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THE THREAT TO JUDICIAL INDEPENDENCE BY CRITICISM OF JUDGES—A PROPOSED SOLUTION TO THE REAL PROBLEM

*Monroe H. Freedman**

This Article is in two parts. The first argues that criticism of judges by lawyers is both constitutionally protected and desirable in a democratic society. The second part suggests an appropriate judicial response in the rare case where judicial independence is truly threatened by criticism of a judge.

I. LAWYERS' CRITICISM OF JUDGES IS DESIRABLE AND CONSTITUTIONALLY PROTECTED

The problem is not that too many lawyers are publicly criticizing judges. Unfortunately, too few lawyers are willing to do so, even when a judge has committed serious ethical violations and should be held accountable.¹

For example, the New York State Bar Association recently debated a proposal to amend the state's ethical rules to require lawyers to report serious misconduct of judges.² You might expect lawyers to welcome such a rule. After all, lawyers have a "special responsibility for the quality of justice."³ Also, establishing an ethical duty to report would make it clear that a lawyer who reports judicial misconduct is not a volunteer, but is acting, in part, because she would herself be violating a disciplinary rule if she failed to complain. The proposed rule was voted down, however, on the expressed concern that "a judge who knows that

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1. I am not unconcerned about judicial independence. See my testimony before Congress, opposing proposed legislation to discipline federal judges by means short of impeachment in *Removal and Discipline of Federal Judges*, 31 *MERCER L. REV.* 681 (1980). See also *infra* Part II.

2. See *House Approves Proposed Amendments to Code*, *STATE B. NEWS* (New York State Bar Ass'n), July-Aug. 1996, at 1, 6.

3. *MODEL RULES OF PROFESSIONAL CONDUCT* Preamble (1992).

a lawyer has reported misconduct could hold it against the lawyer in current or future cases."⁴ In addition, some judges forget about the First Amendment when free speech is directed at them and take disciplinary action against the lawyer.⁵

Unlike New York, most jurisdictions have adopted Model Rule 8.3(b), which requires a lawyer to volunteer information about serious violations of judicial ethics to the appropriate authority.⁶ With regard to public criticism of judges, Model Rule 8.2(a) forbids a lawyer to make a statement about a judge that the lawyer "knows to be false or with reckless disregard as to its truth or falsity."⁷ That is, lawyers are properly subject to a *New York Times Co. v. Sullivan*⁸ "actual malice" standard⁹ in their public criticism of judges.

Lawyers, of course, are particularly knowledgeable about judges' conduct, and are therefore in a position to inform the public about abuses of judicial power. Moreover, judges are not "anointed priests" entitled to special protection from the public clamor of democratic society.¹⁰ The law gives judges and the institutional reputation of courts "no greater

4. *House Approves Proposed Amendments to Code, supra* note 2, at 6.

A rule requiring lawyers to report such conduct would make it clear that zealous representation does not require tolerance of judges who commit serious violations of judicial ethics. Note, however, that confidentiality would still override an obligation to report judicial misconduct. As stated in Model Rule 8.3(c), reporting is forbidden if doing so would require the lawyer to reveal client information protected by Model Rule 1.6. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(c).

5. See, e.g., *In re Snyder*, 734 F.2d 334, 337 & n.6 (8th Cir. 1984), *rev'd*, 472 U.S. 634 (1985).

One exception is Minnesota Judge Jack Nordby. A decision Judge Nordby made to release a defendant on bail

resulted in a number of vituperative calls and letters from citizens as well as a strident . . . editorial, the gist of which was (to paraphrase politely) that [he] was a poor judge and should not be re-elected, a goal several of them, usually anonymously, pledged to pursue. *All of this, of course, is entirely proper and to be encouraged . . .*

Minnesota v. Andersen, 4th Judicial Dist., File #96 089254 (emphasis added) (on file with author). Judge Nordby added that "petulant and anonymous resort to journalists, while unquestionably an essential and protected form of expression, and perhaps a desirable supplement to good courtroom advocacy, is a poor substitute for it." *Id.* (emphasis added).

6. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(b). New York does require a lawyer to reveal knowledge of judicial misconduct, but only "upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of . . . judges." NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(B) (1995).

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2(a).

8. 376 U.S. 254 (1964).

9. See *id.* at 279-80.

10. *Bridges v. California*, 314 U.S. 252, 292 (1941) (Frankfurter, J., dissenting).

immunity from criticism than other persons or institutions."¹¹ Those First Amendment truths were reiterated by the Supreme Court in an opinion by Chief Justice Warren Burger.¹² Judges, after all, are not "flabby creatures."¹³ Rather, they are expected to be "[people] of fortitude, able to thrive in a hardy climate."¹⁴ Thus, we have a practice "familiar in the long history of Anglo-American litigation, whereby unsuccessful . . . lawyers give vent to their disappointment in tavern or press."¹⁵

Consider, then, the following cases of judicial criticism:

Case One: The judge's opinion is "irrational" and "cannot be taken seriously."¹⁶

Case Two: "This judge sitting on the bench is a danger to the people of this city."¹⁷

Case Three: "I have had more than enough of judicial opinions that . . . falsify the facts of the cases that have been argued, . . . that make disingenuous use or omission of material authorities, . . . that cover up these things"¹⁸

Case Four: The state's appellate judges are "whores who became madams. . . . I would like to [be a judge] But the only way you can get it is to be in politics or buy it—and I don't even know the going price."¹⁹

Case Five: The judge's decision is "overt racism," and the defendants "have no more chance of having a fair hearing in front of [the judge] than they would being judged by the Ku Klux Klan."²⁰

Case Six: The judge is "dishonest," "ignorant," a "buffoon," a "bully," "drunk on the bench," and shows "evidence of anti-Semitism."²¹

Do any of these criticisms warrant professional discipline of the lawyer?

11. *Id.* at 289.

12. *See* *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39, 842 (1978).

13. *United States v. Morgan*, 313 U.S. 409, 421 (1941).

14. *Craig v. Hamey*, 331 U.S. 367, 376 (1947).

15. *Morgan*, 313 U.S. at 421.

16. *See infra* text accompanying notes 22-23.

17. *See infra* text accompanying notes 24-28.

18. *See infra* text accompanying note 29.

19. *See infra* text accompanying notes 30-34.

20. *See infra* text accompanying notes 35-36.

21. *See infra* text accompanying notes 37-63.

The quotation in *Case One* will be familiar to most readers as what passes for civil discourse among Supreme Court Justices. The particular quotations (“irrational,” “cannot be taken seriously”) were directed against Justice Sandra Day O’Connor by Justice Antonin Scalia.²² No professional disciplinary action has been reported against Justice Scalia, or any other Justice, for these or other incivil remarks.²³

The quotation in *Case Two* (the judge is a “danger to the people”) is a criticism of a New York City criminal court judge by Mayor Rudolph Giuliani (a lawyer).²⁴ It is similar to other remarks about the judge by Governor George Pataki (also a lawyer).²⁵ Similarly, New York Criminal Court Judge Harold Rothwax boasts that he informs his students at Columbia Law School, “The court of appeals is in session; we are all in danger.”²⁶ Further ridiculing the administration of justice, Rothwax has written that a jury trial is a “crapshoot”²⁷ and that New York’s highest court is a “lottery.”²⁸ No professional disciplinary action has been reported against Mayor Giuliani, Governor Pataki, or Judge Rothwax for these public attacks on judges or for disparaging the judicial system.

The intemperate and broad-scale attack on the integrity of judges in *Case Three* (complaining that judges too often falsify facts and use authorities dishonestly) is from a talk that I gave to the Judicial Conference for the Federal Circuit.²⁹ Fortunately, no disciplinary action was taken on that occasion.

Case Four (“whores,” “madams,” and the “going price” for a judgeship) is from a *Life* magazine article about a New York lawyer

22. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532, 536 n.* (1989) (concurring opinion).

23. See Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U. L. REV. 583, 641-42 (1994); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1188-98 (1992).

24. See *Mayor Presses Ouster of Abuse Case Judge*, N.Y. TIMES, Feb. 17, 1996, § 1, at 29.

25. See Don Van Natta, Jr., *Judge Rebuked After a Woman Is Slain*, N.Y. TIMES, Feb. 15, 1996, at B3.

26. HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 31 (1996). Not everyone finds Judge Rothwax’s commentaries to be either amusing or accurate. See, e.g., Steven Duke, *Crime and Punishment*, N.Y. TIMES, Mar. 31, 1996, § 7 (Book Review), at 8 (concluding that Judge Rothwax’s book is “deeply misleading about the system as a whole”).

27. ROTHWAX, *supra* note 26, at 162.

28. *Id.* at 31.

29. See *The Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 128 F.R.D. 409, 439 (1989); see also Monroe Freedman, *When Judges Tamper with the Evidence*, LEGAL TIMES, Nov. 19, 1990, at 22 (discussing the problem of dishonest judicial opinions).

named Martin Erdmann.³⁰ Erdmann was subjected to disciplinary proceedings and censured for his comments, but the discipline was reversed by the New York Court of Appeals.³¹ Yet Erdmann's comments had been published in a magazine with a circulation of several million copies,³² and as pointed out by a dissenting judge, "[i]t is difficult to read the article . . . without coming to the conclusion that neither the legal system nor the legal profession possesses integrity."³³ Nevertheless, New York's highest court held 5-2 that

isolated instances of disrespect for the law, Judges and courts expressed by vulgar and insulting words or other incivility, . . . or committed outside the precincts of a court are not subject to professional discipline. Nor is the matter substantially altered if there is hyperbole expressed in the impoverished vocabulary of the street.³⁴

The quotation in *Case Five* (comparing the judge to the Ku Klux Klan) was by Ronald L. Kuby. The disciplinary committee dismissed a complaint against Kuby, and the United States District Court for the District of Connecticut affirmed.³⁵ The court said that Kuby's statement "concerning a highly respected judge . . . was, to be charitable, intemperate, incivil and immature. It was not, however, actionable under the Disciplinary Rules . . . and First Amendment jurisprudence."³⁶

The charge in *Case Six* ("dishonest," "buffoon," "drunk," etc.) resulted, initially, in suspension of a lawyer from practice before the federal district court for two years.³⁷ The grounds were that the lawyer, Stephen Yagman, had violated local rules forbidding a lawyer to engage in conduct that "degrades or impugns the integrity of the Court" and "interferes with the administration of justice."³⁸ But that disciplinary

30. See James Mills, *I Have Nothing to Do with Justice*, LIFE, Mar. 12, 1971, at 56, 66.

31. See *Justices of the Appellate Div. v. Erdmann*, 301 N.E.2d 426, 427 (N.Y. 1973) (per curiam).

32. See *id.* at 430 & n.1 (Gabielli, J., dissenting).

33. *Id.* at 428 (Burke, J., dissenting).

34. *Id.* at 427 (citation omitted).

35. See *In re Kuby*, G.P.-86-10 (D. Conn. Aug. 18, 1993) (affirming motion to dismiss) (on file with author).

36. *Id.*

37. See *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1434 & n.4, 1435 (9th Cir. 1995).

38. *Id.* at 1436 (quoting Local Rule 2.5.2 of the U.S. District Court for the Central District of California).

action was reversed by the Ninth Circuit in an opinion by Judge Alex Kozinski.³⁹

Bound by prior authority in his circuit, Judge Kozinski was not able to apply *New York Times Co. v. Sullivan*.⁴⁰ The *Sullivan* "actual malice" standard protects even false charges against a public official unless made with knowledge of falsity or in reckless disregard of the truth.⁴¹ As applied by the Ninth Circuit in disciplinary cases against lawyers, however, recklessness is determined objectively, by reference to the kind of investigation that would be made by "the reasonable attorney, considered in light of all his professional functions . . . in the same or similar circumstances."⁴² The court's "inquiry focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made,"⁴³ and may include "whether the attorney pursued readily available avenues of investigation."⁴⁴ Truth is, of course, an absolute defense, and the burden of proving falsity is on the disciplinary committee.⁴⁵

As Judge Kozinski noted, this standard is consistent with cases like *In re Holtzman*.⁴⁶ There, Kings County District Attorney Elizabeth Holtzman was reprimanded for issuing a press release that falsely accused a judge of requiring the victim of a sexual assault to demonstrate the position she had been in at the time of the assault.⁴⁷ Before making her charges public, Holtzman had not obtained the minutes of the proceedings, had not made any effort to speak to court officers, the court reporter, defense counsel, or any other person present during the alleged misconduct, and had not even met with the trial assistant in her office who had originally reported it.⁴⁸ Thus, she had been reckless in not "pursu[ing] readily available avenues of investigation"⁴⁹ before making false charges against the judge.⁵⁰

39. *See id.* at 1438-45.

40. 376 U.S. 254 (1964).

41. *See id.* at 279-80.

42. *Yagman*, 55 F.3d at 1437 (quoting *United States Dist. Court v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993)).

43. *Id.* (citing *Sandlin*, 12 F.3d at 867).

44. *Id.* at 1437 n.13.

45. *See id.* at 1438.

46. 577 N.E.2d 30 (N.Y. 1991) (*per curiam*).

47. *See id.* at 31-32.

48. *See id.* at 32-33.

49. *Yagman*, 55 F.3d at 1437 n.13.

50. Holtzman's lawyer, Norman Redlich, has noted, however, that she acted only after she had a sworn statement from the prosecutor who had been present at the hearing. *See* Letter from Norman

Unlike allegations of fact, opinions are not subject to proof or disproof. This means, Judge Kozinski noted, that an expression of opinion (like an allegation of intellectual dishonesty or being the worst judge on the bench) cannot be punished unless it implies a false assertion of fact. “[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.”⁵¹

With regard to the allegation of anti-Semitism, Yagman said that the judge “has a penchant for sanctioning Jewish lawyers: me, David Kenner and Hugh Manes. I find this to be evidence of anti-semitism.”⁵² In rejecting the charge against Yagman on this count, Judge Kozinski relied, in part, on the Restatement (Second) of Torts which states that a “simple expression of opinion based on disclosed . . . nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.”⁵³

Yagman’s statement that the judge had been “drunk on the bench,” however, “could reasonably be interpreted as suggesting that [the judge] had actually, on at least one occasion, taken the bench while intoxicated.”⁵⁴ It therefore “implies . . . facts that are capable of objective verification.”⁵⁵ However, the committee presenting disciplinary charges against Yagman had the burden to prove the falsity of Yagman’s statement about the judge’s drunkenness, and it failed to present any evidence at all on that issue.⁵⁶ Accordingly, Yagman could not be disciplined for that statement either.⁵⁷

Those who argue that lawyers are entitled to less freedom of speech than other citizens in criticizing judges rely principally on two Supreme Court decisions, neither of which are on point. One case is *Florida Bar*

Redlich to Monroe H. Freedman (Apr. 19, 1996) (on file with author). This fact does not appear in the court’s opinion.

51. *Yagman*, 55 F.3d at 1441 (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)).

52. *Id.* at 1438. The court was quoting statements that Yagman made to a newspaper reporter. See Susan Seager, *Judge Sanctions Yagman, Refers Case to State Bar*, L.A. DAILY J., June 6, 1991, at 1.

53. RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1977); see also *Yagman*, 55 F.3d at 1439.

54. *Yagman*, 55 F.3d at 1441 (quoting Seager, *supra* note 52, at 1).

55. *Id.*

56. See *id.*

57. See *id.* at 1441-42.

*v. Went For It, Inc.*⁵⁸ *Went For It, Inc.* involved solicitation of clients, which is commercial speech and therefore receives only “a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.”⁵⁹ By contrast, criticism of a public official is core First Amendment speech.⁶⁰ Thus, *Went For It, Inc.*, a commercial speech case, cannot justify restrictions on criticism of the official conduct of judges.

The other Supreme Court case limiting lawyers’ speech is *Gentile v. State Bar of Nevada*.⁶¹ However, the five-member majority in *Gentile* emphasized that the case did not involve speech alone, but also involved the conflicting right to a fair trial. The majority held that “[t]he regulation of attorneys’ speech [adopted in *Gentile*] is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect [on a fair trial].”⁶² Thus, *Gentile* is inapplicable to criticism of a judge that does not relate to a pending or impending trial.

Judge Kozinski concluded his opinion in *Yagman* with a quotation from Justice Hugo Black:

“The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.”⁶³

Therefore, like Justice Scalia, Judge Rothwax, Governor Pataki, and Mayor Giuliani, lawyers in general do not forfeit their First Amendment rights to criticize public officials when they become members of the bar.

II. THE REAL PROBLEM AND A PROPOSED SOLUTION

We are told, however, that judicial independence is a “‘crown jewel’” in our system of government, a jewel that will be shaken from

58. 115 S. Ct. 2371 (1995).

59. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

60. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 272-73, 279-83 (1964).

61. 501 U.S. 1030 (1991).

62. *Id.* at 1076.

63. 55 F.3d at 1445 (quoting *Bridges v. California*, 314 U.S. 252, 270-71 (1941)).

the crown if judges are subjected to criticism.⁶⁴ Is that true? If so, to what extent? And, where judicial independence is threatened, what is the appropriate judicial response?

One thing is plain. Much of the judicial hand-wringing about criticism of judges has more to do with judicial vanity than with judicial independence. Take, for example, the most extreme of the illustrations discussed above. Surely, Erdmann's widely publicized references to whores, madams, and corruption in the selection of judges⁶⁵ is an assault on the *amour propre* of judges. It is even possible that Erdmann would cause some members of the public to become concerned about selecting judges by what the *New York Times* recently called a "club-house-dominated election system."⁶⁶ But how was judicial *independence* threatened by Erdmann's remarks?

Or consider the *Holtzman* case, where the lawyer was sanctioned for erroneously accusing the judge of having demeaned the victim in a rape case.⁶⁷ Understandably, the judge felt a sense of grievance over the accusation. Nevertheless, Holtzman's criticism was unlikely to affect the judge's independence on the bench.

There are some criticisms that do indeed threaten the independence of the judiciary, but these are not the criticisms of practicing lawyers like Erdmann, Holtzman, Yagman, and Kuby. Rather, the real threat to judicial independence comes from public officials, from lawyers like Mayor Rudolph Giuliani, Governor George Pataki, and President Bill Clinton—that is to say, from people who have the power to affect a judge's career on the bench. And, ironically, when those officials criticize judges and expressly threaten them with removal from office because of particular decisions, no disciplinary action is ever taken.

An instance in which a judge's independence was, in fact, compromised is the recent case involving Judge Harold Baer. In a drug case, Judge Baer suppressed a large quantity of cocaine that had been seized from the trunk of the defendant's car.⁶⁸ Relying in part on material discrepancies between an officer's testimony and his written report, Judge Baer found the accused more credible than the officers regarding the

64. Linda Greenhouse, *Rehnquist Joins Fray on Rulings, Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1996, at A1 (quoting U.S. Supreme Court Chief Justice William Rehnquist, who stated that judicial independence is "one of the crown jewels of our system of government").

65. See *supra* text accompanying notes 30-34.

66. *No Way to Choose Judges*, N.Y. TIMES, Nov. 11, 1996, at A14.

67. See *In re Holtzman*, 577 N.E.2d 30, 32 (N.Y. 1991) (per curiam).

68. See *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y.), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996).

events surrounding the seizure of the evidence.⁶⁹ As a result of that decision, President Bill Clinton threatened to ask for the judge's resignation if he did not reverse himself.⁷⁰ Then Senate Majority Leader Robert Dole added that if the judge did not resign, "he ought to be impeached,"⁷¹ and 140 members of Congress agreed.⁷²

In response, Chief Judge Jon O. Newman and three senior judges of the United States Court of Appeals for the Second Circuit denounced the threats against Judge Baer as "an extraordinary intimidation" of a judge in a pending case.⁷³ Indeed, a substantial number of prominent lawyers

69. See *id.* at 242. Contrary to police testimony, the judge found that four young men had not run away from the defendant's car when they saw the police. See *id.* at 241-42. The judge added that even if the men had run when the police began to stare at them, it would not have been grounds for searching the car. See *id.* at 242. In support of that conclusion, he cited documented findings of serious police corruption and abuse in that precinct. See *id.* at 242 & n.18. Professor Chester Mirsky of New York University Law School and Professor Paul Rothstein of Georgetown Law Center have endorsed the judge's reasoning on this point. See Henry J. Reske, *A Duffel Bag of Controversy for Judge, A.B.A. J.*, May 1996, at 32; see also Michael E. Tigar, *Flight Isn't About Guilt*, NAT'L L.J., Apr. 15, 1996, at A23 (discussing the issue of flight as not always "betoken of a guilty mind").

70. See Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1.

71. Katharine Q. Seelye, *A Get-Tough Message at California's Death Row*, N.Y. TIMES, Mar. 24, 1996, § 1, at 29.

72. See Don Van Natta, Jr., *Dismissing Defense Effort, Judge Stays on Drug Case*, N.Y. TIMES, Apr. 13, 1996, § 1, at 25 [hereinafter Van Natta, *Dismissing Defense Effort*].

Defense counsel alleged in court papers that Judge Baer had sent his clerk to the press room at the federal district courthouse to get a transcript of White House remarks about asking for his resignation. Judge Baer did not deny the allegation. See Don Van Natta, Jr., *Judge Baer Takes Himself Off Drug Case*, N.Y. TIMES, May 17, 1996, at B1 [hereinafter Van Natta, *Judge Takes Himself Off Case*].

73. Anthony Lewis, *Where Would You Hide?*, N.Y. TIMES, Apr. 8, 1996, at A15; see also Don Van Natta, Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1.

The defense of Judge Baer by so many judges exposes the fallacy that judges are forbidden to defend themselves against criticism. In fact, "[a] judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, [and] the administration of justice." MODEL CODE OF JUDICIAL CONDUCT Canon 4B (1990) (footnote omitted). The pertinent limitation is that a judge may not make a public comment "while a proceeding is pending or impending in any court," but even that limitation applies only if the comment "might reasonably be expected to affect [the proceeding's] outcome or impair its fairness." *Id.* Canon 3B(9).

Indeed, the proceeding was still pending before Judge Baer when the four Second Circuit judges published their comments. Acknowledging Canon 3B(9), the judges stated that "the Code also places on judges an affirmative duty to uphold the integrity and independence of the judiciary. In this instance, we believe our duty under this latter provision overrides whatever indirect comment on a pending case might be inferred from this statement (and we intend none)." Van Natta, *supra*, at B1; see also *An Alert from the Chief Justice*, N.Y. TIMES, Apr. 11, 1996, at A24 (discussing Chief Justice William Rehnquist's defense of judicial independence against the threat of politicians "who have taken to berating judges with whose decisions or philosophies they disagree"); James Dao, *Pataki, in High Court, Exchanges Barbs with Top Judge*, N.Y. TIMES, May 2, 1996, at B3 (discussing "the rights and responsibilities of politicians in criticizing members of the judiciary"); Clyde Haberman, *Under Fire, Judge Decides to Fire Back*, N.Y. TIMES, Feb. 27, 1996, at B1

and jurists spoke out on behalf of Judge Baer, expressing their deep concern about the independence of the judiciary.⁷⁴ In short, judicial independence had many fervent and eloquent defenders.

But there is something missing in this picture. Despite all of the rhetoric by Judge Baer's defenders about the independence of the judiciary, there was no reference to Carol Bayless. Understandably, in fact, many readers will wonder who Carol Bayless is and what she has to do with judicial independence. The answer is that Ms. Bayless was the defendant whose Fourth Amendment rights Judge Baer upheld (along with the constitutional rights of all of us) at the first suppression hearing.⁷⁵ On the basis of that hearing, Judge Baer found that the police had unlawfully seized evidence against Ms. Bayless and that they had testified falsely to cover up their own wrongful conduct.⁷⁶ Specifically, he found that Ms. Bayless's testimony relating to the seizure of the evidence had "great credibility,"⁷⁷ while the police testimony was "incredible."⁷⁸ Accordingly, as required by Fourth Amendment jurisprudence, Judge Baer suppressed the evidence against Ms. Bayless. It was at that point that political pressure mounted against the judge—the President demanding that he resign and Congress threatening impeachment—unless he reversed his decision suppressing the evidence against Ms. Bayless.⁷⁹

Judge Baer got the message. He conducted a rehearing and reversed his decision.⁸⁰ And no one was in doubt about what had happened. The *New York Times* headlined its front-page report, *Under Pressure, Federal*

(discussing one judge's action in light of what has been characterized as "open season on judges").

In addition, speaking before a circuit conference, Second Circuit Judge (and former Yale Law School Dean) Guido Calabresi stated that it is "perfectly appropriate" for a judge to make a statement in response to suggestions that he or she should resign or be impeached because of an unpopular ruling. Henry J. Reske, *Questions of Independence*, A.B.A. J., June 1996, at 110, 112.

74. "Some 27 bar associations and the deans of seven law schools . . . condemn[ed] [the] 'intemperate and personal' attacks that 'diminish the independence of the judiciary.' Many federal judges also defended Baer." Reske, *supra* note 69, at 32.

75. See *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y.), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996).

76. See *id.* at 242-43.

77. *Id.* at 236.

78. *Id.* at 240, 242.

79. See *supra* text accompanying notes 70-72.

80. See *United States v. Bayless*, 921 F. Supp. 211, 215-18 (S.D.N.Y.), *vacating* 913 F. Supp. 232 (S.D.N.Y. 1996).

*Judge Reverses Decision in Drug Case.*⁸¹ Similarly, the *National Law Journal* headline was, *Under Fire, Judge Reverses Himself.*⁸²

In an attempt to justify reversing himself, Judge Baer noted that the prosecution, at the second hearing, had introduced the police officers' report of the arrest and seizure, which they had filed shortly after the arrest.⁸³ Ironically, however, the police report appeared to impeach the officers' credibility even more. In their testimony, the officers said that a crucial fact justifying the stop was that the men who had put duffel bags into Ms. Bayless's car had run away when they saw the officers.⁸⁴ But the police report said nothing about the men fleeing.⁸⁵ Judge Baer resolved this discrepancy in the prosecution's evidence by ignoring it.⁸⁶ Indeed, the *New York Times* article about the second hearing carried the subheadline, *Judge's New Ruling Puzzles Experts Who Say Evidence Did Not Change.*⁸⁷ As the *New York Times* commented editorially, Judge Baer's "impartiality has been hopelessly compromised."⁸⁸

What then should Judge Baer have done when faced with "extraordinary intimidation" by politicians who held the power to promote him to higher office or to impeach him? What should any judge do whose impartiality has been "hopelessly compromised"? The answer is clear.

Under federal law, Judge Baer should have disqualified himself from the case prior to the rehearing on the suppression motion.⁸⁹ Before amendment of 28 U.S.C. § 455 in 1974, there was understood to be a judicial "duty to sit," and the standard for disqualification was subjective.⁹⁰ Now, however, the duty to sit has been reversed, and the standard is objective.⁹¹ Section 455(a) requires that the judge "shall" disqualify himself whenever "his impartiality might reasonably be questioned."⁹² This statutory language requires the judge to avoid "the

81. Don Van Natta, Jr., N.Y. TIMES, Apr. 2, 1996, at A1.

82. Deborah Pines, NAT'L L.J., Apr. 15, 1996, at A12.

83. See *Bayless*, 921 F. Supp. at 215.

84. See *id.* at 216.

85. See Don Van Natta, Jr., *Drug Case Reversal*, N.Y. TIMES, Apr. 3, 1996, at B3.

86. See *id.*

87. See *id.*

88. *Judge Baer's Exit*, N.Y. TIMES, May 18, 1996, at A18.

89. See 28 U.S.C. § 455 (1994).

90. See H.R. REP. NO. 93-1453, at 5 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355.

91. See 28 U.S.C. § 455; *Liteky v. United States*, 510 U.S. 540, 548 (1994).

92. 28 U.S.C. § 455(a). The identical rule is applicable to state judges. See MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (1990).

appearance of impropriety whenever possible.”⁹³ Thus, § 455(a) covers all forms of interest and bias, and requires them “*all* to be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance.”⁹⁴

Explaining the legislative history of § 455, the Supreme Court has noted that “people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.”⁹⁵ Section 455(a) was therefore adopted to “promote confidence in the judiciary”⁹⁶ by avoiding those “suspicions and doubts.”⁹⁷ The statute’s objective standard—which is to be applied “universally”⁹⁸ and “whenever possible”⁹⁹—means that a judge cannot remain in a case on the ground that he, personally, is a person of integrity who would not be affected by “extraordinary intimidation” that has “hopelessly compromised” his impartiality in a pending case. The same result is required as a matter of constitutional due process of law, which requires a judge to disqualify himself to avoid even the appearance of impropriety.¹⁰⁰

Thus, Judge Baer was required to disqualify himself from Ms. Bayless’s case prior to the hearing in which he reversed his original decision. This, however, was not the course Judge Baer followed. On the contrary, he reversed his suppression decision,¹⁰¹ and denied a defense motion to disqualify him several days later.¹⁰² Over one month later Judge Baer recused himself.¹⁰³ In doing so, he placed the blame not on the politicians who had pressured him, but on Ms. Bayless, giving the

93. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (citing S. REP. NO. 93-419, at 5 (1973); H.R. REP. NO. 93-1453, at 5).

94. *Liteky*, 510 U.S. at 548.

95. *Liljeberg*, 486 U.S. at 864-65.

96. *Id.* at 865.

97. *Id.* at 864.

98. *Liteky*, 510 U.S. at 548.

99. *Liljeberg*, 486 U.S. at 865.

100. *See, e.g., Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 148 (1968); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

101. *See United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y.), *vacating* 913 F. Supp. 232 (S.D.N.Y. 1996).

102. *See Van Natta, Dismissing Defense Effort, supra* note 72, § 1, at 25. Counsel for Ms. Bayless noted that “[n]ever before have the President of the United States, the Speaker of the House, 140 members of Congress and a Presidential candidate sat in on a case and said that a Federal judge should be impeached or resign.” *Id.*

103. *See Van Natta, Judge Takes Himself Off Case, supra* note 72, at B1.

implausible reason that his belated withdrawal might avoid a defense challenge to his decision to admit the evidence.¹⁰⁴

Assume, however, that Judge Baer had recused himself prior to the rehearing, expressly putting the responsibility on those who had compromised his impartiality. How would that have served the interests of either judicial independence or Ms. Bayless? The answer lies in the next step in the proceeding. Any judge assigned to replace Judge Baer would inevitably be aware of the political pressures in the case and would be similarly compromised in reconsidering Judge Baer's original decision to suppress the evidence. Thus, no judge could properly have conducted a rehearing of Judge Baer's decision, meaning that his decision to suppress the evidence would have remained the law of the case. Of course, the government might then have sought a reversal on appeal, but appellate judges would have been disqualified from sitting in the case by the same political pressures.¹⁰⁵

Arguably, this proves too much. According to the Rule of Necessity, if all judges are disqualified, then at least those judges who are members of "a court of last resort" are permitted to sit.¹⁰⁶ Thus, the Supreme Court, at least, could have chosen to review Judge Baer's decision. But that review would be discretionary. As the Supreme Court has held, the Rule of Necessity requires a court in each case to balance two public interests. One is the public interest in having the case decided; the other is the public interest in avoiding a decision that would be tainted by the appearance of interest or bias on the part of the judge.¹⁰⁷

In deciding whether to hear an appeal in Judge Baer's case, the Supreme Court would know that a remand of the case would require Judge Baer, or any substitute judge, to conduct proceedings once again "under pressure" and "under fire." In addition, the Supreme Court would

104. *See id.* A month later, Ms. Bayless pleaded guilty after Judge Robert P. Patterson, Jr. ruled that she could nevertheless appeal Judge Baer's ruling that the evidence was admissible. *See Don Van Natta, Jr., A Publicized Drug Courier Pleads Guilty to 3 Felonies*, N.Y. TIMES, June 22, 1996, § 1, at 23.

105. Also, an appellate court would have had difficulty reversing Judge Baer's factual findings, because they were based in part on the demeanor of Ms. Bayless and the officers.

106. *United States v. Will*, 449 U.S. 200, 214 (1980) (quoting *State ex rel. Mitchell v. Sage Stores Co.*, 143 P.2d 652, 656 (Kan. 1943)). Arguably, too, the Rule of Necessity applies to courts other than those of last resort. If so, it could apply to Judge Baer or another trial judge. The rationale of the rule, however, is that "failure [of a judge to sit] would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated." *Id.* (quoting *Sage Stores Co.*, 143 P.2d at 656). In Ms. Bayless's case, both the defendant and the government had had their day in court at the first suppression hearing.

107. *See id.* at 217.

recognize that a "Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government."¹⁰⁸ Thus, there would be good reason for all judges to let Judge Baer's decision in the first suppression hearing stand.

The lesson in this for politicians would be clear. When Judge Baer caved in to the pressures, the irresponsible politicians won, and they can only have been emboldened to do the same thing again in the future. If, however, the prosecution of Ms. Bayless had been aborted as a result of the politicizing of the case, the message would have been that irresponsible criticism of decisions in pending cases will backfire against the critics.

There would be two salutary results to this approach. First, politicians would be on notice that their efforts to affect the outcome of cases by interfering with the independence of the judiciary would not have the desired effect. This might not silence all irresponsible politicians, but it could give pause at least to some. Second, citizens would not have to suffer prosecutions in which their statutory and constitutional rights are violated by having their cases decided by judges who lack the appearance of impartiality. The latter result addresses the real problem of judicial independence—the impact on litigants whose cases are decided by judges whose impartiality has been compromised by political pressures. And that problem can indeed be solved by judges who honor their statutory and constitutional duties to recuse themselves from sitting in such cases.

108. *Id.* at 217-18.

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