Introduction

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I. What Is “Judicial Independence”?

The term “judicial independence” is widely misunderstood. To some, “independence” connotes inappropriate “activism” or quests to “create” law unbound by the constraints of statutes or common law precedents. For many thoughtful people it is an “I know it when I see it” kind of term. Like the elusive phrase “sustainable development” in environmental discussions, it reflects values that are important to the people who hold them, even though they may not agree about details.

The term in my view connotes judges whose tenure is reasonably secure, who have been selected carefully (recognizing that systems of selection vary), and who will decide cases according to the rule of law unconstrained by political fear, fear for physical safety, or other undue pressures, and uninfluenced by the status of the parties, the threat of salary reductions, or extraneous considerations. These characteristics are the basic ones, although it is possible to imagine heroic judges acting independently even if they were selected solely for political reasons or lacked secure tenure.

Drawing on Isaiah Berlin's influential Two Concepts of Liberty, Professor Pamela Karlan identifies two “judicial independences”: one to be “free from certain kinds of pressures or influences”; and one to be “free to envision and realize certain goals” and policies, essentially those contained in the Constitution, statutes, and the common law rather than held individually by judges. There is relatively “strong consensus for the negative [or ‘freedom from’] conception of judicial independence” but, understandably, more criticism and little consensus on the positive or “freedom to” conception-and, in particular, on how that is manifested in particular cases.

Another factor that makes the definitional question an uneasy one is judicial ambition. It is one thing to expect a judge not to be influenced by pecuniary concerns or physical threats if adequate salary and reasonable security are provided. It may be another to expect a judge not to be influenced by the subtle pressures of personal ambition, for example, the wish to be promoted to a higher court, to be chosen for a prestigious assignment, or, for some state judges, to be either reelected, retained,
or reappointed as state judges or appointed to the federal bench. As Karlan puts it:

Asking the question “Should judges be free from the fear they will be tossed out of office for making a correct but unpopular decision?” suggests one answer. No one explicitly supports that kind of retaliation. But asking the question “Does judicial independence require a conscientious voter to disregard a judge's decisions when deciding whether to vote to retain her?” suggests a different one. It bears emphasis that there are relationships between and among our three branches of government. A good example is the United States Supreme Court's recent decision in Hamdan v. Rumsfeld, explaining that the President's unilateral decision to institute military tribunals for Guantanamo prisoners disregarded statutory constraints imposed by Congress and that the proper way for a President to address such matters is to work with Congress. Judicial independence should not connote the image of some isolated jurist in the desert completely separated from reality, including being separated from the legislature and the executive, or immune from constraints or criticism. After all, legislatures provide the funds for the salaries of judges and the operations of their courts and enact jurisdictional statutes; executives often nominate or appoint judges; and, within constitutional limits, both the legislature and the executive can change the law that a judge has applied, sometimes in an “ongoing colloquy” between the branches. Judicial accountability is an integral part of judicial independence.

II. Why Is Judicial Independence Important?

Our Declaration of Independence describes the British king as having “made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.” Thomas Paine, providing common sense for the American Revolution, said, “[w]here, you may ask, is our king? In monarchies, the king is law. In our democracy, the law is king.” In contrast to monarchical domination, Article III of our Constitution provides that federal judges “hold their Offices during good Behaviour” and that their compensation “shall not be diminished during their Continuance in Office.” Independence of judges from the will of the executive and from threats to their compensation is crucial. Security of judicial tenure also is crucial, although it varies among jurisdictions.

Gerhard Casper, Professor and President Emeritus of Stanford University, and Kathleen Sullivan, renowned law professor and advocate, have aptly written that “[t]he point of insulating judges from the winds of politics is ultimately to protect individual rights from potential tyranny by the majority.” The Massachusetts Constitution of 1780 stated that “[i]t is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice.” Alexander Hamilton, writing in The Federalist No. 78, stated that “[l]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.”

Judicial independence is especially important today because the judiciary and the rule of law are under relentless and severe attacks from various quarters. In ways that both challenge Congress
and may implicate the judiciary, the President is bypassing the separation of powers, for example, through the misuse of so-called “signing statements,” which state that he will not or may not follow an act of Congress, a practice recently and correctly condemned by the American Bar Association. A notorious example is his recent statement that he will not follow the McCain Amendment, which forbids any U.S. official to use torture or cruel, inhuman, or degrading treatment on prisoners, if he thinks that doing so would be necessary to prevent terrorist attacks. His government has created and maintained a climate of fear and repression accompanied by deception and secrecy, a subject I addressed in a recent talk entitled Citizenship in a Time of Repression. His administration has authorized cruel, inhuman, and degrading treatment of prisoners, unlawful detentions, renditions of individuals to foreign countries, unconstitutional tribunals, and warrantless wire-tapping. Congress and the President sought to influence the judicial outcome of a single state case in the Terri Schiavo matter. Congressman Tom DeLay, then powerful, now disgraced, declared that “[w]e will look at an arrogant, out-of-control, unaccountable judiciary that thumbed their noses at Congress and the President.” The “time will come,” he said, “for the men responsible for this to answer for their behavior.”Shortly after the courts refused to intervene in the Schiavo case, Tom Toles, in an editorial cartoon published in the Washington Post, depicted a Republican elephant in a business suit railing against a judge in the courtroom, with the judge saying: “I didn't do what he wanted so now the complaint is ‘inactivist’ judges.” In recent years judges and members of their families have been murdered or threatened with violence.

Disagreement with judicial decisions has provoked demands that judges be impeached or recalled and, in the case of the Ninth Circuit, that an entire circuit be divided. In South Dakota, the voters in November 2006 resoundingly declined to abrogate the traditional immunity that judges have had from liability for their decisions. The initiative, called “J.A.I.L.” for “Judicial Accountability Initiative Law,” sought to remove judicial immunity and establish special grand juries to hold judges accountable for decisions. Though soundly defeated, this initiative may provide the blueprint for similar initiatives in other states. As my ALI colleague, U.S. District Judge Paul Friedman, has said, “It is hard to remember a time when judges, courts, and the judicial branch in general were subjected to so much gratuitous criticism, vitriolic commentary, and purposely misleading attacks.” He is concerned that “if this current, often politically motivated drumbeat against judges continues unchallenged, more and more people . . . will lose faith not just in the courts but in the rule of law itself.”

In earlier years, our country's faith in and adherence to the rule of law had been a cause for hope for people as well as an inspiration to judges not just in America but also in other countries. If that faith evaporates and injustice consequently increases, the repercussions will be global. As Martin Luther King wrote in Letter from Birmingham Jail, “Injustice anywhere is a threat to justice everywhere. We are . . . tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.”
III. Can We Distinguish Between Appropriate Criticism and Inappropriate Criticism of the Judiciary?

Judges are public officials. With rare exceptions, their rulings are public records. Their actions in court are usually open to the public and often also are recorded by a court reporter or tape recorder, although such recordings cannot fully capture the judge's demeanor.

Judges are also subject to procedural and substantive constraints, such as principles of personal jurisdiction, subject matter jurisdiction, standing, ripeness, mootness, applicable statutes and rules, the common law, and precedent and stare decisis. Courts other than the Supreme Court of the United States or the highest state court on a nonfederal issue are also subject to appellate review. They are not free to disregard these constraints. In appellate courts, panels of three or more judges provide an additional safeguard against one judge disregarding applicable law. Although federal judges are rarely impeached and removed from office, the circuit courts of appeal occasionally administer discipline. State judges are subject to censure and removal for misconduct or disability, for example, in California by a Commission on Judicial Performance and ultimately by the state supreme court. Judges are further subject to removal by the electorate—for any reason or for no reason—when they run for reelection or retention. Moreover, most judges want to establish a good reputation with their colleagues, the profession, and the public.

On various matters, judges are appropriately accorded discretion and their exercise of that discretion is reviewable only for abuse. It is important to have judges exercise their discretion with judicial temperament, impartiality, and wisdom together with a sense of responsibility for seeking the right answers to the questions before them.

Two key implications of the foregoing group of constraints are: (1) they provide litigants and the public an extensive set of safeguards against judicial abuse or an individual judge's pursuit of personal goals or policies; and (2) they provide objective standards for analyzing and critiquing individual decisions. If critics think that a decision is wrong, invoking one or more of these objective standards in criticizing a decision not only is a permissible exercise of a First Amendment right, it also is healthy and constructive. The law reviews are full of articles and student notes that often criticize as well as sometimes praise a judicial decision. When they or other commentators criticize a judicial decision for exceeding or violating one of these standards, they contribute to the marketplace of ideas for potential improvement. Because their comments by definition invoke an objective standard, they can be assessed for their persuasiveness, objectivity, and rationality.

It also is appropriate as well as potentially constructive for commentators to criticize judges that do not live up to minimal standards. For example, is the judge prepared, competent, and alert? Is she courteous to witnesses, jurors, parties, counsel, court staff, and others? Is the hearing and decision unburdened by undue delay? Does the judge listen impartially to the evidence and argument? If a written decision is prepared, is it intelligible? Critical comments again can be evaluated on the basis of their persuasiveness, objectivity, and rationality. An example of such
commentary is Dean Roscoe Pound's famous speech, given a century ago, entitled The Causes of Popular Dissatisfaction with the Administration of Justice.

Looking at our entire system of justice, of which the courts are a crucial but not the only part, other kinds of public criticism are useful. For example, many of the legal needs of low-income and middle-income people are unmet. Many civil litigants are unrepresented by counsel. Although Gideon v. Wainwright and subsequent decisions promise indigent defendants in criminal cases a constitutional right to an appointed lawyer, often such counsel are inadequately compensated, overworked, underresourced, undersupervised, and unable to provide effective representation. As David Udell and Rebekah Diller of the Brennan Center for Justice point out:

[F]or people with physical or psychiatric disabilities, court buildings and court procedures pose barriers that may be insurmountable. . . . [F]or people with limited English proficiency, the lack of translation and interpreting services in many of the nation's courts can also be insurmountable. . . . [T]he role of the courts is increasingly circumscribed by laws and by court decisions that eliminate whole categories of claims from the courts' jurisdiction. For example, government efforts have been made to circumscribe the function of the courts in reviewing government conduct in the so-called “war on terror,” in reviewing decisions applying immigration law, and in reviewing claims of prisoners challenging conditions of imprisonment. Court decisions also have enforced contractual limitations that curtail drastically the ability of consumers and employees to present their claims to a court.

Turning to the needs of businesses, which increasingly rely on arbitration clauses and alternative methods of resolving disputes, including mediation, can the courts meet their needs? Those needs often include the need to select an expert decision maker, to manage and limit discovery, to schedule a case conveniently, to resolve a dispute privately, to reach an expeditious resolution without undue cost, and to avoid the perceived risks of a jury trial. With intelligence and management, the courts may be able to respond positively to many of these needs, with the possible exception of the privacy interest given the public nature of their responsibilities.

In May 2006, Chief Justice John Roberts gave a welcome and friendly greeting to the members of the American Law Institute at our annual meeting in Washington, D.C. He distinguished between “informed criticism of judicial decisions,” and “collateral attacks” on judges “because of disagreement with their decisions.” What are the limits, if any, to criticism of individual judges, individual decisions, and the judiciary as an institution? Apart from violations of the criminal law or acts that constitute contempt of court, given the extensive protections of the First Amendment, there are very few limits on what is permissible criticism, as distinguished from what is appropriate or fair criticism.

Thomas Jefferson, for example, challenged life tenure for judges and said that “man is not made to be trusted for life, if secured against all liability to account,” and that judges were “thieves of liberty.” Theodore Roosevelt, who had appointed Justice Holmes, strongly expressed his disappointment with Holmes after he sided with the trusts in the Northern Securities case, stating:
“I could carve out of a banana a judge with more backbone.” Franklin Delano Roosevelt tried to pack the Supreme Court and accused it of establishing itself as a “third house of Congress—a superlegislature.” Although they later attempted clarifications, former California Governor Gray Davis said “[m]y appointees should reflect my views... [they] are not there to be independent agents,” and Senator John Cornyn, a former member of the Supreme Court of Texas, prompted an understandably concerned Justice O’Connor to say, “It doesn’t help when a high-profile senator, after noting that decisions he sees as activist cause him great distress, suggests that there might be a cause-and-effect connection between such activism and recent episodes of courthouse violence.”

Given such notorious illustrations of irresponsible comments from high public officials, can we educate the public to distinguish between informed criticism and collateral attack? This question leads to my next one.

IV. What Can We Do About the Public’s Inadequate Understanding of Judicial Independence?

I start with the following suggestions:

(1) If the criticism is not based on an objective standard but simply on the speaker's personal opinion, or religious belief, or disagreement with the decision or the underlying law, it should be unpersuasive to fair-minded listeners. The same is true for attacks on the integrity or motives of judges. Disparaging a judge as “soft” on criminals, or “political”, “immoral”, or “anti-religious” does not invoke objective standards.

(2) Because of ethical considerations, judges rarely respond to attacks on their rulings. Such attacks are a cheap shot for complainers or bullies like Tom DeLay. Most people have an innate sense of fairness. If adequately informed, perhaps they may be unwilling to be persuaded by a cheap shot.

We have a long way to go, however, in educating the public about judicial independence.

About thirty years ago, I served on the California Commission on Fair Judicial Election Practices. At a public hearing in Los Angeles, witnesses did not comprehend the difference between state or county legislators campaigning on their past records and future programs and judicial candidates who were neither advocates for their decisions nor sponsors of program agendas. Some witnesses wondered why, for example, judges should not have to defend their sentences in particular cases. The public does not seem to appreciate that every judicial election presents both the opportunity to educate the public about the judiciary and the risk of misinformation and partisanship. I do not sense any improvement in public understanding or appreciation for the role of our judiciary over the past thirty years. In fact, the situation has gotten worse. With the reduced emphasis on teaching civics in the schools, the prominence of so-called “judicial reality” television shows that do not necessarily correspond to reality, the general failure of the media to educate the public seriously and in depth, and public apathy in
general, the public does not have a good understanding of the role of judges or the importance of their independence.

A recent American Bar Association poll found that over fifty-six percent of the American public agrees with the statement that “judicial activism . . . seems to have reached a crisis. Judges routinely overrule the will of the people . . . .” On August 31, 2006, the Annenberg Public Policy Center released a survey that is most disturbing. Only fifty-eight percent of Americans believe that if the President disagrees with a Supreme Court ruling, he should nevertheless follow it rather than do what he thinks is in the country's best interests. The percentage drops to fifty-three percent if the President believes the ruling will prevent him from protecting the country against terrorist attack.

The idea that the President can defy a Supreme Court order should alarm us. We should view it not as an issue of partisan politics but as a fundamental issue of government. Conscientious conservatives, for example, are indeed concerned. For example, in his recent book Conservatives Without Conscience, John Dean, a Goldwater conservative, says that the claim of authoritarian conservatives that the President is not bound by rulings of the Supreme Court, or for that matter by acts of Congress, is “truly frightening in its implications.” Dean is deeply concerned that “the authoritarians, who have already taken control, will take American democracy where no freedom-loving person would want it to go.”

In her opening statement on the rule of law as the new Chair of the ABA Section of Litigation, my ALI colleague Kim Askew described Mamie Farley, her fourth grade teacher:

She introduced me to the principles of “rule of law” and “independence of the judiciary.” . . . [S]he made civics and government come alive in the class room. She believed in our constitutional system and made its principles a lot more interesting than the usual math and reading assignments. She explained separation of powers and the three separate and equal branches of government. She introduced me to the concept of checks and balances. Because of her, the terms independent and impartial became a part of this young student's lexicon. I did not know what the Constitution was before Miss Farley mentioned it, but through her I learned of Marbury v. Madison long before my law school days. How many of us here today can relate similar stories from our childhood or, more recently, from our children or grandchildren in the fourth grade, the seventh grade, or any grade? We need many more Miss Farleys.

Such education is not going to occur just in schoolrooms, new classes in civics, street law programs, and visits by students to courts, important as they are. It must occur also in civic meetings, in internet discussions, in professional organizations, in neighborhood gatherings, in volunteer groups, at the family dinner table, and in the media. In state judicial election campaigns, incumbent judges as well as candidates can educate voters about judicial independence, as Wisconsin Chief Justice Shirley Abrahamson and others have urged. Justices Breyer, O'Connor, Ginsburg, and Kennedy have taken the lead in educating our citizens about our Constitution. Such judges are setting the example of what responsible members of our
profession can do.

The media has a special responsibility. Consider, for example, the infamous McDonald's hot coffee case, which became a poster child in the campaign against the judiciary. Most newspaper articles focused on the $2.7 million verdict for punitive damages. Their selective reporting in general did not report the third-degree burns and permanent scarring the elderly victim suffered, the painful skin grafts she endured, the fact that she was willing to settle for her medical expenses of about $20,000 and that the company offered her only $800, the fact that McDonald's coffee was served about twenty degrees higher than what was standard in the trade, the seven hundred previous claims against McDonald's for similar complaints, the company's indifferent response but eventual payment of nearly three quarters of a million dollars to settle such claims; or the reduction by the trial judge of the punitive damage award to $480,000, after which the parties reached a confidential settlement.

Americans who are informed are ready to renew their natural self-reliance and resiliency. An informed, self-reliant, and resilient public is ready to engage in our democracy. An engaged public will resist abuses of power and threats to judicial independence. It will demand that its President stop abusing executive power and that Congress stand up to him. It will replace timid legislators with courageous ones, authoritarian legislators with freedom-loving ones, and venal legislators with honest ones. Its expressions and actions, literally and figuratively, will be the footsteps of Americans. When elected representatives hear those footsteps, not just once or twice, or here and there, but every day, pounding in a crescendo of strong beats, then, maybe, they will begin to do what is right.

V. Why Is Better Public Understanding of Judicial Independence Important, Especially Now?

Unlike the world astronomers who by resolution can eliminate Pluto from our solar system, we cannot erase the last six years of our political history. In reviewing these years, I venture to predict that future political historians will help us understand four points.

First, the current President aggressively, relentlessly, and often lawlessly attempted to increase executive power and succeeded in doing so. When the President lacks executive restraint, the other two branches, Congress and the judiciary, in specific cases, are challenged either to check him and keep our system in balance or acquiesce. Acquiescence by one branch increases the pressure on the other.

Second, the Congress as a whole did not stand up to the President, and the majority often accommodated or even applauded him. There were significant exceptions on particular matters such as the McCain Amendment against torture and cruel, inhuman, and degrading treatment, which the President then undermined with his signing statement. Together with the minority-which itself could have done better-the handful of so-called “moderate” Senators in the majority could have protected both the country and the United States Senate as an independent
institution but did not muster the sufficient collective courage, capacity, and will to just say “No” to the President. They all have their excuses and rationales of course, and some showed leadership on individual items of legislation or statements. Although it may seem harsh to criticize seemingly well-meaning people, they were the ones who, acting together, could have made an institutional difference but as yet have failed to do so. By contrast, on June 1, 1950, then-freshman Republican Senator Margaret Chase Smith from Maine delivered her Declaration of Conscience against McCarthyism at a time when such a statement was a rare act of great political courage. Although joined by only six colleagues at the time, and disparaged by McCarthy as “Snow White and her Six Dwarfs,” her brave act helped inspire the country to reject McCarthyism and the Senate to censure him.

Third, although the Supreme Court was responsible for allowing the President to take office without pursuit of further voting or procedures in the Constitution, it also held in later cases that he had exceeded his powers. Hamdan v. Rumsfeld is the most recent and notable example. It did so, however, with only a fragile majority of justices who displayed courage, judicial independence, and the quiet force of reason.

Fourth, although there were some courageous voices, the American public as a whole was phlegmatic, uninformed, fearful, apathetic, and unengaged.

Will you be a part of changing this sorry history? Are you willing to let the Supreme Court brave the hurricane winds of politics alone? When Judge Learned Hand gave his famous speech entitled The Spirit of Liberty to new citizens in 1944, he said: “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.”

Fifty years ago, when I was in my first year of military service, and when our country was emerging from the McCarthy Era, we faced the real and imagined threats of communism and a Soviet regime that had executed millions of people and enslaved millions of others in hard labor. With reference to Judge Hand's haunting words, my father then remarked as follows:

The judges whose job it is to apply [the Constitution] must carry liberty in their hearts even when other men have ceased to. Who is to say that liberty is dead in the hearts of men who are silent? Liberty is not lost suddenly, catastrophically; it is lost imperceptibly, by erosion. Who is to say it is irretrievably lost until it has died in the hearts of those whose job it was to care that it lived in the hearts of others? It would be good to be able to count on judges who, like Justice Robert Jackson in West Virginia Board of Education v. Barnette (the “Second Flag Salute” case) wrote: “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”
Suppose, however, the day comes when ordinarily cautious judges become timid and uncourageous and when we cannot count on either judges or legislators to protect our liberty. Suppose a vacancy occurs in the Supreme Court during the next two years and the President nominates, and a timid and acquiescent Senate confirms, a justice who will change the delicate balance that now exists on the Court. Suppose that the newly constituted Court no longer stands up to presidential abuse of power. Let us not wait for such a day. Now is the time to educate and engage ourselves and our fellow citizens. It is a critical time.

Brian Jenkins, the dean of America's terrorism researchers, has just published a brilliant and inspiring essay entitled True Grit: To Counter Terror, We Must Conquer Our Own Fear. In Jenkins' words,

we in America have spent the past five years scaring the hell out of ourselves. . . . What else but fear can explain the readiness of Americans to tolerate tossing aside the very Geneva Convention agreements the United States had fought to implement? What else but fear could have led Americans to even entertain public arguments in favor of torture and against any restrictions on how we might treat those in custody? There has always been an alternative, a strategy more consistent with American tradition—a strategy aimed at reducing public fear through a different style of communication and governance and at more actively engaging citizens in their own preparedness and response. Such an approach, if adopted, would attack the terror, not just the terrorists. It would see the White House working closely with the legislative and judicial branches to increase security without trespassing on liberty. It would aim at preserving national unity. In sum, it would be a strategy that seeks lasting strength.

Conclusion

At the beginning of this talk, I referred to Justice Carter's independent spirit. As I get ready to conclude, I want to take you back to 1953, a year when two significant speeches were made, on different coasts, in different contexts, on different subjects, by different leaders. Each speaker, however, reflected the essential values on which this country is founded.

In his inaugural address, President Eisenhower asked for

the power to discern clearly right from wrong, and allow all our words and actions to be governed thereby, and by the laws of this land. . . . [W]e, the people, elect leaders not to rule but to serve. . . . [Our enemies] feed upon the hunger of others. Whatever defies them, they torture, especially the truth. . . . [W]e Americans know and we observe the difference between world leadership and imperialism; between firmness and truculence; between a thoughtfully calculated goal and spasmodic reaction to the stimulus of emergencies.
In an address to the Bar Association of Monterey County, entitled Challenges to Freedom, Justice Carter spoke not of foreign aggression or subversion but of the manipulation of fear by “self-appointed guardians of our liberties.”

Fear is the most devastating and costly force in the world today . . . . [While] the basic concepts of liberty and freedom embraced in our fundamental law—the Declaration of Independence and the Constitution of the United States . . . still sway the American heart, they are being challenged by demagogues who are spreading philosophies of fear, hate and intolerance which are praying [sic] on the minds of hopeless and frustrated men . . . . Fear, hate and hysteria should not be substituted for evidence, reason and common sense as a basis for legislation and court decisions.

It is time for our country and our people and institutions to reaffirm our basic values and show courage in the defense of our liberty. Our liberty and our values are our best defense as well as our best weapon against terror. Our country needs activist citizens. It is time for our profession to take the lead. A cornerstone of liberty is judicial independence. Whenever politicians or others engage in collateral attacks on judges, lawyers and their bar associations should expose the fallacies immediately, set the record straight, and educate the public. A central purpose of a law school is to foster analysis, advocacy, and leadership. We as lawyers can help citizens understand the importance of an independent judiciary and support it. We can help them understand the difference between legitimate criticism and inflated rhetoric, partisan sniping, and other collateral attacks. President James Madison “understood the Constitution as the people's law, which was to be revered and not remolded by their servants.” It seems little to ask that “We the People” stand up for our law, our Constitution, and our judges.