice or Court of Appeals judge must be licensed to practice law for at least five years.

³⁷⁸ Ibid.

³⁷⁹ Ibid.

³⁸⁰ Id., at page 2.

another retention election. All judges must retire at 72 years old.³⁸¹ The judicial evaluations/qualifications use the following criteria to evaluate a judge's performance:³⁸²

1. Integrity;
2. Knowledge and understanding of substantive, procedural, and evidentiary law;
3. Communication skills;
4. Preparation, attentiveness, and control over judicial proceedings;
5. Sentencing practices;
6. Docket management and prompt case disposition;
7. Administrative skills;
8. Punctuality;

³⁸¹Id., at pages 2 and 3.

³⁸²Id., at page 3.

9. Effectiveness in working with participants in the judicial process; and
10. Service to the legal profession and the public.

The commission then gathers information from various sources such as court observations, letters submitted by interested parties, oral interviews with people appearing before the judge on a regular basis and a public hearing.³⁸³

An extensive booklet was produced by the Association of the Bar of the City of New York Special Committee to Encourage Judicial Service.³⁸⁴ The booklet makes several interesting observations. Traditionally, it was believed that a candidate for judicial office required substantial experience as a trial lawyer in order to become a judge. While trial experience remains helpful, it is not essential for many judicial positions.³⁸⁵ Each judicial position has minimum qualifications required by statute. Eligibility requirements for New York City judicial positions on the Family Court, Criminal Court, and Civil Court include residency, ten years as an attorney admitted to practice, and an age limit of 70 years old.³⁸⁶

³⁸³ Ibid. Note: The criteria are vague and subjective. This type of evaluation may promote a popularity contest as opposed to a true evaluation of a judge's independent skills and integrity.

³⁸⁴ How to Become A Judge by the Association of the Bar of the City of New York Special Committee to Encourage Judicial Service.

³⁸⁵ Id., at page 3.

³⁸⁶ Id., at page 4. N.Y. Family Ct. Act section 124; N.Y. City Criminal Ct. Act section 22(1); N.Y. City Civil Ct. Act section 102-a; N.Y. Const. Art. 6, sections 13, 15, and 20.

Election of judges in partisan races is for positions in the Civil Court of New York City require a political party nomination. The political parties have screening panels for nomination of candidate for judicial office.³⁸⁷ The same statutory eligibility requirements pertain to judges running for judicial office.

There are also judges of the Housing Part of the Civil Court of New York City. This position is appointed by the Administrative Judge of the Civil Court of New York City. The eligibility qualifications include admission to practice as an attorney in New York for five years, two of which must have been in active practice, before taking office.³⁸⁸

Supreme Court judges for the State of New York are elected through partisan election. The election process was declared unconstitutional in 2006.³⁸⁹ This decision was based on the First Amendment to the United States Constitution. In January 2008, the Supreme Court of the United States reversed the decision and upheld the New York State elections process as not a violation of the First Amendment.³⁹⁰ In New York State the Supreme Court is the trial court of general jurisdiction. New York's Constitution provides that "the justice of the supreme court

³⁸⁷ Id., at page 6.

³⁸⁸ Id., at page 8. N.Y. City Civil Ct. Act section 110(i).

³⁸⁹ Ibid. *Lopez Torres v. NYS Board of Elections*, 462 F 3d 161 (2nd Cir. 2006).

³⁹⁰ *New York Board of Elections v. Lopez Torres* 552 U.S. ____ (2008).

shall be chosen by the electors of the judicial district in which they are to serve.”³⁹¹ Historically the nominees did not have to be enrolled members of the political party by which they were nominated.³⁹² However, in practice, New York Supreme Court Judges are selected through a *de facto* appointment system, which is largely controlled by county leaders of the two major political parties: Democratic party and Republican party.³⁹³ Onerous structural obstacles designed to ensure that county leaders, not voters, select Supreme Court judges have prevented highly qualified individuals from becoming justices on the New York Supreme Court.³⁹⁴ The only actual eligibility requirements for this position are admission to practice for ten years and under the age of 70 years old.³⁹⁵

Federal Administrative Law Judges are required to have seven years formal administrative law or litigation experience or some combination of the two, and membership in good standing in a bar for seven years immediately preceding application. They are also required to have two years qualifying experience at a level

³⁹¹ Brennan Center For Justice Lopez Torres v. NYS Board of Elections Court Cases 1/16/08. www.brennancenter.org.

³⁹² How to Become A Judge by the Association of the Bar of the City of New York Special Committee to Encourage Judicial Service, at page 8.

³⁹³ Ibid. Brennan Center For Justice Lopez Torres v. NYS Board of Elections Court Cases 1/16/08 www.brennancenter.org.

³⁹⁴ Ibid.

³⁹⁵ Id., at page 9: How to Become A Judge by the Association of the Bar of the City of New York Special Committee to Encourage Judicial Service.

of difficulty and responsibility commensurate with the position.³⁹⁶ This is a merit based appointed position. The applicants are required to pass an examination.³⁹⁷

Qualifications for State Administrative Law Judge positions vary from state to state. The California Public Utilities Commission requires one year of experience in the California Public Utilities Commission at a level of Senior Transportation Representative presenting cases before the Commission, or Five years of experience within the last ten years performing similar duties at the Senior Transportation Representative for another state agency, or a member or hearing officer of a quasi-judicial body.³⁹⁸ Also, an equivalent to graduation from college is required.³⁹⁹

Becoming a judge in England and Wales involves a merit based selection process.⁴⁰⁰ To be appointed to judicial office it is necessary to have been fully qualified as a barrister or solicitor for a minimum of seven years.⁴⁰¹ Advocacy experience is not an essential requirement for appointment to judicial office. Judicial

³⁹⁶ United States Office of Personnel Management. www.opm.gov/qualifications/alj.

³⁹⁷ *Id.*, at page 2.

³⁹⁸ Administrative Law Judge I, Public Utilities Commission Open Continuous Examination Exam # 6UC17.

³⁹⁹ *Ibid.* It appears that a law degree is not required, however, it would be hard for someone to have the other qualifications without a law degree.

⁴⁰⁰ You Be the Judge: Career Opportunities in the Judiciary in England and Wales, Department for Constitutional Affairs, October 2005.

⁴⁰¹ *Id.*, at page 5: Legislation has been introduced to reduce the minimum time period to five years.

appointments are made strictly on merit without regard to age, gender, ethnic origin, marital status, sexual orientation, political affiliation, faith or disability.⁴⁰²

Judicial appointments are only open to citizens of the United Kingdom, the Republic of Ireland or a Commonwealth country.⁴⁰³ There is no lower age requirement, although you need to have been qualified as a barrister or solicitor for a set number of years.⁴⁰⁴

Spain

As discussed before, becoming a judge in Spain is a career choice after law school. To become a judge in Spain, you have to study five years of law. Then you have to take a special examination, where 438 topics are tested followed by judge's school. Most judges are twenty-four or twenty-five when they become judges.⁴⁰⁵

⁴⁰² Ibid.

⁴⁰³ Ibid.

⁴⁰⁴ Id., at page 6.

⁴⁰⁵ Speak Truth To Power, Human Rights Resources, www.speaktruth.org.

Non Lawyer Judges

The United States has a long history of non lawyer judges, especially in sparsely populated rural areas. Lay judges are judges who have not been admitted to the practice of law. These judges have been part of the United States Government since early settlement.⁴⁰⁶ In England, part time lay judges called justices of the peace, out number full time professional judges.⁴⁰⁷ While there is opposition from legal professionals, non lawyer judges are as competent as lawyers in carrying our judicial duties in courts of limited jurisdiction.⁴⁰⁸

Colorado still uses non lawyer judges. Every non lawyer judge who is subject to the jurisdiction of the Colorado Judicial Commission on Qualifications must pay an annual fee of \$10 to the Colorado Supreme Court, and must meet a mandatory continuing legal education requirement.⁴⁰⁹ In 2000, the National Judges Association recognized a Colorado non lawyer judge, Harold Taylor, from a small county as the Outstanding Non-attorney Judge of the United States.⁴¹⁰

⁴⁰⁶ Doris Marie Provine, *Judging Credentials, Non Lawyer Judges and the Politics of Professionalism*, The University of Chicago Press 1986.

⁴⁰⁷ www.britannica.com.

⁴⁰⁸ *Ibid.* *Judging Credentials, Non Lawyer Judges and the Politics of Professionalism*.

⁴⁰⁹ www.coloradosupremecourt.us.

⁴¹⁰ News Release, Colorado Judicial Branch, Mary J. Mullarkey, Chief Justice, Gerald Marroney, State Court Administrator.

Judge Taylor was appointed to the bench in 1992, after a career as a mathematics teacher. He was appointed to President Ronald Reagan's National Commission for Excellence in Teaching Mathematics and Science in 1983 and 1984.⁴¹¹ Before being named county judge, Judge Taylor was the assistant municipal judge in a small town and served on the county Board of Education. He is past president of the National Judges Association and has taught at the National Judicial College in Reno, Nevada.⁴¹²

As a county judge, Judge Taylor handled about 480 cases annually, the majority of which are misdemeanors, small claims, and traffic cases.⁴¹³ County judges serve a four-year term and must be retained by the voters. Judge Taylor won his retention election by a high margin.⁴¹⁴

In the United States there are approximately 25,000 non lawyer judges.⁴¹⁵ In Idaho, there are non attorney magistrates. They are paid by the number of cases they hear in a year. A non attorney magistrate who hears less than 1,750 cases a year is

⁴¹¹ Ibid.

⁴¹² Ibid.: The National Judicial College has a number of courses designed for judges without formal law school training to handle small claims, traffic court and misdemeanors. For example, see the 2008 Courses Spring/Summer Course announcements: Special Court Jurisdiction.

⁴¹³ Id., at page 2.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid.

paid about \$15,000 less than a non attorney magistrate that hears more than 4,500 cases a year.⁴¹⁶

In Texas there are non attorney judges, as well at the municipal court level. All municipal judges (both attorney and non-attorney) must attend on accredited judicial education program every year.⁴¹⁷ Newly appointed or elected non-attorney judges must, within one year from the date of appointment or election, complete 32 hours of continuing judicial education before attending a 12-hour seminar the next year and once every school year thereafter.⁴¹⁸

The 32-hour New Judge Seminar for new non-attorney judges offers classes on basic court procedures, judicial ethics, juvenile law, magistration, traffic law, a trial skills workshop, and other classes directed at a foundation of knowledge and thorough understanding of the laws affecting their limited jurisdiction courts.⁴¹⁹

⁴¹⁶ Legislature of the State of Idaho, Second Regular Session – 2004, Senate Bill No. 1407.

⁴¹⁷ Texas Municipal Courts Education Center, www.tmced.com.

⁴¹⁸ Ibid.: New judges that were licensed by the State Bar of Texas must only take the 12-hour seminar each school year.

⁴¹⁹ Ibid.: New judges' seminars are five days in length and begin at 1:00 p.m. on Monday and conclude at 12:00 noon on Friday. The Texas Municipal Courts Education Center pays for accommodations.

Missouri still has non lawyer Municipal Court and Traffic Court judges.⁴²⁰ A municipality with a population of less than seven thousand five hundred may have a non lawyer judge.⁴²¹

Within six months after selection for the position of municipal court or traffic court judge, each judge who is not licensed to practice law in Missouri shall satisfactorily complete the course of instruction for municipal judges prescribed by the Supreme Court of Missouri.⁴²² If the non lawyer judge does not complete satisfactorily the prescribed course within six months after taking office, the judge's office shall be deemed vacant and that person will not be permitted to serve as a municipal judge.⁴²³

In 2003, the Florida Bar celebrated the 25th anniversary of service of Holmes county Judge Robert Earl Brown, a disappearing breed of Florida's non attorney judges.⁴²⁴ Florida's judicial history includes 34 non attorney judges who were

⁴²⁰ Missouri Revised Statutes, Chapter 479, Municipal Courts and Traffic Courts, section 479.020, August 28, 2007.

⁴²¹ *Id.*, at section 3.

⁴²² *Id.*, at section 8. See also Supreme Court Rules, Office of State Courts Administrator, Rule 18 – Rules Governing the Missouri Bar and Judiciary – Municipal Judge Continuing Education Requirements and Non Lawyer Certification.

⁴²³ *Ibid.*

⁴²⁴ Florida Bar News: Nonlawyer judge rules in Holmes County for 25 years. July, 2003.

grandfathered in at the implementation of Article V of the Florida State Constitution in 1973.⁴²⁵

Non lawyer judges are being phased out completely in some states. James T. Leonard was the last non-lawyer judge to sit as a New Jersey municipal court judge. He died in 1991. Judge Leonard's judicial career began in 1946, when New Jersey's lower courts were often staffed by local residents not trained as lawyers.⁴²⁶ When the state began requiring the new judges have legal degrees, Judge Leonard and 200 other judges like him stayed on the bench. By 1985, Judge Leonard was the last of the non lawyer judges. He retired in 1989.⁴²⁷ Judge Leonard had been mayor, a councilman, a volunteer firefighter and a special police officer in the small town of Garwood, New Jersey.⁴²⁸

Spain

Because of the way judges are selected in Spain through examination after law school and educated specifically to become judges, there are no non lawyer judges.

⁴²⁵ Article V of the Florida State Constitution was amended in 1973 to establish a two-tier trial court system, providing all judges must be attorneys except county judges in counties with populations less than 40,000.

⁴²⁶ New York Times, James T. Leonard, 80, A Non-Lawyer Judge, August 18, 1991.

⁴²⁷ Ibid.

⁴²⁸ Ibid. Garwood, New Jersey is a working-class town of 5,000 residents in Union County.

Adjudicators' Bill of Rights

1. A Fair and Living Wage. This is crucial to preventing economic pressure leading to improper acceptance of gifts, etc.
2. A Forum Free From Political Pressure. This is crucial to a fair and impartial adjudication of any matter. Employment and pay cannot be based on decisional content or outcome. The way judges are selected can have a profound effect on this issue.
3. An Atmosphere of Independence. While there should always a chain of command and a review system, the results of supervision and review of decisions and outcome can never be a basis of discipline or negative/positive job performance review. Independence does not mean a judge can do anything he/she wants to do. Judges are bound by ethical conduct and committed to following the law. But judges must be allowed to make decisions independent of popular beliefs and the idea du jour. (Note: see the discussion of election of judges and term limits)
4. A Decent Physical Plant From Which to Work and Conduct Adjudications. This is crucial to the integrity of the process. Even items such as flags and seals add to the atmosphere of respect. For the community to respect the process, the process must be respected.

5. Access to Education and Research Materials. This is important to accuracy.

An adjudicator must be able to keep up with changes in the law.

6. A Reasonable Work Load. Too many cases and/or too little time to deliberate does not support the best possible adjudication. Setting reasonable time limits to adjudicate a matter is fine, provided there are ways to give a matter more time if necessary without outside pressure of consequences.

7. Job Security. Retention and tenure must not be based on the content of decisions. Removal must be based on proof of serious misconduct or intentional violation of ethical rules.

Judicial Immunity

“The problem of power is how to achieve its responsible use rather than its irresponsible and indulgent use – of how to get men of power to live *for* the public, rather than *off* the public.”⁴²⁹

Judicial immunity is a form of legal immunity that protects judges and others employed by the judiciary from lawsuits brought against them for official conduct in office.⁴³⁰ Some examples are that a judge cannot be sued for libel for statements made in the course of a trial. There are two purposes for judicial immunity. It encourages judges to act in a fair and impartial manner, without regard to the possible extrinsic harms their acts may cause and it protects government workers from harassment.⁴³¹

Historically, judicial immunity grew out of the concept in English common law that the “King could do no wrong”. Judges were the King’s delegates and as such “ought not to be drawn into question . . .”⁴³²

⁴²⁹ Kennedy, Robert F., “I Remember, I Believe,” *The Pursuit of Justice* (1964) - United States politician, born at Brookline, Massachusetts. Educated at Harvard and was admitted to the Bar in 1951, and became a member of the staff of the Senate Select Committee on Improper Activities (1957 – 1959). He became Attorney General of the United States (1961 – 1964) and Senator for New York (1965). He was assassinated on June 5, 1968.

⁴³⁰ en.wikipedia.org.

⁴³¹ Ibid.

⁴³² *Floyd & Barker*, 12 Co. Rep. 23, 25, 77 Eng. Rep. 1305, 1307 (Star Chamber 1607).

Jurisdictions in the United States, in general, grant public employees' immunity from civil liability for acts or omissions resulting from his/her acts as the result of the exercise of the discretion vested in him/her, whether or not such discretion is abused.⁴³³ A judge is not to be held answerable in damages for acts performed in his/her judicial capacity.⁴³⁴

In California it is well established that judges are granted immunity from civil suits in the exercise of their judicial functions.⁴³⁵ This rule is based on the principle that the highest importance to the proper administration of justice that a judicial officer shall be free to act upon his or her own convictions without apprehension of personal consequence to him or herself.⁴³⁶ Judicial immunity is used to protect the decision-making process from reprisals by dissatisfied litigants. It promotes fearless and independent decision-making.⁴³⁷ Proper accountability and action by dissatisfied litigants is to appeal a decision to a higher court, not file a lawsuit against a judge.

This protection is extended to judges at all levels. Where a civil suit under the federal Civil Rights Act was filed against several persons, including an administrative law judge, the court concluded that administrative law judges are immune from any

⁴³³ See California Government Code section 820.2.

⁴³⁴ *Santa Clara v. County of Santa Clara* (1969) 1 Cal.App.3d 493.

⁴³⁵ *Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585, 586.

⁴³⁶ *Tagliavia v. County of Los Angeles* (1980) 112 Cal.App.3d 759, 762.

⁴³⁷ *Thiele v. RML Realty Partners* (1993) 14 Cal.App. 4th 1526, 1531.

suit for civil damages, on the basis of judicial immunity.⁴³⁸ The court states that it is clear that a judge is not liable under the Civil Rights Act or under any other⁴³⁹ theory for judicial acts committed within his judicial jurisdiction.

California Government Code section 821.6 provides that “a public employee is not liable for injury caused by his (or her) instituting or prosecuting any judicial or administrative proceeding within the scope of his (or her) employment, even if he (or she) acts maliciously and without probable cause.”⁴⁴⁰

It is firmly established that judges enjoy absolute immunity from suit for all “judicial acts” unless they have acted “in the clear absence of all jurisdiction.”⁴⁴¹ The court states that the “judicial acts” for which judges enjoy immunity include all functions normally performed by a judge when the parties deal with the judge in her (or his) judicial capacity.⁴⁴² Immunity for judicial acts cannot “be affected by the motives with which they are performed.”⁴⁴³ Nor does the fact that the plaintiff brought a civil rights action⁴⁴⁴ for acting in a partial and biased manner alter the

⁴³⁸ *Taylor v. Mitzel* (1978) 82 Cal.App.3d 665, 670, 671.

⁴³⁹ *Ibid.*

⁴⁴⁰ See also *Genburg v. Miller* (1994) 31 Cal.App.4th 512, 518.

⁴⁴¹ *Bradly v. Gray, United State Court of Appeals*, (2003) 10th Circuit, Oklahoma CIV-03-143-M, citing *Stump v. Sparkman*, 435 U.S. 349 (1978), *Forrester v. White*, 484 U.S. 219, 225 (1988), and *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335m 348 (1872).

⁴⁴² *Stump v. Sparkman*, 435 U.S. 349 (1978).

⁴⁴³ *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335m 348 (1872).

⁴⁴⁴ Under 42 U.S.C. section 1982.

judge's civil immunity.⁴⁴⁵ The judge's actions were clearly "judicial acts" and the judge had jurisdiction over the matter. The court concluded that the judge had absolute immunity in the case.⁴⁴⁶

Little can be done to stop an angry party from filing a suit against a judge.⁴⁴⁷ Such suits are usually resolved quickly, usually when a demurrer⁴⁴⁸ is granted. However, such law suits can be a costly nuisance, wasting judges' time and draining them emotionally.⁴⁴⁹

One example often cited by judges in the United States is the case of Los Angeles Superior Court Judge Raymond D. Mireles, who was sued by a public defender who was physically removed from a courtroom and brought before the judge. Judge Mireles had ordered the bailiff to "forcibly and with excessive force seize" the public defender and bring him into Judge Mireles courtroom. Although he

⁴⁴⁵ *Pierson v. Ray*, 386 U.S. 547, 554, 555 (1967).

⁴⁴⁶ *Bradly v. Gray*, *United State Court of Appeals*, (2003) 10th Circuit, Oklahoma CIV-03-143-M, at page 2.

⁴⁴⁷ Guccione, Jean Immunity Still Not Absolute, Judge Lament Los Angeles Daily Journal, 05-15-97 page 1.

⁴⁴⁸ Demurrer is a request made to a court, asking it to dismiss a lawsuit on the grounds that no legal claim is asserted. For example, if you were sued by you neighbor for parking on the street in front of her house, you could file a demurrer. Your parking habits may annoy your neighbor, but the street is public property and parking here does not cause any harm recognized by the law. After a demurrer is filed, a hearing is held at which both sides can make arguments about the matter. The judge may dismiss all or part of the lawsuit or may allow the party who filed the lawsuit to amend its complaint. In some states and in the United States Federal Court, the term demurrer has been replaced by "motion to dismiss for failure to state a claim (called a "12(b) (6) motion" in federal court) or a similar term. [www. Nolo.com/definitions](http://www.Nolo.com/definitions)

⁴⁴⁹ Guccione, Jean, at page 1.

claimed judicial immunity, he lost in the lower court. Finally, the United States Supreme Court, in an unusual move, summarily reversed and remanded the case without oral arguments, finding that Judge Mireles had performed a judicial act, and, therefore, was immune from liability.⁴⁵⁰ It should be noted that the judge is not immune from disciplinary action by the California Commission on Judicial Performance.

However, until the United States Congress passed the Federal Courts Improvement Act of 1996,⁴⁵¹ judges could be sued under the civil rights laws for prospective injunctive relief, attorneys' fees and court costs. As many as 2,000 civil rights actions have been filed against judges nationwide since 1984, when the Supreme Court of the United States found that judicial immunity does not bar actions under the Civil Rights Act for prospective injunctive relief in civil rights actions, so that a judicial officer must pay the plaintiff's attorney fees and costs.⁴⁵² This ruling came out of a challenge to a Virginia county magistrate's practice of jailing defendants charged with misdemeanor offenses when they did not post bail, though if convicted, the offenders under state law could not be jailed. The law suit cost the

⁴⁵⁰ *Mireles v. Waco*, 502 U.S. 9 (1991).

⁴⁵¹ 42 USC sections 1983 and 1988 prohibits the assessment of attorney fees and costs against judges in civil rights cases for actions taken in their judicial capacity "unless such action was clearly in excess of such officer's jurisdiction." It also prohibits prospective injunctive relief against judges "unless a declaratory decree is violated or declaratory relief was unavailable."

⁴⁵² *Pulliam v. Allen*, 466 U.S. 522 (1984).

magistrate \$43,000 in attorney fees and court costs after appeals.⁴⁵³ This decision “breached the wall” of absolute immunity.⁴⁵⁴

There are some instances on a state court level when a judge’s conduct is not immune from suit.⁴⁵⁵ A state court judge from Illinois wrongfully terminated a probation officer. The Supreme Court of the United States, in allowing a section 1983 tort damages lawsuit, held that judge’s conduct that is “ministerial” is not judicial and therefore does not enjoy immunity.⁴⁵⁶

Also, when a court, as part of its function, enforces certain rules, it is not acting in a judicial capacity and is therefore susceptible to civil suit.⁴⁵⁷ In a case where the Virginia Supreme Court refused to allow attorney advertising, in spite of the fact that the United States Supreme Court had held that an attorney has a First Amendment protected right to commercial speech, the United States Supreme Court held that an injunction was appropriate. In that case, declaratory and injunctive relief was proper for preventing the punishment of First Amendment protected attorney advertising.⁴⁵⁸

⁴⁵³ Guccione, Jean, at page 2.

⁴⁵⁴ *Ibid.*, quoting Chief Justice Joseph R. Weisberger of the Rhode Island Supreme Court who led the fight to have Congress overturn the effects of the Supreme Court’s decision in *Pulliam*.

⁴⁵⁵ Miller, Jeremy M. Chapman University School of Law, Legal Ethics: Taking the Hard Knocks of Judicial Immunity (1992), Los Angeles Daily Journal, Vol. 105, No. 7.

⁴⁵⁶ *Forrester v. White*, 484 U.S. 219 (1988).

⁴⁵⁷ *Supreme Court of Virginia v. Consumers Union*, 466 U. S. 719 (1980).

⁴⁵⁸ *Ibid.*

Judges are not immune from prosecution for crimes committed while performing their ministerial duties. A judge was indicted for failing to include African-Americans as jurors. The function of choosing jurors was held to ministerial.⁴⁵⁹

Spain

Spain, like most civil law countries, select judges through public competition, usually among young law graduates. Becoming a judge is a career choice, and they are expected to spend their lives climbing up from lower courts to upper judicial positions.⁴⁶⁰ The principle of judicial accountability is developed in the New Organic Law.⁴⁶¹ Three types of liability: criminal, civil and disciplinary are discussed.⁴⁶²

⁴⁵⁹ *Ex Parte Virginia*, 100 U.S. 339 (1879).

⁴⁶⁰ Diez-Picazo, Luis-Maria, professor at L'instituto de Empresa de Madrid, Judicial accountability in Spain, Cour de Cassation April 2003.

⁴⁶¹ Arts. 405 ff. of the Ley Organica del Poder Judicial of 1985.

⁴⁶² *Ibid.*, also see Diez-Picazo, Luis-Maria, professor at L'instituto de Empresa de Madrid, Judicial accountability in Spain, Cour de Cassation April 2003.

Criminal Liability

Spanish judges are criminally liable for any offence committed in the fulfillment of their function. This includes bribery and obstruction of justice. Spain also allows private prosecution. Private persons, even if they are not the victim of the crime, may start criminal proceeding for most offenses.⁴⁶³ This *actio popularis* applies to judges also.

Traditional safeguards against potential abuse were abolished in 1995. Before 1995, in order to prevent the use of criminal prosecution to be used to intimidate judges, criminal proceedings against a judge could not be started without leave of the court of appeal or Supreme Court.⁴⁶⁴ At a preliminary stage, the court of appeal would conduct a non-public inquiry into the seriousness of the charges.⁴⁶⁵ This requirement is known as *antejuicio* (before the trial).⁴⁶⁶ This safeguard was abolished in 1995, as contrary to the right of due process.⁴⁶⁷

The only safeguard that still is in force, is that judges are not tried by ordinary courts, but by the corresponding court of appeal or Supreme Court. This is a statutory

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ In this context "seriousness" appears to mean "viability".

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid.

deviation from ordinary rules of jurisdiction.⁴⁶⁸ The justification for this change of the rules of jurisdiction is that the judges in the upper courts are more experienced and detached, which helps to protect judges for purely “demagogic” convictions.⁴⁶⁹

As a practical matter, prosecutions against judges are not frequent, but do happen. There have been a few cases, including the conviction of one member of the Supreme Court, for corruption.⁴⁷⁰

Civil Liability

Judges in Spain may be sued for damages caused in the performance of their duties. Liability in tort presupposed malice or negligence, but statutory law is not clear as to the level of negligence required.⁴⁷¹ A civil action cannot be brought against a judge until the proceedings where the alleged damage occurred is completely finished.⁴⁷² The final judgment in the original proceedings cannot be modified, so that civil liability is not an entirely effective remedy against unfair judicial decisions.⁴⁷³ Civil suits against judges are extremely unusual. Also, under

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid.

⁴⁷² Ibid.

⁴⁷³ Ibid.

the Spanish Constitution⁴⁷⁴ the State may be sued directly for damages caused by judicial error or “anomalous functioning” of the administration of justice.⁴⁷⁵ The state may be able to get indemnified by the official who performed the wrongful act. There are two grounds for state liability: judicial error and anomalous function of the administration of justice.⁴⁷⁶

Judicial error is defined by the Constitutional Court as: 1. the mistake has to be crucial, not simply incidental, for the judicial decision; 2. the mistake has to be attributable to the judge (this excludes mistakes made by the parties); 3. the mistake has to be patent, that is any competent lawyer should realize it; and 4. the mistake has to be prejudicial for the party that is complaining of the error.⁴⁷⁷ There is also a procedural condition. Judicial error has to be declared as such by the Supreme Court in a special procedure. Then the litigant can file a claim for compensation at the Ministry of Justice. The Ministry of Justice’s decision can be reviewed just like any other administrative decision.⁴⁷⁸

⁴⁷⁴ Spanish Constitution Art. 121.

⁴⁷⁵ *Id.*, at page 2.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

Citizens of Spain may also file a *recurso de amparo*, an individual complaint before the Constitutional Court for alleged violations of fundamental rights. Judicial error is deemed to be a breach of the Spanish Constitution.⁴⁷⁹

Anomalous⁴⁸⁰ functioning of the administration of justice is much simpler.⁴⁸¹

This ground for state liability covers damages arising in the course of judicial proceedings but not due to a judicial decision as such, but the workings of the “machinery” such as undue delay in rendering justice.⁴⁸² A claim for anomalous functioning is filed directly with the Ministry of Justice, and follows the ordinary procedure for damages caused by administrative actions.⁴⁸³

⁴⁷⁹ Spanish Constitution Article 24. This article is roughly equivalent to Article 6 of the European Convention on Human Rights.

⁴⁸⁰ Anomalous in this context is used to refer to a breach of a rule or established practice.

⁴⁸¹ Diez-Picazo, Luis-Maria, professor at L’insttuto de Empresa de Madrid, Judicial accountability in Spain, Cour de Cassation April 2003 at page 2.

⁴⁸² Ibid.

⁴⁸³ Ibid.

Economics

“Economics is the science which studies human behaviour as a relationship between ends and scarce means which have alternative uses.”⁴⁸⁴

The United States Constitution in Article III, Section 1, “The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”⁴⁸⁵ “The Compensation Clause has its roots in long standing Anglo-American tradition of an Independent Judiciary. A judiciary free from control of the Executive and Legislative branches is essential to have claims decided by judges who are free from potential domination of other branches.”⁴⁸⁶ Alexander Hamilton, writing in the Federalist Papers⁴⁸⁷ emphasized that “in the general course of human nature, power over a man’s subsistence amounts to power over his will.”

Thus, once a salary figure has gone into effect, Congress may not reduce it nor rescind any part of an increase, although prior to the time of its effectiveness

⁴⁸⁴ Robbins, Lionel Charles (Lord Robbins), *Essay on the Nature and Significance of Economic Science* (1932) chapter 1, sec 3 - British economist and educationalist. He was professor of economics at the London School of Economics (1929 – 1961). (Cambridge Encyclopedia)

⁴⁸⁵ United States Constitution Article III, Section 1 “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.” www.law.cornell.edu/constitution.

⁴⁸⁶ *United States v. Will*, (1980) 449 U.S. 200, 217 -218.

⁴⁸⁷ The Federalist, No. 79 (J. Cooke, ed., 1961), 531.

Congress may repeal a promised increase.⁴⁸⁸ The decision was rendered in the context of a statutory salary plan for all federal officers and employees under which an increase went automatically into effect on a specified date. Four years running, Congress interdicted the pay increases, but in two instances the increases had become effective, raising the barrier of Article III, Section 1 Clause of the United States Constitution. In one year, the increase took effect October 1st. The President signed the bill reducing the amount during the day of October 1st. The court in *Will*⁴⁸⁹ is also authority for the proposition that even general, nondiscriminatory reduction affecting judges but not aimed solely at them, is considered barred by the Clause.

However, in *O'Malley v. Woodrough*⁴⁹⁰ the Supreme Court of the United States held that judges salaries could be subject to income tax. The Court allowed the taxation of judges' income stating it "is merely to recognize that judges are also citizens."⁴⁹¹

In February 2001, The American Bar Association (ABA), in conjunction with the Federal Bar Association (FBA), filed a report entitled Federal Judicial Pay Erosion: A Report on the Need for Reform.⁴⁹² The stated objective of the report is to

⁴⁸⁸ *Id.*, *U.S. v. Will* a page 224 – 230.

⁴⁸⁹ *Id.*, at page 226.

⁴⁹⁰ *O'Malley v. Woodrough* (1939) 30 U.S. 277.

⁴⁹¹ *Id.*, at page 282.

⁴⁹² www.abanet.org or www.fedbar.org.

raise the salaries of Federal judges.⁴⁹³ It is the conviction of the ABA and the FBA that judges' salaries as of 2001 have "reached such levels of inadequacy that they threaten to impair the quality and independence of the Third Branch."⁴⁹⁴ The report finds that if Congress and the President do not enact reforms to ensure that Federal judges are adequately and equitably compensated, the government may jeopardize its capacity to continue to attract and retain the very best talent in public office.⁴⁹⁵ The report states that the cause of this problem is that Federal judges' salaries are tied to the salaries of Members of Congress, and that linkage causes Federal judges to suffer the "consequences of Congress' reluctance to award itself a pay increase or even to accept cost-of-living adjustments provided by statute."⁴⁹⁶ Federal judges have received only three of eight possible cost-of-living adjustments since 1993.⁴⁹⁷ The report compares private sector attorney compensation with Federal judges' compensation and finds that the disparity between judges' salaries and those of their peers has reached unacceptable levels.

Members of the Federal judiciary increasingly are resigning or retiring from the bench.⁴⁹⁸ In not stating a specific salary for judges in the Constitution, Alexander

⁴⁹³ Ibid.

⁴⁹⁴ Id., at page I (Executive Summary).

⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid. Between 1991 and 2000, 52 Article III judges resigned or retired from the bench.

Hamilton noted, "It will be readily understood, that the fluctuation in the value of money and in the state of society, rendered a fixed rate of compensation for judges in the Constitution inadmissible. What might be extravagant today, might in half a century become penurious and inadequate."⁴⁹⁹ Congress was given the responsibility for setting its own pay, as well as the pay of the President and the Federal judiciary.⁵⁰⁰ The report finds that Congress and the President have worked on this problem over 30 years and have essentially failed to find a mechanism to make fair decisions about compensation while minimizing the political battles that inevitably accompany salary decisions.⁵⁰¹

In 2000, a member of Congress proposed repeal of the Ethics Reform Act's prohibition against receipt of honoraria by judges, so that being a judge would be more attractive financially.⁵⁰² The report concludes that Supreme Court justices have experienced a 38.3 percent loss in purchasing power, while circuit and district judges' salaries lost 24.6 percent.⁵⁰³ This decrease in the value of a judge's salary coupled

⁴⁹⁹ The Federalist No. 79 at 491-492 (Lodge ed. 1908).

⁵⁰⁰ The ABA/FBA report, at page 4.

⁵⁰¹ Ibid.

⁵⁰² Ibid. – Introduced by Senator Judd Gregg (R-NH), Chairman of the Senate Appropriations Subcommittee on Commerce, Justice, State and the Judiciary, at the request of Senator Mitch McConnell (R-KY), the repeal provision – later dropped – was included in the Committee's version of H.R. 4690, the Fiscal Year 2001 Appropriation for Department of Commerce, Justice and State, the Judiciary and related agencies.

⁵⁰³ Id., at page 10, Charts B and C.

with an increase in per judge workload, has an adverse impact on the retention and recruitment of judges.⁵⁰⁴

While the report on Federal judges' salaries came out in 2001, the issue is still alive, especially for state court judges. An editorial opinion in the New York Times on December 18, 2007⁵⁰⁵ refers to a pay raise for New York judges, stating that the state's judges are "woefully underpaid"⁵⁰⁶ The opinion states that the compensation crisis is a serious threat to the quality of justice.⁵⁰⁷

Not surprisingly, not everyone agrees that there is a salary crisis. In response to Chief Justice John Roberts report⁵⁰⁸ that the pay increases that his colleagues have received over the past two decades are so inadequate that a "constitutional crisis" exists, three law professors wrote a response: Are Judges Overpaid?: A Skeptical Response to the Judicial Salary Debate.⁵⁰⁹ They point out that judges have been complaining for years about their salaries, including state court judges.⁵¹⁰ The

⁵⁰⁴ Id., at page 15 and 16 District Court judges earned \$145,100 in 2001, page 20.

⁵⁰⁵ The New York Times editorial Fair Pay for Judges, Published December 18, 2007 www.nytimes.com.

⁵⁰⁶ Ibid.

⁵⁰⁷ Ibid.

⁵⁰⁸ Chief Justice John Roberts, 2006 Year-End Report on the Federal Judiciary, January 1, 2007, at 7, available at www.supremecourtus.gov.

⁵⁰⁹ Choi, Stephen (New York University School of Law), Gulati, G. Mitu (Duke University School of Law), and Posner, Eric A. (University of Chicago School of Law), Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate (2007) www.law.uchicago.edu/Lawecon.

⁵¹⁰ Id., at page 2: Citing American Bar Association, The Improvement of the Administration of Justice 67 (Fannie J. Klein, ed., 6th ed. 1981 and other articles from Indiana, Texas and New York.

authors point out that it is hard to know if a judge is underpaid.⁵¹¹ Judges usually cite salary studies of practicing attorneys in the United States, law professors, and foreign judges. The authors question this as a proper means to determine if judges are underpaid.⁵¹² They also observe that salary is not the only component of compensation. Compensation also includes “status, tenure, pensions”, job satisfaction, power, and good job conditions, including staff to help them, and (not mentioned by the authors), usually have good health care coverage.⁵¹³

The authors of this article also state that “judicial pay should advance the interest of the public.”⁵¹⁴ While conceding that there are salary differentials between judges salaries and other legal professionals, they ask the question: is this differential unfair?⁵¹⁵ The authors agreed that compensation should be designed to assure that judges perform their office diligently and attract qualified people.⁵¹⁶ They question whether or not raising salaries might not change or might worsen incentives to perform diligently in the public interest and also may “improve patronage opportunities of elected officials, raising salaries for judges in inadvisable.”⁵¹⁷ Then

⁵¹¹ Id., at page 3.

⁵¹² Ibid.

⁵¹³ Ibid.

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ Id., at page 4.

⁵¹⁷ Ibid.

the authors discuss that there are no empirical studies to show whether or not an increase in salary would improve the performance of judges, or the quality of the people who become judges.⁵¹⁸

After formulating an empirical study and collecting data, the authors state that the empirical results “tell a complicated story.”⁵¹⁹ They conclude that judicial productivity (specifically opinion writing) is not increased by higher salaries.⁵²⁰ However, judges that face a higher risk of termination (failure to be reelected or reappointed) are more productive than those who are not at risk for termination.⁵²¹ A review of quality (as opposed to quantity) shows that judges with more secure positions write higher-quality opinions.⁵²² Finally, the authors find no relationship between salary and judicial independence, regardless of the method of tenure.⁵²³

The authors conclude that the case for raising federal court judges’ salaries is not persuasive, but that there is support for increased salaries in states where judges “face a meaningful risk of termination.”⁵²⁴

⁵¹⁸ Ibid.

⁵¹⁹ Id., at page 5

⁵²⁰ Ibid.

⁵²¹ Ibid

⁵²² Ibid. “Quality” was measure by the number of out-of-state citations.

⁵²³ Ibid.

⁵²⁴ Id., at pages 59 and 60.

A survey of state judicial salaries in 2006⁵²⁵ shows that the median⁵²⁶ salary for state court judges is over \$121,744, and that the median of chief of the highest state court salary is \$145, 184.⁵²⁷ The study shows that state court judges' salaries have not increased significantly over the previous three years.

The National Center for State Courts also did a survey comparing judges' salaries to salaries of other professionals.⁵²⁸ The study shows that judicial salaries are generally lower than physicians and lawyers, but about the same as civil engineers.

The setting of state court judges' salaries is decentralized and accomplished in a variety of ways, from compensation commissions to the state legislatures.⁵²⁹ While judges are not the highest paid profession in the United States, it appears that, in general, (with some noted exceptions for Texas and New York) they are well compensated for their positions.⁵³⁰⁵³¹ As the authors of the article skeptical about the

⁵²⁵ Survey of Judicial Salaries, Nation Center for State Courts, Vol. 32 January 1, 2007. A list of salaries for each state is included.

⁵²⁶ Median is the point at which half the values are less than the median number and half the values are greater than the median number. (Cambridge Encyclopedia)

⁵²⁷ *Id.*, NCSC study at page 1.

⁵²⁸ NCSC Survey of Judicial Salaries, vol. 28, No. 2.

⁵²⁹ *Ibid.* Note: a listing of state commissions is included.

⁵³⁰ *Ibid.* Note: each state is separately listed in the survey.

underpayment of judges,⁵³² contrary to United States Supreme Court Justice Roberts'⁵³³ belief, it appears that the independence of the judiciary in the United States is not threatened by inadequate salaries.

Economics as it relates to corruption

Another issue arises when discussing the economics of the judiciary and judicial system. That is the issue of judicial corruption. In a discussion of corruption within the judiciary⁵³⁴ Ms. Mary Noel Pepys⁵³⁵ identifies a number of causes of judicial corruption. One of the causes identified in her article is low judicial and court staff salaries.⁵³⁶ She asserts that judicial salaries that are too low to attract qualified legal personnel or retain them, and that do not enable judges and court staff to support their families in a secure environment, may “prompt” judges and court staff to supplement their incomes with bribes.⁵³⁷ While there certainly are complaints in the United States concerning judges’ salaries, they are not so low as to “prompt” corruption. While individuals in any judicial system may be corrupt, the judicial

⁵³¹ In a 1997 survey of United States Administrative Law Judges, it was found that Administrative Law Judges’ salaries are 70 to 85 percent less than Article III judges.

⁵³² Choi, Stephen, et al. “Are Judges Overpaid?” *Infra* at footnote 509.

⁵³³ See footnote, 508, *Infra*.

⁵³⁴ Pepys, Mary Noel, Corruption within the judiciary: causes and remedies. www.transparency.org.

⁵³⁵ Mary Noel Pepys is a United States based senior attorney with a specialization in the rule of law, specifically international legal and judicial reform.

⁵³⁶ *Id.*, at page 6.

⁵³⁷ *Ibid.*

system in the United States as a whole does not suffer from wide-spread corruption. However, Ms. Pepys' article a majority of respondent's described the United States legal system as corrupt.⁵³⁸

Spain

Judicial Salaries in Spain are set by a centralized through the Ministry of Justice section of the Budget Office. That office has the responsibility to see that all budgets of the courts are included in the general budget of the Ministry of Justice, including "remuneration of judges and other officers, and the material support available for the administration of justice."⁵³⁹ The services of the tribunals are centrally financed by the Ministry of Justice.⁵⁴⁰ The General Council of Judicial Power has powers to initiate, propose, and in some cases, inform on concerns of the remuneration system for judges, magistrates, and personnel serving in the Administration of Justice.⁵⁴¹

The remunerative system was established for members of the Judicial Career and for the officers in the administration of justice service, by statute.⁵⁴² The Organic

⁵³⁸ Id., at pages 12 and 13, Table 2.

⁵³⁹ Judicial Independence: The Contemporary Debate, ed. By S. Shetreet, at page 319.

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid. also Id., at page 330, endnote 44: Organic Law of the General Council, art.3.

⁵⁴² Id., at page 332, endnote 52: Law 17, April 24, 1980.

Law of Judicial Power guarantees the economic independence of judges and magistrates, by means of remuneration commensurate with the dignity of their jurisdictional function and through a social security system that will protect them.⁵⁴³

According to Judicial Salaries of National High Courts, 2004/2005 (Watson and Wolfe), Spain ranks number 12⁵⁴⁴ at \$135,686 with a COLA⁵⁴⁵ adjusted salary of \$166,282.⁵⁴⁶

Spain's Supreme Court was found not to be financially independent.⁵⁴⁷ In Spain, negotiations concerning the supreme courts budgets are conducted with the participation of the judicial commission.⁵⁴⁸ In Spain, the President of the Supreme Court and its Management Department settle on the financing of the Supreme Court with the Ministry of Justice and the Supreme Judicial Commission.⁵⁴⁹ Management of the Supreme Court budget as a task of the department of justice is the case in Spain. Within this framework, the daily administration of financial needs is entrusted

⁵⁴³ Id., at page 332, endnote 54: Organic Law, Chapter IV, Title II, Bk. III and art. 415.

⁵⁴⁴ The United States Supreme Court ranks fifth with a salary of \$203,000.

⁵⁴⁵ COLA (Cost of Living Adjustment) adjusts the actual salary to reflect the actual value of the salary in relationship to the cost of living.

⁵⁴⁶ Id., at page 17.

⁵⁴⁷ Material for 2nd Coloquium of the Network of Presidents of the Supreme Judicial Courts of The European Union, Warsaw, June 12, 2006, Financing Activities of Supreme Courts of European States, Lech Gardocki, First President of the Supreme Court of Poland www.network-presidents.eu.

⁵⁴⁸ Id., at page 6.

⁵⁴⁹ Id., at page 7.

to the Technical Chamber of the Court. The President of the Supreme Court has on numerous occasions addressed the Ministry of Justice pointing out the need for budgetary autonomy, but so far with no results.⁵⁵⁰

Economics as it Relates to Corruption - Spain

In the Pepys' article on judicial corruption, less than 50 percent of the respondents' from Spain believe the judiciary is corrupt.⁵⁵¹

⁵⁵⁰ Id., at pages 11 and 12.

⁵⁵¹ Pepys, Mary Noel, Corruption within the judiciary: causes and remedies. See footnote 534.

Participants' Bill of Rights⁵⁵²

1. The person subject to an action in court shall be given notice and an opportunity to be heard, including the opportunity to present and rebut evidence.⁵⁵³
2. The person subject to the court action shall be given a copy of the governing procedures relevant to their matter.
3. The person subject to the court action shall be given access to the law necessary to understand and pursue their matter.
4. Any hearing or court procedure shall be open to public observation, unless it is in the public interest to close the proceedings.⁵⁵⁴
5. The adjudication function shall be separate from the prosecutorial, and advocacy functions of the government.⁵⁵⁵
6. The presiding officer shall be subject to disqualification for bias, prejudice, or interest.

⁵⁵² Based on California Government Code section 1145.10

⁵⁵³ This section reflects the minimum due process and public interest requirements that must be satisfied.

⁵⁵⁴ E.g.: some juvenile proceedings are closed, or proceedings involving juveniles.

⁵⁵⁵ This is different in Civil Law Legal Systems.

7. Decisions shall be in writing, based on the record, and include a statement of factual and legal basis for the decision. Decisions shall be subject to at least one appeal.

8. *Ex parte* communications shall be restricted.

9. Language assistance shall be made available as well as assistance to the hearing impaired, the sight impaired and accommodation shall be made for disabilities.

Conclusion and Policy Recommendations:

The United States

In general, the theoretical underpinnings of the judicial system are sound and constructed to achieve an independent, fair, impartial and ethical judiciary. In practice, the election of judges is problematic.

It has been suggested by some academics that the United States should reform the judicial selection process and adopt the European way for the selection of state court judges.⁵⁵⁶ The author concentrates on the appointment process for the selection of state court judges. She advocates the civil service model.⁵⁵⁷ That kind of extreme reform is not necessary. However, reforms should be considered in some areas.

First, the election of judges, especially in partisan races, is contrary to the ideals of democracy and the balance of powers. The Founding Fathers⁵⁵⁸ of the United States made philosophical and intellectual choices that they believed would put the best people in the courtroom. They decided to make judges appointed for life through a vetting process whereby the President makes the appointment and the

⁵⁵⁶ Mary L Volcansek, *Fordham Urban Law Journal*, January 1, 2007, *Appointing Judges the European way. Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges*.

⁵⁵⁷ *Id.*, at page 3.

⁵⁵⁸ The authors of the Declaration of Independence and the United States Constitution included John Hancock, Samuel Adams, John Adams, Benjamin Franklin, James Madison, George Washington, and Alexander Hamilton.

Senate consents. This gives the appointing power a chance to find out the qualifications of the judge candidates and examine the past record of the candidates for personal integrity, intelligence, legal ability and judicial temperament.

Some type of reform requiring the examination of the qualifications of candidates for judicial office seems appropriate, even where judges are elected. Actually, doing away with the election of judges altogether would go a long way toward making the judiciary independent with accountability to the law and not to politics. Minimum qualifications beyond age and a legal education should be required demonstrating characteristics that make a good judge.

Second, better education for judges should be required before taking office. Educating judges in the art and science of judging after they take office is contrary to logic. Judging is not instinctual and a good judge needs time to learn subjects such as ethics and avoiding bias. Requiring judges to undergo a basic educational course before actually sitting on the bench would be a reasonable way of assuring better quality decisions and positive courtroom demeanor. This would be a desirable reform. Attempts at centralizing judicial education in the United States have been unsuccessful. Centralizing and standardizing education for judges should be a concern of all state courts.

Third, reforms directed at better access to the courts should be supported. Middle class and working class citizens of the United States do not have easy access

to dispute resolution through the court system. Promoting alternative dispute resolution, such as mediation and arbitration, raising the jurisdictional amount of small claims court, and extending pro bono or low cost legal services to the under represented population would go a long way toward giving a greater number of citizens access to the courts.

Spain

In Spain, through the New Constitution instituted in 1978, the theoretical construction of the judicial system is designed to promote fair, independent and autonomous judges. However, in practice, there are a number of problems that have arisen.

First, reforms directed at eliminating or diminishing the delays should be instituted. Delays, such as the ones discussed above, lead to serious challenges to the judicial system and undermine the confidence of the community in judicial dispute resolution. A combination of more judges, and reforms designed to make the system less complex would help the delays tremendously.

Second, there should be an age requirement and/or an experience requirement considered for judicial qualification. The most common complaint about the judges voiced by the attorneys that were interviewed was that judges coming out of the judicial college have no experience as attorneys and are too young to have much life

experience. Adding a requirement to intern under an older, more experienced judge for substantial amount of time, such as a year, would give the new judges a chance to develop some maturity and experience before actually acting as a judge. It would also develop a mentor system, so that new judges would have someone to consult if they needed help deciding a complex issue.

Third, there should be a disclosure requirement for judges to list potential conflicts of interest including interests held by family members. Disclosure is important for the appearance of fairness and transparency. The assumption that judges will disclose potential conflicts of interest as they arise is problematic. Thinking about it before the fact, makes it easier to avoid problems if the issue arises. To assume that judges, much less the family members of judges do not have economic interests in companies that come before the courts is, at best naïve, and at worst, potentially underhanded. Spain has been criticized for not requiring disclosure of economic interest by the judges. Reform, requiring disclosure, would make the Spanish judicial system more transparent and raise the confidence of those subject to it.

There are many paths to integrity and ethics in western adjudicatory systems. Further success in achieving these goals requires an open mind and a concern for fair and impartial justice.

Appendix 1 A

May 2007

Barcelona Spain

Discussions with:

Abel Garriga, Advocat Civil insurance defense/subrogation

Jordi Oliveras i Badia⁵⁵⁹, Advocat

Josep Rabionet i Rissech, Advocat/Economista

Eduard Soria i Badia, Advocat

Vicenc Navarro i Betrain, Advocat/Abogado

Luis del Castillo Aragon, Abogado

Cristobal Martell Perez-Alcalde/ Presidente de la Comission de Deontologia/Abogado

Miguel Angel Gimeno Jubero, Presidente Seccion 6, Audiencia Provincial de

Barcelona/Jutge

Santiago Vidal i Marsal, Magistrat – Jutge, Professor de Dret, Universitat de

Barcelona

Eva Soria Puig, Attorney, Institut Ramon Llull, translator

⁵⁵⁹ Names in Catalan typically are two names separated by “i”. The first of the two names is the paternal name and is the name used in informal contexts. The second of the two names is the maternal name and is not used informally, but only in formal contexts.

Interview with Santiago Vidal i Marsal is a judge of the 10th penal division of the Provincial Court of Barcelona. He hears felony criminal cases as part of a three judge panel. He also sits on appeals from the lower court. About 50% of his work load is appeals.

He became a judge in an unusual way that is no longer available. Most judges go to school (like doctors in the US) to become judges. They take an examination and if they pass, they are assigned to a court. Some judges are appointed by a commission of judges to the bench because they are outstanding attorneys or scholars. This is called the fourth turn/position. Judge Vidal became a judge both by examination and appointment. This was called the third turn/position. He is appointed for life and has been on the bench since 1988 (this may be wrong since he also said he has been on the bench 11 years). To be promoted, you must apply for an open position and the most senior judge that applies gets the position. The judge must have three years in the first or lowest court to advance; five years in the second court and ten years for the third court with and additional four years to advance to the appeal court.

Judge Vidal is paid by the government and is not subject to employment review outside following a criminal code of conduct (to be discussed further) and of course his decisions can be appealed. The appeal is to either a Supreme Court in Madrid or a constitutional court in Madrid, depending on the issue appealed.

As a judge, he is subject to a code of ethics/conduct. The Organic Law of Judicial Branch, Disciplinary Rules. A panel of judges from the Supreme Court decides disciplinary actions for a maximum penalty of three months suspension with no salary or a fine. If you treat litigants badly you can be disciplined, but you cannot be disciplined for your decision unless you purposefully give an unlawful decision.

He has never experienced political pressure directly because he does not have to stand for election, however, he did talk about high profile cases such as terrorism or money laundering where there is scrutiny by the press.

He has never experienced an improper communication. There is a prohibition against *Ex Parte* communication.

The biggest problem with the judicial system (as expressed by Judge Vidal) is the delay. There are long delays for cases to be heard originally and to be appealed. An individual can stay in jail for up to two years without a final adjudication.

A judge cannot belong to a political party or give money to a political party. Judge Vidal stated that he is president of the Human Rights Commission and he had to get permission from the higher court to participate.

Judge Vidal gave a tour of the Ministry of Justice. One of the large courtrooms had cameras and monitors set up so that the press and the audience could view the proceedings. The audience was allowed in a balcony area in the back of the courtroom, quite far from the actual proceedings. The judges' robes were elaborate with badges that designated rank. The judges' chambers were quite modest with three judges working in the same office.

Interview with Miguel Angel Gimeno Jubero, Presidente Seccion 6, Audiencia

Provincial de Barcelona/Judge is the presiding judge of the provincial court of Barcelona, Section 6.

Judge Gimeno Jubero's is the president of a twelve member section of the court. His position is for two years. He was elected to that position by the members of the court. He presides over cases involving complex financial crimes.

His main concern is that there are no written ethical canons for judges in Spain. This has been a matter of recent attention after the criminal trial of Judge (Juez de Instruccion) Estrvill.⁵⁶⁰ The only action taken against a judge is punishment pursuant to a criminal code of conduct. Other public workers can have "administrative punishment." It is a crime for judges to commit serious misconduct including preveracacion (obstruction of justice), and cohecho⁵⁶¹ (bribery). He feels this is negative regulation. There is no positive obligation to keep up to date on legal matters (continuing education) or ideas about how to be a good judge (issues of demeanor and bias). He wants an ethical code that imposes a positive obligation on judges to act ethically. There are no preemptory challenges against judges in Spain. The main issues he sees with the courts are delay and work load issues. Those two issues are related, of

⁵⁶⁰ The matter concerning the criminal conviction of Judge Estivill is discussed at page *Infra*

⁵⁶¹ Cohecho is defined as using the authority of a public servant for his/her own benefit or the benefit of a third person – a present, gift or offering or promise – using the power of authority – an action or omission is punishable by tow to six years in prison and a fine of up to three times the amount of the bribe and removal from judicial position or seven to twelve years suspension from judicial duties. (Codigo penal)

course – too many cases leads to long delays. There is an organization in Spain, Judges for Democracy, which is trying to get an ethical code passed as a government resolution. He stated that there are 4500 judges in Spain.

Interview with attorneys at large law office: Rabionet & Associats, Advocats and Economistes. The firm consisted of 40 labor lawyers, 35 corporate lawyers and ten family law lawyers. There were also several economist directly associated with the firm. At the interview were: Josep Rabionet i Rissech, Advocat and Economista, Eduard Soria i Badia, Advocat, and Vicenc Navarro i Betrian. A few younger associates sat in on the interview.

This was a firm of politically left wing, Catalan attorneys. They explained the system of how someone goes about becoming a judge. After law school, a test is taken. Those students that score high enough enter judges' school. They explained that there is another way to become a judge. It is called "fourth turn." If an attorney or law professor has a notable career, writes law commentary, or has special credentials (one attorney said: "grey hair"), then an appointment can be made by the Commission of Judges.

The court of first impression is the City Court of Barcelona. The judges there are often young and inexperienced. The attorneys complained that in judges' school all the students have to do is memorize the law. The ability to memorize is valued over the ability to use critical thinking skills. The attorneys felt that the judges at the first level make many mistakes and are overturned often. The attorneys found this to be a big problem because it wastes money and time.

The first appeal is to the Provincial Court. There are 25 sections with four judges in each section⁵⁶². These judges are older and more experienced. The next appeal, depending on the case, can be taken to the Supreme Court in Madrid or the Supreme Court of Catalonia. The higher the court, the more experienced the judge.⁵⁶³

Lawyers make more money than judges. However, judges work for the state⁵⁶⁴ and have the prestige of being called "Your Honor" for life. It is very unusual for a judge to resign to go back to practicing law to make more money.

The attorneys felt that their relationship with the judges was not good. They believe that the judges see them as the enemy and that the lawyers on both sides want to fool the judge. However, they did feel that the judges make a good faith effort to follow the law, but the younger, less experienced ones do not do that well.

⁵⁶² Santiago Vidal i Marsal is one of the four judges from the 10th section. See his interview beginning on page 180.

⁵⁶³ There are three high courts in Spain. In Madrid there is a Tribunal Constitucional. This court is the final court for constitutional issues. In Madrid there is a Tribunal Supremo. This is the court that hears appeals from provincial courts depending on the issues. In Barcelona there is the Tribunal Superior de Judicia de Catalunya. This is the appeals court to which most appeals from lower courts end up.

⁵⁶⁴ Judges have job security.

The attorneys also complained that the judges are not in touch with reality. They do not have much life experience and they do not really have enough time to learn the facts of the case. The judges do know the law by heart, for whatever that's worth. The attorneys complained that the judges rule on their first impression and in a conclusory way, relying on bad witness and poor proof.

In Spain, the judge can have a specialist (expert witness) give information on a case.

Before 2000, there could only be one, now there can be two. The judge can appoint the expert witness from a list of specialists maintained by the bar association. The attorneys felt that the list did not necessarily reflect the best experts in any particular field. The judges seem to have a problem applying the law to the facts. The attorneys did not feel that the experts that are appointed by the judge are actually neutral.

Legally, *ex parte* communications are not allowed. The judge cannot talk to one side, without the other side present.

Young women are now going to judges' school. The attorneys complained about a young female judge without any legal or life experience taking a very narrow view of the law. A client was held in contempt for violating an order not to

communicate with his estranged wife, when he called her from the airport to tell her his plane was late and he would be late picking up their child.⁵⁶⁵

The attorneys did agree that domestic violence was a big issue in Barcelona because it had been ignored for a long time. The attorneys were not convinced, however, that the effort to stop domestic violence was over zealous.⁵⁶⁶

⁵⁶⁵ If this is true, it does appear to put form over substance. However, since this was the husband's attorney speaking, there is no way to know if he is bending the truth to make the judge's actions appear absurd.

⁵⁶⁶ All the attorneys interviewed were men except one.

Interview with Cristobal Martell Perez-Alcalde⁵⁶⁷, Martell, Abogados and Presidente de la Comision de Deontologia⁵⁶⁸.

Judges are subject to the General Council of Judicial Branch. They have a commission that makes inspections to determine if judges are doing a good job. It is a crime for judges to obstruct justice (prevaricacion) and accept bribes.

If there is a jury trial⁵⁶⁹, there is an appeal to a median appellate court. There are three high courts: Catalonia Supreme Court, Supreme Court of Madrid, and the Constitutional Court in Madrid. The Constitutional Court in Madrid has jurisdiction over cases that involve the Spanish Constitution. Mr. Perez-Alcalde said you do not have to be a judge to be on the Constitutional Court. It can be the dean of the University or President of the Spanish Bar Association. It is an appointed position for seven years. The President to the Court is elected by the members of the Court. There are (about) twenty-one members of the court.

⁵⁶⁷ Mr. Perez-Alcalde was clearly Spanish as opposed to Catalan.

⁵⁶⁸ The Comissio de Deontologia is a committee of the Il.lustre Col.legi d'Advocats de Barcelona. This group establishes the ethical standards and guidelines for attorneys.

⁵⁶⁹ Jury trials are only held if it is a serious crime and the defendant requests a jury. The Spanish attorneys and judges interviewed are very suspicious of juries.

The General Council of the Judicial Branch can discipline or remove judges. A judge has to be pretty bad to be removed. Mr. Perez-Alcalde mentioned prevaricacion (obstruction of justice) and cohecho (bribery). The definition of bribery is: authority of public servant or a benefit or benefit of a third person – a present/gift or offering or promise using power by action or omission. Violation of this law calls for two to six years in prison and a fine of three times the amount of the bribe. A judge can be removed from his position or suspended for seven to twelve years⁵⁷⁰. A judge can be disciplined if his demeanor is aggressive or angry.

Different sections of the judiciary have different reputations. Mr. Perez-Alcalde pointed out that the 9th section has the reputation of being very harsh.

Students at judicial school do a one month internship at a law firm. The intern goes to court with the attorneys. Mr. Perez-Alcalde is happy with the judges. He believes the problems are with the legislature, not with the judges. He said: “Bad laws, not bad judges.” He also complained about long delays. He gave an example to a matter that he was trying in court in 2007. The case involves Environmental Law: garbage in the water. It case began in 1992. He believes that there should be fair judgment for the public without undo delay.⁵⁷¹

⁵⁷⁰ Mr. Perez-Alcalde read this definition from the Codigo Penal and the translator translated it.

⁵⁷¹ Delay was a common complaint among attorneys and judges alike.

Interview with Luis del Castillo Aragon, Abogado.⁵⁷²

To become a judge, law students take a test and go to school. If you go to judges' school you can be any kind of judge. There is no specialization at judges' school. However a lawyer of reputation could be chosen to serve as a judge in a specific field. He described a third way of becoming a judge. After five years as a lawyer, a person could be appointed as a judge to a first level court. The lawyer has to have twelve or more serious trials to qualify for this appointment.⁵⁷³

He prefers judge trials. Juries are unfriendly toward defendants. He does not trust a jury except in homicide cases. He believes that the jury cannot understand the technical aspects of the law.

Courts make mistakes. That why there are appeals. There is no presumption of innocence. Guilt is assumed and defendants are convicted on very little evidence. He believes that drug charges had changed the legal standards. The example he gave is that if your name came up in a telephone conversation

⁵⁷² Mr. Castillo Aragon was a revered older attorney who made a reputation representing left wing dissenters to the Franco Regime.

⁵⁷³ Judge Vidal i Marsal said that this way to become a judge was no longer in use.

between drug dealers, your behavior would be linked to the drug deals, even though you did not have any actual drugs.⁵⁷⁴

He complained that judges have no practical experience. The candidate for judicial school is accepted based on how well they can memorize. Judicial students are removed from reality and they only study, then go from student to judges. The new judges are young: 24 and 25 years old. They have no life experience. They also come from the upper middle social class. They are not “street wise.” They have never done a trial and never even been a lawyer. He believes memorizing leads to no flexibility and no practicality. They are too far removed from the “social contamination” that they must deal with in court. He proposed that judges not be under 35 years old and act as an attorney for at least 10 years⁵⁷⁵.

⁵⁷⁴ This actually sounds similar to our drug conspiracy cases.

⁵⁷⁵ In general most judges in the United States are over 35 years old and have more than 10 years of experience in the law.

Interview with Abel Garriga, Civil Attorney, Insurance Defense and Subrogation.

Mr. Garriga explained that in criminal court there are “instruction judges⁵⁷⁶” who investigate crimes. They work with the prosecutor and the police to develop evidence against the accused. The instruction judge can order an accused jailed until the matter is resolved. He explained the case of Judge Estivill.⁵⁷⁷ This judge was involved in blackmail and bribery.⁵⁷⁸ He had an attorney accomplice. Judge Estivill would threaten to jail an accused, usually a white collar criminal, pending the investigation of charges. Of course, Mr. Garriga, pointed out, the accused was usually guilty of some wrong doing. Judge Estivill would then direct the accused to see a specific attorney. That attorney would then arrange to keep the accused from being jailed if the accused would pay a specific amount of money to the attorney in addition to the attorney’s legal fees. Then the attorney would arrange with the judge to keep the accused out of jail pending the investigation of the matter and the judge and the attorney would share the money. Judge Estivill was caught when a victim of this scheme decided to report this attempt at blackmail and bribery to the

⁵⁷⁶ Juez de Instruccion

⁵⁷⁷ We had been warned about this case by our translator, but she did not know any detail. This was the first time we learned the details of the case involving Judge Estivill.

⁵⁷⁸ See more details at pages 121 and 122.

authorities. The investigation created a major scandal in the legal community and was the subject of almost every conversation for months.⁵⁷⁹

Mr. Garriga stated that this was such a shocking scandal because it was so unusual for a judge to take advantage of his position to extort money from victims. The court system in Barcelona (and Spain in general) has a culture of fairness and integrity and this was a major deviation from what is expected of judges and attorneys in their system.

⁵⁷⁹ It was clear that Mr. Garriga thought we were there to investigate this matter and was reluctant to say much at first. It was explained to us that the judge who was involved in the bribery case went to jail. Now, the judges "circle the wagon" when corruption comes up. After we spent some time together and talked, he realized that we did not know anything about this scandal and were in Barcelona to interview attorneys and judges for educational purposes, not about corruption. After this interview, many opportunities opened up.

There is a Bench/Bar Commission where attorneys can bring complaints concerning attorneys and judges. If the complaint is serious enough, it is sent to the judges' commission in Madrid. They then decide whether or not to take action against the judge. The attorneys are disciplined through the Spanish Bar Association. Mr. Oliveras finds it unfortunate that there is not very much interest among the bench and bar about these issues concerning ethics and complaints. They held a meeting and very few members attended. He does not believe that there are proper standards set forth for ethics.

There is a Commission appointed by Parliament⁵⁸⁰ that handles complaints. They are 25 to 35 members and they are too enthusiastic about finding judges who have committed misconduct. He pointed out that because of the system of taking a test after law school to become a judge, the students have selected themselves for a career as a judge.

Mr. Oliveras indicated that there were four judges convicted in Barcelona of misconduct in six years. He did not think that was very many.⁵⁸¹ He mentioned the name of Judge Jose Ramon Manzanares. This judge was removed from office by the Spanish High Court for obstruction of justice

⁵⁸⁰ Comision de Elecones con la Administrecion de Justicia.

⁵⁸¹ Mr. Oliveras was not talking about criminal convictions, but about internal discipline for misconduct.

(prevaricacion). Judge Manzanares was the in charge of a prison. It was his job to rule on prisoner permit requests to return home for holidays or other family emergencies.

Specifically there were 242 such permit requests made for Christmas 1998. Judge Manzanares only ruled on 95 in time for Christmas. The other requests were not ruled on for two months after Christmas. Many families complained. Judge Manzanares was not getting along with the administration of the prison, either. He was convicted of malicious delay in the administration of justice (a form of obstruction of justice) and sentenced to 30 months in prison and expelled from being a judge as of January 24, 2003. The court found that Judge Manzanares had ample information to rule on the permit requests and that his request for more information was just a rouse for not performing his duty. The judges' refusal to do his duty was grounds for convictions.

Appendix I B

May 2004 to April 2008

Interviews with Judges and Attorneys from the United States⁵⁸²

1. Judge of the Superior Court of Nevada County, Elected to the bench in 2006.
2. General Jurisdiction Judge from the Office of Administrative Hearings, Oakland Office. Administrative Law Judge II, member of the medical quality hearing panel with over twenty-two years of experience.
3. Judge of the Superior Court of the City and County of San Francisco, retired 2003. Originally appointed. *⁵⁸³
4. General Jurisdiction Judge from the Office of Administrative Hearings, Oakland office. Administrative Law Judge II, past presiding judge with about ten years of experience.

⁵⁸² In order to protect the actual identity of the judges and attorneys, a confidential names list has been prepared and is available if necessary. The judges and attorneys will be identified by number and a brief description of his or her jurisdiction or main area of practice. There were 21 interviews: four attorneys and 17 judges.

⁵⁸³ The "*" designates the interviews that are transcribed and attached hereto.

5. General Jurisdiction Judge from the Office of Administrative Hearings, Sacramento Office. Administrative Law Judge II, past presiding judge and past Deputy Director. Administrative Law Judge II with over twenty years of experience.*

6. Workers' Compensation attorney with both plaintiff's and defense experience over 25 years.

7. General Jurisdiction Judge from the Office of Administrative Hearings, San Diego Office. Administrative Law Judge II, member of the medical quality panel with about 15 years of experience.

8. General Jurisdiction Presiding Judge from the Office of Administrative Hearings, Sacramento office. Past presiding judge of the Oakland office and past Deputy Director with about 15 years of experience.

9. Special Education Judge from the Office of Administrative Hearings, Sacramento office with five years of experience.

10. Commissioner for the Informal Juvenile and Traffic Court – for the Superior Court of the City and County of San Francisco with 18 years experience.*

11. Unemployment Insurance Appeals judge with less than a year of experience

12. Director and Chief Judge of the Fair Employment and Housing Commission, State of California with about 15 years of experience.*
13. General Jurisdiction Judge of the Office of Administrative Hearings, Los Angeles office. Administrative Law Judge II with about 15 years of experience.*
14. Administrative Law Judge II for the California Public Utilities Commission
15. Family Law Attorney, San Francisco City and County
16. Criminal and Civil Law trial attorney
17. Law Professor and Federal Criminal Law trial attorney with 50 years of experience.*
18. Judge of the United States Immigration Court with about ten years of experience.
19. General Jurisdiction Judge of the Office of Administrative Hearings, Oakland office. Administrative Law Judge II, member of the medical quality panel with about 15 years of experience.

20. General Jurisdiction Judge of the Office of Administrative Hearings,
Sacramento/Fresno office. Administrative Law Judge II with about 15 years of
experience.

Administrative Law Judge of the Office of Administrative Hearings, Oakland office –
Administrative Law Judge II and member of the Medical Quality Panel. (Judge
Number 2)

Judge Number 2 reported an incident of direct attempted political pressure. A State
Assembly person's aid attempted to contact Judge #2 by telephone to demand that a
respondent in a Department of Insurance disciplinary matter be granted a continuance.
The continuance was requested untimely (at the hearing), the Attorney representing
the Department of Insurance objected, and there was no good cause as required by
law to grant the continuance request. The hearing proceeded and the Department
proved cause for disciplinary action and the respondent's license to conduct insurance
business in California was revoked. The Assembly person put her demand in writing
that the matter be reheard, with an implied threat. The letter was forwarded to the
Director of the Office of Administrative Hearings, who handled the matter. It was
shocking to Judge #2 that an elected official would get involved in trying to influence
the outcome of a case.

Judge #2 also has experienced a number of instances of disclosure and recusal.
One was during a Medical Board hearing when Judge #2 was sitting with the Medical
Board Panel. The panel was the decider of fact, and Judge #2 was ruling on evidence
and presiding over the matter, but did not have a direct role in acting as a decision

maker. After several days of hearing⁵⁸⁴, Judge #2's daughter's best friend comes into the hearing room with her mother⁵⁸⁵, who is a witness for the Medical Board. The witnesses name did not alert Judge #2, because it was a different last name than the daughter's friend and Judge #2 had never met the daughter's best friend's mother. Judge #2 immediately took the Medical Board Panel aside and explained the problem and then called up both counsel for a sidebar conference. Neither attorney objected to Judge #2 continuing to preside at the hearing, after all, Judge #2 was not involved in deciding the matter, just presiding over the hearing. Further, the panel and the parties would lose several days of hearing if Judge #2 had to be recused. The hearing continued, the panel decided the case and the physician respondent was placed on probation. Some time later, Judge #2 became aware that the daughter's friend and her mother were very angry with Judge #2 because of the panel's decision not to revoke the physician's license. The situation was socially uncomfortable for awhile, but resolved itself over time.

Judge #2 had to recuse him/herself once when the respondent was a friend's brother, once when the attorney for the judge's son in a civil matter, was representing a respondent, and once when a physician who offered an expert opinion in a case had been the subject of a prior disciplinary hearing. Judge #2 had to disclose several times and offer recusal when one of the judge's law professors represented a

⁵⁸⁴ The physician, who was a psychiatrist, was charged with over prescribing a dangerous drug that lead to the suicide of a patient.

⁵⁸⁵ The mother was the patient's significant other.

respondent and when a family member had been treated by a physician that was offering an expert opinion⁵⁸⁶.

Judge #2 was threatened once in a letter from a respondent. Judge #2 also has had a few incidents of inappropriate comments and behavior in the hearing room, including a witness who disrupted the proceedings by yelling and gesturing. Security had to be called to remove the witness. However, Judge #2 states that these incidents do not affect the outcome of the matter, because “as judges we are trained to focus on the relevant issues and not to be distracted by irrelevant ‘white noise.’”

Judge #2 along with one or two other judges in the office received a Christmas card from a respondent’s attorney who fairly regularly appeared in cases heard by the office, with an insert that indicated a goat and three rabbits had been donated to a charitable organization in the judges’ honor. This is a violation of the Judicial Canons, since gifts of this kind are not allowed. Judge #2 wrote a letter to the attorney acknowledging the kind thought, but declining the donation in the judge’s honor.

⁵⁸⁶ This was in an uncontested matter.

Judge of the San Francisco Superior Court for the City and County of San Francisco,
Retired. (Judge Number 3)

Political pressure was put on the judges as a group by the powerful speaker of the California House of Representatives.⁵⁸⁷ He wanted a particular person hired as a Superior Court Commissioner, a position hired by the judges. The judges decided to give the position to another candidate. The Speaker threatened to hold up an appropriation bill for an additional judge's seat that the court needed to lessen the work load of the judges. When the court did not hire the person he wanted, he did, in fact, hold up the appropriations bill for several months.

Some judges are better than others. One of the judges running for retention of his seat this year (2008) is being challenged. He sent out a letter to all the judges, including the retired judges requesting funds for his reelection campaign. He is not a very good judge and has a reputation for biased against women. Judge # 3 does not intend to contribute to his campaign.

⁵⁸⁷ None of the stories told by any of the judges or attorneys has been independently verified. They meant as anecdotal experiences of the person interviewed and not presented or represented as true.

General Jurisdiction Judge of the Office of Administrative Hearings in the Sacramento Office - Administrative Law Judge II was previously the Deputy Director, presiding judge, and member of the medical quality panel with over twenty years of experience (Judge #5).

Judge #5 is the only judge that reported an attempted bribe. The judge was hearing a Bureau of Automotive Repair case in December 2004. It involved "cleanpiping"⁵⁸⁸ and other misconduct concerning improper smog tests. The Bureau did three days of video taped surveillance, and cleanpiping occurred on all three days. The only defense the respondent's offered was that he "did not believe the tape." Judge #5 was on vacation the week before Christmas 2004. A Christmas card came in the mail addressed to the judge. The return address was from a woman in Fresno. One of the clerical staff opened the top of the envelope, which is the practice for all mail sent to the office for any one of the judges. The clerical staff person glanced inside the envelope and saw what appeared to be checks. The envelope also contained a Christmas card and a note. The clerk immediately brought the matter to the attention of the Director and the Presiding Judge. Then the legal Department for the Department of General Services⁵⁸⁹, the Director of the Department of General Services and the California Highway Patrol⁵⁹⁰ were all consulted. It was decided not

⁵⁸⁸ Cleanpiping is the use of a vehicle that can pass a smog check in lieu of the vehicle that needs to be tested.

⁵⁸⁹ The Department of General Services is the parent agency of the Office of Administrative Hearings.

⁵⁹⁰ The California Highway Patrol is the law enforcement agency invested with the responsibility for protecting the judges and other state employees.

to tell Judge #5 until the decision in the matter was completed and mailed. The judge ended up revoking the respondent's Smog Station Certificate as well as his personal registration. Respondent's smog business was shut down completely. After the decision was signed by Judge #5, the judge was informed of the attempted bribe. The Director then sent a letter to the parties (respondent was represented by counsel) informing them of the events and letting them know that the card, note and checks were turned over to the authorities for possible prosecution. The note and card purported to be from respondent's sister. The envelope contained two money order for \$500 each with a promise of "9 more" within two months if they got a good "Christmas present".

Special Education unit judge for the Office of Administrative Hearings –
Administrative Law Judge I with less than five years experience. (Judge # 9)

Judge #9 was appointed as a limit term judge for two years. This is a difficult position because at the end of the two years, the employment agreement can simply not be renewed. No cause has to be given. Then in 2007, Judge #9 was given a full employment contract which requires a one year probationary period where the judge can be terminated for failure to meet probationary goals. During the limited term assignment and the probationary period⁵⁹¹, there is subtle pressure to make sure supervisors are happy with the work including the outcome.

Judge #9 experienced an improper communication when an attorney called to complain about the failure of a mediation agreement and was asked to intervene with the other attorney. Judge #9 explained that it was an enforcement matter and that his involvement would be inappropriate.

Judge #9 has also experienced parties that were threatening, loud, angry and hostile in the hearing. One parent, a large, aggressive man, became confrontational. Judge #9 handled the matters without calling security.

⁵⁹¹ During the probationary period Judge # 9 is subject to two written review from the supervisor of the unit.

Judge #9 reports that he has experienced attorneys in social or professional occasions acting over polite and obsequies, calling the judge, "Your Honor" in an informal social situation.

Judge #9 was the subject of three preemptory challenges⁵⁹². One challenge was by an attorney who had been the subject of the judge's disapproval in a settlement conference. One challenge was by a lawyer from a firm that was fined by Judge #9 for frivolous behavior. The third one was incomprehensible to Judge #9.

Judge #9 pointed out the tension between consistency and independence. The judge's decisions are subject to two levels of review before they are released. The first review is by a colleague and the second review is by the Director of the Special Education Division. While no one tells the judge to change a decision, the comments of the reviewers are taken seriously. There is a question whether or not a supervisor who is responsible for performance review should be involved in reviewing decisions, since that person's opinion might take on more weight than is proper to maintain independence. Also, review of this type takes on additional significance during a probationary or limited term period. Judge #9 stated that concerns about quality, ethics, and other important aspects of being a good judge should be taken care of in the screening and hiring process.

⁵⁹² A preemptory challenge is allowed once by each side in a case. The party has to file an affidavit claiming the judge cannot be fair and impartial, but does not have to be specific or prove actual bias.

Commissioner of the Informal Juvenile and Traffic Court for the Superior Court of the City and County of San Francisco with 18 years of experience (Judge #10).

Judge #10 was appointed to the position by the Superior Court Judges. The term is indefinite, but at the will of the presiding judge of the Unified Family and Juvenile Court.⁵⁹³ Judge #10 is subject to period review by the presiding judge of the Unified Family and Juvenile Court. The decisions are considered convictions and can be appealed to the presiding judge. Judge #10 is subject to the same code of ethics as all Superior Court Judges and is subject to the same sanctions.

Judge #10 reported that the judge has to be careful with the juvenile probation officers not trying to have *ex parte* communications about pending matters.

Judge #10 reported an incident of attempted political pressure. The judge received a phone call from the mayor's office requesting that a traffic citation be pulled. The judge never got the citation.

Judge #10 had to recuse him/herself when a friend from high school called the judge at home to discuss the friend's child's traffic citation. When the judge realized that it was a citation that would come before the judge, Judge #10 cut off the conversation and recused him/herself from hearing the matter.

⁵⁹³ This position is pursuant to Welfare and Institutions Code sections 256 et seq.

Judge #10 was offered a gift of “worry beads” from a grateful father. The judge politely declined.

To insure the judge’s own consistency, Judge #10 has created a bench book with fines and kinds of disposition in lieu of fines that can be imposed, and tries to be consistent. Judge #10 believes in justice and mercy. The judges mission is not to complicate people’s lives, but to assist in keeping children safe and protecting the community.

Executive Director and Chief Judge of the Fair Employment and Housing Commission⁵⁹⁴ and General Jurisdiction Judge for the Office of Administrative Hearings, Oakland Office with fifteen years of experience at Fair Employment and Housing Commission and about five years of experience at Office of Administrative Hearings (Judge #12).

Judge #12 was involved in an *ex parte* communication from a family member while acting as a general jurisdiction judge for the Office of Administrative Hearings.

Judge #12 was hearing a case involving the licensing of a elder care facility. The matter did not finish in the time allotted so a continued hearing date was scheduled.

During the hiatus, Judge #12 was contacted by the judge's nephew who left a voice message inquiring whether or not Judge #12 was acting as the judge in the Department of Social Services matter. Judge #12 did not return the nephew's call.

Judge #12's nephew grew up in Orange County California and was in college in Boston at the time of the communication. Judge #12 was unaware of any relationship the nephew may have with the respondent's in the case or the case, for that matter.

Judge #12 wrote a letter to the parties disclosing the communication. Judge #12 indicated in the letter that the judge could provide a fair and impartial hearing, but was required to disclose the communication and make it part of the record.⁵⁹⁵

⁵⁹⁴ Judge #12 became a general jurisdiction judge of the Office of Administrative Hearings.

⁵⁹⁵ Judge #12 was required to disclose the communication and make it part of the record pursuant to Government Code section 11430.10 et seq.

As Chief Judge of the Fair Employment and Housing Commission, Judge #12 reviewed every decision of every judge before it was released. The decisions were reviewed for consistency as well as proper application of the law⁵⁹⁶. The Fair Employment and Housing Commission has precedential decisions that are reported. Unlike the Office of Administrative Hearings, General Jurisdiction division has a culture of independence. Some consistency is assured through agency guidelines which are adopted through a public hearing process administered by the Office of Administrative Law, an independent agency of the State of California. While judges are not required to follow the guidelines, they are requested to give an explanation if they deviate from the guideline. The vast majority of the decisions of the judges of the Office of Administrative Hearing are just the law of the case and do not have any precedential value. There was no such culture of independence at the Fair Employment and Housing Commission. This points out the problem with agencies that have their own judges as opposed to using an independent central panel of judges such as the Office of Administrative Hearings.

⁵⁹⁶ This highlights the problem of tension between independence and accountability.

General Jurisdiction Judge of the Office of Administrative Hearing, Los Angeles
Office – Administrative Law Judge II with about 15 years of experience (Judge #13)

Judge #13 has an unusual situation. The judge hears cases for the Department of Developmental Services. This agency supplies services for developmentally delayed children including children diagnosed with autism. Judge #13 has a grandson that is diagnosed as autistic and receives services from one of the Regional Centers in his jurisdiction. Judge #13 does not hear cases that originate from that Regional Center, nor does the judge hear cases involving autism. The judge also discloses this status when the judge hears cases for other Regional Centers and their clients. Judge #13 has made this disclosure over 70 times and has not been asked to recuse him/herself. However, a new issue has arisen. Judge #13's grandson has been evaluated by a psychologist and Judge #13 disagrees with the psychologist's recommendation to discontinue a particular service. This may go to hearing. Now Judge #13 believes it will be difficult to hear cases involving this psychologist. At least a disclosure has to be made, and probably Judge #13 will have to recuse him/herself if this psychologist is an expert witness in any case.

Judge #13 wanted to represent his grandson at a hearing in which a judge for the Office of Administrative Hearings would preside. After consultation with the administration and the office's legal counsel, Judge #13 was told he could not do that. To do so would be a conflict of interest and grounds for termination. The judge was also told he could not even be in the hearing room. The judge appealed that decision

since he was a percipient witness in the case. The judge is allowed in the hearing room to testify, but the administration must be satisfied that the judge is not "pulling the family's attorney's strings."

Judge #13 was hearing a Teacher Credentialing Involving the suspension of a tenured teacher. The issue was alleged threats made by this teacher to the assistant principal. The teacher, through her counsel, made a motion to recuse Judge #13 on the grounds that the teacher's husband was a physician and that he knew Judge #13's wife. Actually it was Judge #13's sister that the teacher's husband knew. Judge #13 denied the motion to recuse. The judge did not know anything about the teacher's husband or the judge's sister's opinion of the teacher's husband. Then, while the parties were waiting for the teacher's husband to arrive to testify, the parties worked out a stipulation. When the husband arrived, Judge #13 told the husband that a stipulation had been worked out and that he did not need to testify. The husband became very angry. After the hearing the husband filed a complaint with the Director of the Office of Administrative Hearing against Judge #13 alleging that the judge had been rude. Nothing came of the complaint.

Another case involving disclosure was a situation where Judge #13 had heard a number witnesses when respondent's attorney asked a police officer who was testifying if the officer knew a certain lawyer. After the witness finished, Judge #13 asked respondent's attorney why the question was asked. Apparently the questions were going toward allegations concerning the competency of that attorney. Judge #13

had been involved in a case prior to becoming a judge that gave him knowledge that the attorney was in prison. The respondent asked Judge #13 to recuse him/herself. Judge #13 denied the motion, stating that the judge could be fair and since he knows the attorney to be a crook, knowledge of that fact was in the respondent's favor. However, after considering the matter further, Judge #13 did recuse him/herself and granted a continuance in the matter.

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or permit others to convey the impression that they are in a special position to
influence the judge . . .”

American Bar Association Center for Professional Responsibility Model Code of
Judicial Conduct Canon 3 requires a judge to “hear and decide matters assigned to the
judge except those in which disqualification is required.” Canon 3 (B)(7) states: . . .
“A judge shall not initiate, permit or consider ex parte communications, or consider

other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . .”

American Bar Association’s Model Code of Judicial Conduct Canon 5 states: “A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity.

Utah Canon 3 (E)(1)

Utah Code of Judicial Conduct Canon 3(F)

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