Interview: A Unique Perspective on Judicial Independence

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**INTERVIEW: A UNIQUE PERSPECTIVE ON JUDICIAL INDEPENDENCE**

*Professor Simon:* Judge Kaye was at Hofstra University School of Law last week and gave a speech about judicial independence. One of the things she said is that judges are not "crime fighters."¹ She was quoting from someone who said we need judges who are crime fighters.² Judges are not crime fighters. Judges rely on their decisions to speak for them. They are there to administer justice, not to fight crime.

*Judge Baer:* I believe I met with her the evening of that speech and we talked a little about judicial independence. She has two concerns that are significant and I share them. One is that the Code of Judicial Conduct makes it very difficult for judges to publicly explain the reasoning behind

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² Judge Kaye was referring to a campaign speech made by former Senator Robert Dole (R-Kan.), in which he stated that “[t]he single most important thing a President can do to fight crime is put crime fighters in our courtrooms—both on the bench and at the prosecutor’s desk.” Id. at 708 (quoting Katherine Q. Seelye, *Revisiting the Issue of Crime, Dole Offers List of Remedies*, N.Y. Times, May 29, 1996, at A1); see also id. ("Judges are not part of the executive branch. They are not ‘on the team with the police to catch criminals.’" (quoting James Dao, *Pataki Gains Pick as Court Loses Judge*, N.Y. Times, Apr. 6, 1996, at B28)).
their decisions in response to criticism. The decisions, as she said, do speak for the judge. The problem is that, even when it appears clear that the critic did not read or did not understand the decision, when you consider section 100.3(B)(6) you see that a judge must abstain from public comment about a pending or impending matter in any court. Consequently, there is not much a judge can do about these attacks.

The other concern that Judge Kaye and I share is a totally unrelated topic but close to us both; that is, the difference between the pressures public criticism places on Article III judges as compared to judges who are elected or appointed for limited terms. It is quite different to be an Article III judge with lifetime tenure than it is to be appointed by a mayor or a governor who has to run for election. Judges who are not Article III judges are quite vulnerable to public attacks and again are basically helpless to defend themselves. I believe this is what Judge Kaye was saying. There is no real protection for what these judges write. They are essentially at the mercy of the incumbent mayor or governor. It is hard to conclude that this does not have a chilling effect on judicial independence.

3. See id. at 711-12 (discussing the Code’s prohibition of public comments by judges about pending or impending actions).

4. See id.

5. See N.Y. COMP. CODES R. & REGS. tit. 22, § 100.3(B)(6) (1996). The Rule provides in relevant part that “[a] judge shall not initiate, permit, or consider ex parte communications . . . concerning a pending or impending proceeding.” See also id. § 100.3(B)(8) (providing that “[a] judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories”); cf. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (1990) (prohibiting judges from making “any public comment that might reasonably be expected to affect [the] outcome [of the proceeding] or impair its fairness” while it is pending or impending).

6. See id. at 710 & n.28 (noting the risk that state court judges face, primarily the loss of a re-election campaign, if they render a decision that is politically unpopular).

Professor Simon: What was your reaction at the beginning of the year when New York Governor George Pataki criticized the New York Court of Appeals?  

Judge Baer: The underlying problem and the immediate problem are the same. A judge, as I noted, is not permitted to fight back under the Code of Judicial Conduct. I think this makes such attacks not just unfair, but I suspect knowingly unfair.

The larger issue, which the Governor may not understand or perhaps understands all too well, applies on both the state and federal levels. While we talk about judicial independence, it is abundantly clear that in our tripartite system of government the judiciary is not only the weakest link in the chain, but that as such, it may be limited by the legislative and executive branches. The Federalist Papers indicate that the Framers of the Constitution understood and intended this to be the case, but I urge anyone to read the balance to understand the role our founding fathers assigned to the judicial branch.

Recently, this issue arose in Plaut v. Spendthrift Farm, Inc., which I refer to in my opinion in Benjamin v. Jacobson. In Plaut, the Court examined the kinds of bills the legislative branch can pass and the executive can sign, and how together they can severely limit the judiciary.

In the Benjamin decision, I wrote at length about how bad the Prison Litigation Reform Act ("PLRA") was, and at least as much on

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8. See, e.g., George Pataki, Evidence Shows Court Must Change, DAILY NEWS (New York City), Feb. 7, 1996, at 31; see also Paul Schwartzman, Sitting in Judgment, Highest State Court on Trial, DAILY NEWS (New York City), Jan. 28, 1996, at 5.

9. See, e.g., THE FEDERALIST NO. 78, at 227 (Alexander Hamilton) (Roy P. Fairfield ed., 1966) (stating that "the judiciary is beyond comparison the weakest of the three departments of power").

10. 115 S. Ct. 1447 (1995). In Plaut, the Supreme Court reviewed a 1991 congressional measure designed to extend the statute of limitations for certain private civil actions provided by the Securities Exchange Act of 1934. The amendment also mandated retroactive reopening of any time-barred cases, which would have been timely filed under the new limits, on the date that the legislation was enacted. See id. at 1451. After a historical discussion which included numerous citations to The Federalist Papers, see id. at 1453-56, the Court relied on separation of powers principles to rule the provision unconstitutional and stated that “Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.” Id. at 1457 (emphasis omitted).


how in my view it was nonetheless constitutional.13 The underlying concern in Benjamin is that Congress, along with the President signing the legislation, put real restraints on entities like the Legal Aid Society, which had brought an action against the city ten to fifteen years ago because of the conditions at Riker's Island. As a result, the city consented to a lot of changes in the way that jail was to be run in the future, including supervision by a federal court.14

Now we have to wait and see what the court of appeals decides.15 There isn't any doubt that if the Second Circuit upholds the constitutionality of the PLRA, Congress has significantly limited the courts' ability to supervise matters regarding prisoners' rights.16 If this legislation is upheld, prisoners will not only have more difficulty bringing lawsuits in the first place, but they will have to do it in a shorter time period.17

This illustrates my thought that to explore the concept of judicial independence, we need to look beyond public attacks on the judiciary and examine the scope of Congress's power to regulate the judiciary under the Constitution. My view is that much of this type of legislative action is constitutional, despite the fact that to exercise that right, such

13. A few quotes from Benjamin illustrate Judge Baer's concerns. "Retrogression or even harmful aspects of new legislation play little or no role in the Court's assessment of its constitutionality." 953 F. Supp. at 338. "It is worth noting that some believe that this legislation which has a far-reaching effect on . . . prisoners' rights deserved to have been the subject of significant debate. It was not." Id. at 340. "Although the Court's concerns with this new legislation are myriad, I am constrained under the law to uphold it." Id. at 337.

"It is not within our authority to determine whether the congressional judgment expressed in that Section is sound or equitable, or whether it comports well or ill with purposes of the Act. . . . The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom." Id. (quoting Flemming v. Nestor, 363 U.S. 603, 611 (1960) (upholding the constitutionality of a Social Security eligibility provision)).


15. The appeal of Judge Baer's decision in Benjamin v. Jacobson has been filed as Benjamin v. Abate, No. 97-7133 (2d Cir. Jan. 29, 1997).

16. The PLRA prohibits courts from granting or approving any prospective relief, such as consent decrees for maintaining proper prison conditions, "unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C.A. § 3626(a)(1)(A) (West Supp. 1997). The Act also provides for the immediate termination of any prospective relief which was initially granted without utilizing the restrictions imposed by section 3626(a)(1)(A). See id. § 3626(b)(2). Moreover, any motion to terminate prospective relief that was granted prior to the enactment of the PLRA is automatically stayed 30 days after the motion is filed. See id. § 3626(e)(2)(A)(i).

as by passage of the PLRA, may be unfortunate.

Professor Simon: Are you suggesting that aside from political attacks on individual judges or the judiciary as a whole, there is a much greater threat to judicial independence; namely, removing or restricting the judiciary's ability to decide certain types of controversies?

Judge Baer: Yes, I think that is well put, but we must look to where the court draws the line on constitutionality. The Plaut case had to do with a statute of limitations situation involving certain securities law violations. Congress tried to say we know that the statute of limitations is \( x \) years, but now we think it ought to be \( x+y \) years so that any defendant who has not been prosecuted or whose conviction was reversed on statute of limitation grounds could be re-indicted. The Supreme Court examined the statute and concluded that Congress cannot force the courts to reopen a case after a final judgment has been entered. Congress cannot go back and say we made a mistake, we really did not mean that. For now, at least, this appears to represent the outer limits of what the Court will hold to be unconstitutional, at least with respect to Article III.

However, in Benjamin, the Second Circuit has an opportunity to make new law, or at least what in my view would be new law. They may say that you cannot limit the courts the way Congress did with the PLRA, for example, by limiting the ability to bring actions on behalf of prisoners on Riker's Island and everywhere else in the United States. It may not matter how the Second Circuit rules, however, because even if it were to reverse and hold the law unconstitutional, another circuit has ruled the law constitutional. If there is a split in the circuits, the issue will likely be determined by the Supreme Court.

Professor Simon: Is this a trend you have seen over the course of your judicial career—the restriction of the jurisdiction of judges to decide certain types of disputes—or is this the beginning of something that may

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19. See id. at 1451.
20. See id. at 1463 (invalidating as unconstitutional a section of the 1991 amendments to the Securities Exchange Act).
21. See Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996) (holding that the PLRA does not violate the Separation of Powers Doctrine or the Equal Protection Clause of the U.S. Constitution).
be new and may reflect the recent move toward more conservative government?\(^\text{22}\)

**Judge Baer:** That is a good question. I have not really thought about it on a long-term basis, including the ten years that I served as a state supreme court justice.\(^\text{23}\) Trend is a kind word by which to describe it. I think a conservative Congress will try to do as much as it can in this area. An example is recent legislation in the area of habeas corpus,\(^\text{24}\) and to some extent the PLRA as well. For now, this is where the nation is moving.\(^\text{25}\)

**Professor Simon:** What are some other areas where you think that same approach may be taken in the future, meaning the limitation of causes of action?

**Judge Baer:** As I said, I think that Congress has done it already in areas that involve habeas corpus. There is another act that has to do with crime control in some ways, although I am just not as familiar with that as I am with the PLRA. The elimination of class action litigation, et cetera, by Legal Services lawyers is of a similar stripe. It seems to me that Congress may do the same thing in other areas, but I think it really depends on who controls the House and Senate.

\(^{22}\) The Republican Party's recent control of Congress during the past three years may be an indication that the nation is indeed becoming more conservative in its political outlook. See Kenneth Jost, *A Changing Legal Landscape*, A.B.A. J., Jan. 1995, at 14 (discussing the initiatives of the newly elected Republican majority in Congress); *see also* Roger H. Davidson, *The Lawmaking Congress*, 56 LAW & CONTEMPO. PROBS. 99, 106 (1993) (discussing partisanship and its effects on members of Congress).


\(^{25}\) Even prior to the 1994 elections, which resulted in Republican control of both houses of Congress, House minority leader Newt Gingrich attacked President Clinton's anti-crime bill as a "'politician's bag of tricks,'" and called for tougher measures to punish violent criminals. George Embrey, *Gingrich Wants Criminals Kept in Military Stockades*, COLUMBUS DISPATCH (Ohio), Jan. 22, 1994, at 9A.
Professor Simon: Do you see on the horizon any limitations in areas such as employment discrimination actions, for class actions or even individual employment discrimination suits where, for example, instead of ninety days after a “right to sue” letter, Congress could require only thirty days or ten days?²⁶

Judge Baer: It is certainly possible that the approach could be applied to Title VII cases; for example, a provision so plaintiffs would have to run to the courthouse a little more quickly. Title VII litigation is, in my view, the fastest growing area of litigation right now, certainly in this district, and it may well be an area in which Congress decides to make some changes and make it more difficult to bring these actions. For Congress to concentrate on the statute of limitations, which is easy to address, would not surprise me.²⁷

Professor Simon: We have been talking largely about statutory types of action in the context of employment discrimination. Could Congress restrict the jurisdiction of federal judges to hear First Amendment claims?

Judge Baer: This is an area to which I have given some thought. I give Congress and some of the leadership high marks for creativity. I think that if you look at the history of cases in the Supreme Court in which statutes were held unconstitutional, they are few and far between. When it does happen, it is after situations where there has been, as I noted before, a final judgment that Congress is anxious to circumvent, for example, the old Wheeling bridge case²⁸ and another case following the Civil War.²⁹ These are basically limited to situations in which Congress changed its mind after a final judgment had been entered.

Certainly it is a method Congress can and has used to limit or restrict the jurisdiction of the federal courts. It is slightly different from what Chief Judge Kaye discussed in her lecture. She was concerned with protecting judges from unwarranted criticism in their day-to-day work.³⁰

²⁷ The statute of limitations for filing an individual claim under Title VII is currently 180 days. See 42 U.S.C. § 2000e-5(e).
³⁰ See Kaye, supra note 1, at 721-22 (characterizing the recent trend of public attacks on judges as an “imbalance” having “no rejoinder in kind”).
I simply wanted to make the point that there are other ways to skin a cat and it's wise to keep them in mind. It garners far less attention; for instance, you don't see much in the press about Benjamin, which dealt with Congress placing limits on the courts, although I believe there was an editorial. On the other hand, a judge's daily decisionmaking provides a fertile area for the press. In part this is the case because it sells more papers.

Professor Simon: In part because it sells papers and in part because . . . .

Judge Baer: Well, while the media has an absolute right to be critical of what judges write, the media frequently criticizes judges without the opportunity to examine and understand what the judge's underlying opinion really says. That could also be because most judges are very busy and few write as clearly as they would like. Perhaps I should speak only for myself on that score. But it is also true that very few reporters have an in-depth understanding of the meaning of judicial decisions. I do not know how many of those assigned to press rooms in courthouses around the country have law degrees, but if I had to guess it would be very few. I am sympathetic to the fact that they too have deadlines and they have to get out their stories quickly. However, they cannot help but mislead when they get out their stories without understanding the facts and the law.

I ran across an interesting quote from Senator Dole after he lost his bid for the presidential nomination in 1988. He said that reporters turned his campaign plane into a place where "preconceived notions, pre-written stories, and premeditated cliches were all confirmed regardless of the facts." Newspapers are by definition current editions of what is going on, or what reporters and editorial writers believe is going on, at the moment. Understandably, readers often believe that what is reported is precisely what is going on. I do not want to leave the impression that this is a media problem. The media it seems to me plays a small role. The picture is much larger and disturbing. If I may wax philosophical for a moment—it shows us moving toward a country of the powerful versus


32. Edward Walsh, Dole Accuses Media of Liberal Bias, Fixation on Campaign Trivia, WASH. POST, Apr. 27, 1988, at A13 (quoting Dole's speech on the Senate floor, which took place four weeks after he dropped out of the Republican primaries).
the powerless; a country that increasingly values only the bottom line and the almighty dollar. It is a picture of a country with a dulled spirit where we see courage and sincerity moved into the background, sometimes so much so that they go unrecognized. No, this is far more than a media problem.

Professor Simon: Are there certain virtues to limiting judicial independence, to making judges more sensitive to the overall political atmosphere? And are elected officials the right people to impose upon the judiciary what they perceive to be the political whims of the country? Is it at all desirable to allow elected officials, without asking judges to violate the law or act contrary to what the judge believes to be permissible, to push judges to exercise discretion in a certain direction?

Judge Baer: Sometimes, Congress—and this may not be responsive to your question—in its legislative role is charged with this responsibility. For instance, when I first came to the U.S. Attorney's Office Judge Weinfeld would cite Stack v. Boyle, which I have not looked at for over thirty years, but I know I looked at it frequently back then since he would cite it whenever a bail application was made. Essentially what it said was that the controlling consideration with respect to bail was whether or not the defendant would come back for his or her next court appearance.

Quite properly I think, Congress has added additional considerations in connection with setting bail. Whether judges with a particular philosophical bent may use those same congressional guidelines differently than judges of another bent is why different courts reach different results. That is the case now and I hope it will continue to be for a long time to come. While every federal judge is sworn to and does

35. See Boyle, 342 U.S. at 4.
36. See Bail Reform Act of 1984, 18 U.S.C. § 1342(g) (1994); see also United States v. Salerno, 481 U.S. 739, 743 (1987) (considering various factors set forth by Congress such as “the nature and seriousness of the charges, the substantiality of the Government’s evidence against the arrestee, the arrestee’s background and characteristics, and the nature and seriousness of the danger posed by the suspect’s release”).

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follow the law of the land, the fact that laws can be and are interpreted differently remains a cornerstone of judicial decisionmaking.

Professor Simon: Let's talk about a situation where an elected official such as the governor or the mayor expresses an opinion about a particular decision or about a particular judge's political stripe, whether it be liberal, ultra-liberal, radical, et cetera. Admittedly, this has the potential to threaten judicial independence in a severe way. Despite this threat, are these public criticisms, encouraging judges to the right or left within their discretion, legitimate constraints on judicial independence?

Judge Baer: If you mean by "legitimate" whether those criticisms are valuable or not, I would worry about them. I see similarities between encouraging judges to lean one way or another and the litmus tests given to judges in the course of the nomination process and confirmation hearings during the Reagan administration. That was really a non-merit type consideration for selecting judges. What we should be looking for are the best possible judges. If the President didn't want to nominate you or the Senate didn't want to confirm you that was their business, but once a judge is nominated and confirmed that judge takes an oath to follow the law. Each judge should be allowed and encouraged to do that in the way he or she believes to be right. Should a district judge err, the matter may be resolved on appeal and I have yet to run across a bashful court of appeals.

While it is a very different ballgame to be a federal judge with a lifetime appointment than it is to be at the mercy of elected officials, some feel that it is within the province of Congress and state legislatures, as well as the executive branch, to publicly criticize judges. I feel that while criticism, especially fair criticism, may be appropriate and even healthy, when it is job-threatening and used more as a scare tactic and a campaign strategy it is not.

37. See Douglas W. Kmiec, Judicial Selection and the Pursuit of Justice: The Unsettled Relationship Between Law and Morality, 39 CATH. U. L. REV. 1, 8-9 (1989) (noting that President Reagan's scrutiny of the legal philosophy of judicial candidates has been characterized as a litmus test); Abner J. Mikva, Judge Picking, 84 MICH. L. REV. 594, 600 (1986) (outlining some of the weaknesses of a litmus test approach to appointing judges); Timothy B. Tomasi & Jess A. Velona, Note, All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Court of Appeals, 87 COLUM. L. REV. 766, 766-69 (1987) (observing that the methodology of the Reagan appointments was designed to advance the conservative agenda and noting the power of the Senate to confirm or reject nominees based on philosophical belief such as judicial restraint).
Professor Simon: Let's talk about the other side of the equation. The Second Circuit came to your defense in a very unusual press release. Did that surprise you?

Judge Baer: It surprised me in the sense that I had no premonition that it would happen. Initially, I was also a little surprised because of the Judicial Code’s prohibition on judges publicly speaking about cases that may come before them. But if this was a concern at all, clearly none of the judges involved need sit on any of the matters about which they commented, and thus the prohibition does not affect them. So I thought the Second Circuit’s response was important, appropriate, and articulate; and I thought the Chief Justice, who made similar comments supporting judicial independence, was very important and helpful, too.

Professor Simon: The Crown Jewel Comment?

Judge Baer: Yes. I take total and complete credit for what I believe is now essentially a revolution with respect to judicial independence. I speak about it as if it was fathered by me. I think that both of those press releases were vital in this revolution. It is very hard for me to open a legal periodical these days, from the ABA Journal to the New York Law Journal, without reading about judicial independence. I assume that is why you, at least in part, chose to put together this symposium.

Professor Simon: The ABA just published an article about a Tennessee Supreme Court judge who was voted out of office for a decision granting a new sentencing hearing in a death penalty case.

Judge Baer: Again, criticism may be warranted, but I worry about the public getting the full picture and whether judges should be subject to removal for their decisions. There was also an interesting article that my

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41. See John Gibeaut, Taking Aim, A.B.A. J., Nov. 1996, at 50, 51 (reporting that Judge Penny J. White lost her seat on the Tennessee Supreme Court in a retention election after being publicly criticized by a number of groups, including the Republican Party).
daughter sent me from the *Boston Globe*. I guess it was just before the election. It detailed the sad experience of several nominees for the federal bench who had taken liberal stands which were later called to the attention of the President, who allegedly did not know about them. The nominees are now in limbo, looking for the clients they had given up based on the representation or their expectations of becoming federal judges. But while this may be sad, it is, as I noted, a little different.

Professor Simon: A remark that Judge Kaye made was that judges are not media stars. Unlike the U.S. Attorney, you cannot hold press conferences and give your side. Judges also do not have the freedom of a defense lawyer who can give a press conference and say even the limited things that defense lawyers are allowed to say. In a sense, you did become a media star. There is certainly much more national attention to your situation than to that of Judge Duckman.

Judge Baer: Unfortunately, my stardom was, as I noted, without any participation by the star. Since judges can easily become punching bags because there is little they can say, I was surprised that the presidential campaign was so benign. Several people have suggested that it was an ABA poll, finding that most Americans did not want to hear the candidates judge-bashing, that kept the issue, for the most part, out of the later portion of the campaign. Certainly Senator Dole, even in his acceptance speech, suggested we would hear from him. For me, the entire experience is best described as bittersweet and filled with lessons.

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43. See id. (reporting that the President stopped supporting certain judicial nominees who were viewed as “liberals,” and decided to forward candidates for judicial posts who were closer to a centrist position).
44. See Kaye, supra note 1, at 723 (stating that judges do not engage in public discussion of their decisions; they “are not media stars [or] Monday-morning quarterbacks”).
45. The telephone survey, conducted July 9-13, 1996, asked approximately 1,000 adults for their opinions concerning the independence of the federal judiciary. The poll revealed that 84% believed it unreasonable for either a President or a member of Congress to attempt to influence a judge’s decision during a case. See Harvey Berkman, *Politics, Judges Don’t Mix*, NAT’L L.J., Aug. 12, 1996, at A6.
46. “And for those who say that I should not make President Clinton’s liberal judicial appointments an issue in this campaign, I have a simple response. I have heard your argument. The motion is denied.” I WILL RESTORE THE PROMISE OF AMERICA, WASH. POST, Aug. 16, 1996, at A36 (remarks made by Robert Dole during his nomination acceptance speech at the 1996 Republican National Convention).
Professor Simon: Has the ABA's new Committee on Judicial Independence and Separation of Powers been a source of comfort to you? Do you think they are going to accomplish anything or make inroads regarding the political consciousness of the importance of judicial independence?

Judge Baer: A number of bar associations including the New York County Lawyers’ Association, where I was fortunate to have served as president, also entered the fray. I was also glad to see that the ABA put together a committee. I think if they produce information that educates and answers the public’s concerns in this area they will have made a significant contribution. It is an area which, now more than ever, requires constant vigilance, and active ongoing committees provide this possibility.

When I talk about taking full responsibility for this sort of upsurge or revolution, I am kidding of course. If anything, my decision, and frankly the courage to reverse myself when the credibility issues and others were resolved, was a spark. This helped begin a debate about what judicial independence is and should be, and making sure people understand why it is such an important consideration. I think the publicity generated by both the ABA and its journal on a national level, the New York State Bar Association, and the New York County Lawyers’ Association here on a local level has been very important.

Professor Simon: You mentioned that for you this has been a personally bittersweet experience. Do you want to discuss that further?

Judge Baer: Almost immediately there was a coast-to-coast interest in judicial independence, and the confidence in me that was expressed by my colleagues, my Chief Judge, and the Chief Judge of the Circuit, that was the sweet part. Some of the editorial comment was bitter. I learned a lot from both. It may just be my perpetually optimistic view of life, but my philosophy is that things always work out for the best; and while I

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47. In August of 1996, ABA President N. Lee Cooper announced the institution of an ABA commission to study the effects that political criticism has upon judicial independence. The commission, comprised of 11 members who hold bipartisan views, was designed to “create an opportunity for dialogue among the branches about what is appropriate oversight and what is inappropriate intrusion.” Berkman, supra note 45, at A6; see also Steven Keeva, Commission to Examine Judicial Independence: Hearings Will Be Held to Determine Oversight Limits, A.B.A. J., Oct. 1996, at 110.

can't say this has all worked out for the best, I think the debate that has been generated is healthy and worthwhile.

Professor Simon: Do you want to comment on merit selection? It would be an interesting development, for example, if the debate on judicial independence ended at the point where more states decided that judges ought to be appointed based on merit or elected for much longer periods of time,49 or some combination where there are people who are nominated outside the realm of the political system. Do you think this would be a good development, and do you think it is likely?

Judge Baer: For a long time before I was elected to the New York State Supreme Court, and for the period between my resignation from that bench and confirmation as a United States District Court Judge, I served on the Fund for Modern Courts.50 A major mission of this committee was and is merit selection and appointment of judges, and I was a staunch supporter of the merit selection system for judges.

However, I must tell you that when I became a supreme court justice and I had an opportunity to listen to my elected colleagues, they made some strong arguments in opposition to the merit selection system. The argument that appealed to me most was with respect to diversity.51 For example, the New York Supreme Court, made up of justices elected to their post, is far more diverse than the contingent of federal judges that sits in New York State. Although, to his credit, President Clinton has made some strides to correct the lack of diversity in the federal judiciary,52 the two systems are still not comparable.

There are those on the federal bench who believe that both election and appointment must be on a colorless basis, with an eye toward


50. The Fund for Modern Courts is a not-for-profit organization dedicated to improving and modernizing the judicial system. Some of the issues that the group addresses are reform of the New York State court system, judicial selection, and judicial discipline.

51. See Goldschmidt, supra note 49, at 69-70 (noting the opinion that "the best hope for achieving a diverse bench is not through merit selection, but an elective system").

selecting only the best judges. There are others who feel that the bench should reflect the complexion of the community. I would only support a merit selection system if there were an assurance of diversity. I think it is a complicated question. Clearly, insulating judges from the kind of criticism that has been more or less rampant in the last six months would be helpful. One of the ways to do that is by extending their terms. In the New York Supreme Court, justices are elected to fourteen-year terms, and for the most part are assured bipartisan endorsement when they run for re-election. Politics sometimes gets in the way as it did this past November in Staten Island, but for the most part re-election is assured. There are many issues with points to be made on both sides that surround this question of election versus appointment, but one thing is sure: There must be protection for judicial appointees from political figures bent on making campaign issues out of unpopular judicial decisions. A judge should not have to worry in terms of keeping his position on the bench, whether the person with power over the appointments likes or dislikes his decisions. That is what, for me at least, judicial independence is all about.

**Professor Simon:** Are you concerned that restricting judicial independence will be the focus of further congressional attack?

**Judge Baer:** While I would not bet against it, Senator Orrin Hatch did say recently in an essay entitled *Congress and the Courts: Establishing a Constructive Dialogue*, that “[n]o one worries that Congress will

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54. See Symposium, *The Road to the Judiciary: Navigating the Judicial Selection Process*, 57 Alb. L. Rev. 973, 976 (1994) (recounting Chief Judge Judith S. Kaye’s comment that “a diverse bench gives the public a feeling of inclusion in the justice system, willing to place its trust and faith in it, not alienated from it”).

55. See N.Y. Const. art. VI, § 6 (“The terms of the justices of the supreme court shall be fourteen years.”).


Some good candidates won. But as often happens, other good candidates lost for reasons having nothing to do with their suitability for the bench. [R]unning for re-election in a heavily Democratic Brooklyn-Staten Island district, [Judge Kuffner] lost not on the merits but simply because a political deal fell through. *No Way to Choose Judges*, N.Y. TIMES, Nov. 11, 1996, at A14.
attempt to reduce the compensation . . . in violation of Article III, Section 1 of the Constitution. Moreover, there is no reason to fear that Congress will . . . control, or interfere with, the adjudication of specific cases or prevent the courts from addressing the constitutionality of the laws they are enforcing."

To answer your question, I guess that was as close as Congress has come to giving me comfort. I think he certainly speaks for the majority of the judiciary committee, so that's a fairly important statement.

Ms. Baldwin: You mentioned the limits that the Model Code of Judicial Conduct places on judges who come under fire. Do you feel that there should be an amendment to the Code to somehow allow judges to defend themselves?

Judge Baer: I am sure there are good reasons for the language in the Code. I can think of several. But on balance, it would be salutary if a judge, who knows the real meaning of what he was doing or what he had written, could have a way to respond. So in some sense, either on that level or perhaps by having a committee of judges to respond to criticism, the Canon deserves some rethinking.

Ms. Baldwin: Should politicians who are also lawyers be treated the same as a typical lawyer speaking about a judge after a case?

Judge Baer: One of the problems we keep coming back to is the breadth of the criticism. If a mayor or a governor criticizes a judge’s decision, it is obviously going to attract wide media attention. If a lawyer who loses a case criticizes a judge’s decision, it is unlikely to see the light of day. In almost every case, at least one of the lawyers is going to be unhappy with the outcome. I do not believe this kind of criticism is a major concern, nor is it a major concern of the ABA or other bar associations.

59. See, e.g., The Governor's Attack on the Judges, N.Y. Times, Feb. 13, 1996, at A22 (criticizing New York Governor George Pataki's attempt to force the New York Court of Appeals to replace its own rulings concerning when to suppress evidence as unlawfully seized with the case law followed by the federal courts).
60. See Daniel Wise, 26 Bar Groups Join to Defend Judiciary: 'Intemperate, Personal' Attacks Criticized, N.Y. L.J., Mar. 8, 1996, at 1 (reporting that 26 bar associations, together with six law
Ms. Baldwin: Do you feel that politicians should be sanctioned when they make personal attacks on judges?

Judge Baer: When you say sanctioned, I do not know precisely what you mean. I think a responsible media, and to a large extent we have a responsible media, has an obligation and does report what the politicians say.

It may be a little late in the day to start worrying about what we might do about politicians who do make outrageous remarks. My guess is that with enough education, the voters will do that sanctioning.