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THE MANY FACES OF JUDICIAL INDEPENDENCE

The Honorable Alex Kozinski[†]

Good afternoon, ladies and gentlemen. When I got the letter from Kent Davis inviting me to participate in this symposium on judicial independence, I remember looking at it and saying, "Gee, what a dumb topic." I mean, what is there to argue about? Judicial independence is one of those feel-good items like chicken soup and honorary degrees and Mom. Who is going to stand up and say we need less Mom?

I think the antithesis of judicial independence is exemplified by a story—and this is a real story—told by Chief Judge Loren Smith of the Court of Federal Claims. He was in Pakistan about ten or twelve years ago. He traveled there on a kind of spread-the-word mission to explain how we do things here, and he was having a meeting with the top lawyers of Pakistan. They were talking about a recent case that had been argued in the Pakistani Supreme Court, and the issue was this: Was it consistent with Islamic law to stone a woman for adultery? Judge Smith asked the lawyers: "How do you argue a question like that before a court?" And the lawyers said nonchalantly, "Oh, just the usual way—the lawyers stand up and marshal whatever arguments they can. One side says, 'Look, obviously it is consistent with Islamic law, because the Koran tells us that Mohammed himself engaged in the stoning of a woman who was adulterous.' Then the other side gets up and argues, 'Yes, but Mohammed was special, and he had a divine inspiration. We simply can't aspire to the wisdom of Mohammed, and therefore, that practice which was open to him is not open to us.' "

Based on those arguments the Pakistani Supreme Court submitted the case, and a while later it came up with a decision, four to three, saying it was not consistent with Islamic law to stone a woman because of adultery. The ruling caused a bit of a stir, and the Pakistani President quickly removed two justices from the court and replaced them with two new justices. There

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was a new vote taken and, sure enough, on rehearing, the court held five to two the other way, and the punishment was carried out.

That is clearly a case where judicial independence was lacking. We all know and understand this is not what we want. So what is there to talk about? But when I thought more about the topic, I realized it raises some difficult questions. It is much closer and more nuanced than it seems. When you get away from examples like what happened in Pakistan, things get to be a lot fuzzier.

What does it really mean to be judicially independent? I've often considered the question of what would happen if one day I decided to show my independence by getting on the bench dressed like Ronald McDonald. I don't really like the traditional black robe—I think it's kind of stupid-looking—and it would be much nicer to have orange hair. Would that prove my judicial independence?

Or let's say I took it on myself to write all my opinions in law French. That would be independent, right? They probably couldn't impeach me for writing my opinions in law French. It would limit my choice of law clerks, but I'm sure I could manage to find some out-of-work medieval history Ph.Ds to help out.

Or take an example given by Professor Bright. In the *Williams*[1] case in 1955, the Georgia Supreme Court told the United States Supreme Court, in so many words, "We are not bound by your judgments." Well, that too is independence, correct? What could be more independent than telling the United States Supreme Court Justices to go jump in a lake?

Or take Judge Roy S. Moore of Alabama, who hangs the Ten Commandments in his courtroom and says that the law of the United States, the Constitution of the United States, doesn't apply in his courtroom. That's certainly independence, right?

Or think about the reversal rate of the Ninth Circuit. We got reversed twenty-seven of twenty-eight times last term. That's independence, right?

As an appellate judge I often have to consider the binding effect of instructions from above. Where is the line between judicial independence and lawlessness? Which brings me to the story of the four rabbis. Four rabbis are always arguing with each other about Talmudic law, and it always winds up that

1. Williams v. State, 88 S.E.2d 376 (1955), *cert. denied*, 350 U.S. 950 (1956).

three of the rabbis agree and gang up on the fourth; they always say he's in the wrong, but he knows in his heart that he is right.

One day they were having a very heated argument. The fourth rabbi knows he is right, and he raises his eyes and he says, "Dear God, I know I'm right. Please send a sign that I'm right." Sure enough, as he says these words, all of a sudden the sun disappears and it becomes quite dark in midday. And he says to the others, "See? I'm right. God agrees with me." And the others say, "No, no, it often happens that you have a cloud in the middle of the day."

The next day they have another argument, and again he's outnumbered. Again he raises his eyes and says a very solemn prayer, "Please, God, give them another sign." Even as he says the words, a thunderstorm comes crashing down, and it goes on for a couple of minutes with lightning and thunder, and then just as suddenly as it came, it's gone. The rabbi says, "See? See? It's a sign. It's a sign I'm right." But the other rabbis aren't convinced. "No," they say, "this is just another natural phenomenon."

So again, the next day, the rabbis are having an argument. Finally the fourth rabbi says to God, "Look, I know I'm right. Please give them a clear sign so there can be no mistake." And just as the rabbi says it, a voice booms from above the clouds, "HE IS RIGHT." So the other rabbis say, "Okay, now it's three to two."

The hard question is trying to figure out what independence means. Of course we want decisionmakers and judges to be independent of certain kinds of influence in making their decisions. But I'm not sure we want to be like the three rabbis, either—completely immune to any outside influence at all. The question becomes, what kinds of influence do we want judges to be independent of and what kinds do we want them to yield to? Do we want them to be independent of things like case law? How about lower court judges being independent of judges of a higher court? How about independence from political influence? How about independence from the standards or morals of the community? Do we want judges to be independent of all personal influences; do we want judges who put the wisdom they have derived from their own lives aside?

If I were Professor Bright—this is the only swipe I will take at my worthy sparring partner—I can come up with a simple rule. Judges I like and agree with are independent, and the ones that

I disagree with are not independent. Those judges are governed by mob rule.

Consider some of the state judges that Professor Bright says lacked independence. I didn't get the impression from the cases that he cites that these were judges who were somehow subject to an improper influence. It's not like they knew the Constitution said one thing but they went along with the mob out of compulsion. No, a lot of the rulings seemed to reflect the judges' own biases. In a real sense they were exercising judicial independence. A lot of those cases just reflect a sad history of bigotry we have in this country. It's not so much a question of judges yielding to pressure to get re-elected as it is judges reflecting the bad ethos of the community.

To get to the hard questions of independence, we have to realize that our judicial system—judges, courts, lawyers—is part and parcel of the political process. Courts are part of the political process. Professor Bright, of course, emphasizes that judges get appointed through the political process, and they get removed, at least in state court, through the political process. But there are more subtle questions as well. The jurisdiction of the courts is determined by the political process. The scope of the laws that the courts apply is almost always determined by the political process. The budget of the courts, how big a courtroom a judge will have, what amenities he will have, whether he will have the materials necessary to research the law and write opinions, the staff, the facilities and so on; those are all questions left in the hands of the political branches of government.

Judges come from the community, they are part of the community, they are often selected to reflect the views, mores and ethics of the community.

We have to recognize that any of these areas of influence—politics, case law, morals, standards, personal experience—may be perfectly fine areas for a judge to consider in making case decisions. The question becomes how much? I've been trying to see if I could come up with a definition or a bright-line rule, and I haven't succeeded. As a judge, I do things case by case, so I thought I would discuss some of the influences we see these days on federal judges.

Start with the appointment process. I went through the process. I was nominated, and I was confirmed, but I had a confirmation battle in between. A number of people got involved in opposing me. Not all of them were political opponents; a

number of people were concerned with local questions of the Ninth Circuit. Attorney General Meese spent a lot of his time working to get me through the process. He had to devote a lot of personal time persuading senators to let me go through, and I have always been very grateful to him for this.

When I went through the process in the Justice Department and the White House—I can only speak about my personal experience, of course—I was a judge already. Everyone knew a little bit about my propensities and my judicial philosophy. People asked me some general questions, like, "What do you think about the judge's role?" I told them I tend to be a non-activist, I believe that judges ought to apply the law, I do believe in constitutional rights, I do believe in constitutional freedom. I had a number of generalized discussions like that. From that process, and on account of the time that General Meese personally spent in getting me through the process, I've always felt a responsibility to think carefully about the rulings I make as a judge. It doesn't happen every time I write an opinion, but every so often I come to a close case and I ask myself the question: "Would Ed Meese approve?" I do. Now, I don't pick up the phone and call Ed Meese and say, "Hey Ed, what do you think of this opinion?" And I don't even believe that if Ed reviewed my 300 or so opinions, he would agree with every one of them. I can tell you for sure he wouldn't agree with a lot of them, because no two people agree. In fact, it's quite possible that he might not agree with any of them.

But that's not the test I apply. The question, for me, isn't what the actual Ed Meese thinks. The question is: Am I living up to be the kind of judge the people who appointed me thought they were appointing? Am I the kind of judge I represented myself to be? Somebody who applies the law, somebody who follows the Constitution, somebody who thinks about cases in an individual way. When I think I've done that, I have done my job well and I sign off on the opinion. Now, whether Ed would actually agree with them or not, I don't know. I've never talked with him about any of my cases. He may have something to say on that subject.

Now, is it okay for people who appoint judges to extract that kind of general information—questions of judicial philosophy—from judicial candidates? I would say it's fine. I think it's perfectly fine for the folks who appoint judges, the President or the Justice Department, to find out what the judicial philosophy of the candidate is. Now, what if they ask more specific

questions? I was not asked questions like where I stand on abortion, where I stand on the death penalty, where I stand on affirmative action, issues like that. But let's say a candidate for judicial office *is* asked that kind of question. Would that be okay to ask, and if so, is it okay for a judicial candidate to respond?

I think that's a closer case, but it seems to me that too is okay. These too are questions involving the judge's philosophy, and they involve a judge's application of constitutional law. The answer reveals something about how the judge will approach those kinds of cases and other cases. But it does not tell you what a judge will do in a particular case, and I think the case that proves that is *Casey v. Planned Parenthood.*[2] I don't know for certain what Justice Kennedy's view is on the question of abortion. But my personal guess as his former law clerk, and as a friend who has known him twenty years, is that if it came up fresh, he would not have voted with the majority in *Roe v. Wade.*[3] And yet, that turned out not to be the dispositive question when the Court was asked to overrule *Roe.* President Reagan, when he appointed Justice Kennedy, appointed a judge whose judicial philosophy did not hinge on his view of a single issue; it consisted of a whole host of principles. The issues which turned out to be dispositive in *Casey* were questions of stare decisis and questions of integrity and stability of the case law. That certainly seems to be what influenced his decision. So asking a judge whether he thinks a case was rightly or wrongly decided as a condition of appointment does not compromise judicial independence. This is because when the question *actually* arises, the judge may well decide it based on different principles, principles appropriate to the unique context each case presents.

Of course a nominee's presentation can influence whether or not he gets confirmed. So if you made a presentation of how you come out on abortion to the administration, it seems to me the Senate can legitimately say, well, if that's how you feel, we're not going to confirm you.

To be more specific, let's say that in appointing a candidate the President actually extracts a promise about how the candidate will vote on a particular case. Now we're getting closer to the Pakistani Supreme Court example. Professor Friedman's paper

2. 505 U.S. 833 (1992).
3. 410 U.S. 113 (1973).

raises the question in the Legal Tender cases, where President Grant had just appointed two justices to the Supreme Court. Now, we don't know what was said in that conversation. The historical understanding is that no presentations on that issue were actually made. But let's say, in fact, the President had extracted a promise from those judges as to those specific cases.

A difficult case, but it seems to me that this is where judicial independence would be compromised. The federal system we have gives life tenure, so failing to keep a promise like that is nonenforceable. Nothing could happen to you. But the specific moral obligation is probably enough to compromise judicial integrity and judicial independence; if a judge makes a promise like that in order to get confirmed, the only solution is for that judge to recuse himself from the case, because making the promise will have compromised his independence.

So I think it's permissible to go pretty far in figuring out pre-confirmation what is going on in the judge's mind, but not so far as to extract a promise of a vote. In the federal system, once you pass the threshold and get confirmed, lots of considerations come into play that will allow a judge to back off anything but a very specific promise to vote a given way in a particular case.

Let's consider next the question of the influence and independence from higher courts. It's easy to say that it's not really much of an issue: Lower courts follow higher courts, and you're supposed to do what the big boys and girls upstairs tell you to do. But I was actually asked a question like this during my confirmation hearings, and it turned out to be the only really interesting question I got during my entire confirmation process. I got a number of very good questions from Senator Hatch, who tried to help me, for which I am grateful; my opponents asked questions designed to make me look like a fool and a charlatan, and they succeeded by and large.

But only one senator came in and asked me the kind of question that forced me to think about my job. Again, this was one of those questions which, having given the answer, shaped my later conduct. The question came from Senator Mathias, and it was this: "Tell me, Judge Kozinski, should a judge worry about his reversal rate?" Kind of a simple question, and it took me sort of by surprise. I thought about it for a minute, and here's the answer I gave, and I'm still wedded to it all these many years later. I said, "Only if the judge never gets reversed." If a judge gets affirmed all the time, then that judge is probably cheating.

Probably what's going on is that difficult questions of law are being concealed as findings of fact or exercises of discretion. Instead of confronting a legal question, which an appellate court can disagree with you about, the judge writes an opinion that makes it all turn on matters that the appellate court cannot easily reverse. The obligation that a lower court judge has to a higher court is to follow the law faithfully. Where there are areas of possible disagreement, the judge must fairly state what he is doing so that the higher court, if it disagrees with him, will be able to affirm or reverse him. Insofar as a judge is slavishly wedded to the idea of getting affirmed, there may be too much of a temptation to simply judge the facts, and this amounts to a loss of independence. You have to allow yourself the possibility of getting reversed. So some independence even from the higher court, it seems to me, is important.

There's an interesting question at our level that Judge Reinhardt and I debate all the time. Judge Reinhardt, as you may know, is at the very liberal end of our court. He and I both agree that as an intermediate court judge, you have to follow Supreme Court precedent as long as it is directly on point. But what if you don't have something that's *directly* on point? What is your responsibility as an intermediate appellate judge?

There are two different views. Remember that we're living in an area of retreating liberality, where people like Judge Reinhardt—he's sort of a mastodon, a disappearing breed—will soon be extinct. The federal courts and the Supreme Court are getting more and more conservative in many ways. So many of the liberal precedents of the sixties and seventies and early eighties are being cut back—not in every way, not in every area—but by and large. So, if you're dealing in an area where the Court has no precedent right on point, you have two choices. You can say, look, what I'm going to look at is what I think the Court today would do, and in deciding what the Court today will do, I have to take into account that this is a time of receding liberalism. If they have a liberal precedent out there, they're not going to take it another step farther in the liberal direction. They're probably going to cut back, and we should recognize the makeup of the Supreme Court and try to guess how they would rule on the issue today. That's my view.

Judge Reinhardt is of a different view. He is of the view that independence means that so far as you are bound by an opinion of a superior court you must follow it, but as soon as you are cut

loose from precedent, your job is to then determine what the law should be as best you understand it, and not worry about what the higher court would do if it reached the question. I think both are legitimate views of precedent and judicial independence.

There's another interesting question touching on the politics between an inferior court and a superior court and the question of independence. What issues should a court like ours reach out to decide and thereby bump up to the Supreme Court for a decision?

There is a very famous case involving Sergeant Perry Watkins, who was removed from the armed forces about ten years ago for being gay.[4] There was an opinion of two judges from our circuit, Judge Norris and Judge Canby, reinstating Sergeant Watkins. Judge Reinhardt, the most liberal judge, dissented. Judge Reinhardt said that although he disagreed with *Bowers v. Hardwick*,[5] the opinion required us to uphold the removal.

What Judge Reinhardt suggested in his opinion, and what he said even more loudly in person—he's said it in public so I'm not breaching any confidences—is that he didn't think this was a good time to bring the question of overruling *Bowers v. Hardwick* before the Supreme Court. He thought that the issue should percolate in the lower courts further, and at that point he didn't know whether perhaps there would be a Democratic president after Mr. Reagan ended his eight-year term. His hope was that by the time the issue came up again, the composition of the Supreme Court would have changed. Was Judge Reinhardt justified to think in these terms? I think so. An inferior federal judge can exercise independence by exercising discretion on which issues to bring up to the Supreme Court and when. State courts can do this as well; they can avoid certiorari by relying on independent state grounds.

Now, let me now touch on the question of judicial independence from the political branches. Not in the appointment process or in the removal process, but rather in how the political branches influence courts as they operate. I will start off with an example of a case I had when I was at the United States Claims Court. It was a case involving the corporation Sperry Rand. Sperry had a claim in the Iranian claims tribunal, which was a

4. Watkins v. United States Army, 837 F.2d 1428 (9th Cir. 1988).
5. 478 U.S. 186 (1986).

tribunal set up after the hostage crisis in 1980. Iran put billions of dollars into a fund, and the tribunal adjudicated the claims of American individuals and companies against Iran, usually commercial claims. If you won a claim against Iran in the claims tribunal, the money would be paid over to the Fed in New York—not directly to the claimant—and the Fed would deduct a three percent fee for services rendered before passing along the money.

Sperry came to the claims court arguing that the fee was illegal, that it was unauthorized. Specifically, they argued that it was not authorized by the IOAA, the Independent Offices Appropriations Act.[6] Now, I'm sure each of you is thoroughly familiar with the statute, and I don't need to recite it, but the IOAA sets standards for when fees may be imposed by federal agencies. I heard oral argument in the case, and I thought it was pretty close. I issued an oral ruling after argument, saying that I've read the IOAA and I didn't think it authorized this three percent fee. Of course, the issue wasn't just important to Sperry; Sperry was making a $50,000 claim, but there were hundreds of millions of dollars at stake. So I said, "This is an important decision. I know that the Court of Appeals would want me to write an opinion explaining my reasons, and I will have a written opinion to you shortly."

And I went back to my chambers and busily started drafting an opinion. But two weeks later, I got a letter from counsel saying Congress has just passed a statute overruling my decision. What happened is that the agency lawyers got a report of my oral ruling, they took it up the Hill, and Congress simply passed a law that authorized the fees specifically. I had to stop and think about that one. Was this an improper interference of the political branches with a decision of the judiciary? But I decided no, it was not, even though it was specifically directed at my ruling. What had happened is that Congress had accepted my ruling, that the existing law did not authorize the fee, so they proposed a new law to accomplish the same end. At the same time they left to me and the rest of the federal courts all sorts of other questions like whether the new statute applied retroactively to the claimants in the Sperry case and the others that were already before the court. And Congress left other questions untouched, such as whether the fee was a taking under

6. Pub. L. No. 89-555, 80 Stat. 663.

the Fifth Amendment. It seems to me that this was an example of a very direct intervention by the political branches on a judicial decision, but it was, ultimately, appropriate.

If you frame the question this way—in terms of direct and indirect intervention on evolving issues of law—borderline examples abound. How about legislation which divests the courts of jurisdiction? Statutes like IIRIRA[7] or AEDPA?[8] This is also an area where interference by the political branches does not unduly interfere with judicial independence because, as we've seen by the Supreme Court in RFRA,[9] there are reserved powers under the Constitution itself.[10] The courts have the last word on what the Constitution says, as well as the nuances of application, retroactivity[11] and interpretation,[12] and Congress gets the rest. So, although the Congress did divest jurisdiction with IIRIRA and AEDPA, it ultimately leaves some things up to the court and, of course, it can't remove powers reserved by the Constitution.

For example, take the cases of *Texas v. Johnson*[13] and *United States v. Eichman*,[14] where Congress actually passed a statute to change a substantive result. Remember, *Texas v. Johnson* was the flag-burning case, ruled unconstitutional five to four. Congress went back and passed a statute authorizing laws which prohibit the burning of flags. In other words, Congress told the Court that it disagreed with the Court's reading of the First Amendment. Then in *Eichman*, the Court comes back and looks at it and says, "We don't care," and the Court has the last word.

That is a pretty good sign that such statutes don't unduly interfere with judicial independence. Although Congress tries to exercise its power to affect how statutes are read, ultimately it bows to the courts on the question of how far it can go constitutionally.

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7. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

8. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

9. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

10. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

11. *See* Lindh v. Murphy, 117 S. Ct. 2059 (1997).

12. *See, e.g.*, Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997).

13. 491 U.S. 397 (1989).

14. 496 U.S. 310 (1990).

More difficult for me are questions where Congress or the President tries to take actions that affect the functioning of the courts directly, perhaps in retaliation for rulings made by the courts. Take the effort to split the Ninth Circuit. Some of those efforts are driven quite explicitly by senators who view the big Ninth Circuit, dominated by liberal California judges, as endangering the interests of the Northwest.[15] That is a closer question, and I may not agree with the wisdom of splitting the Circuit, but ultimately I think the issue of the jurisdiction of the federal courts and how they are organized is so committed constitutionally to the political branches that it's difficult to say that exercise of this power, for whatever reason, improperly interferes with judicial independence.

The last thing I want to discuss, perhaps the most troubling in terms of interfering with judicial independence, is the *Bayless* case, the one involving Judge Baer.[16] That was a case where no action was taken by the political branches, no actual movement to impeach Baer. But threats were made, or at least expressions of unhappiness, by members of the political branches of the government—including the President, who appointed Judge Baer. And although the threatened impeachment or the coercion to resign didn't really have any teeth, it was most unfortunate. And the reason it was unfortunate is not, I think, that Judge Baer bowed to political pressure. I don't think that for a minute. I've read the opinions, and I can't imagine that Judge Baer changed his mind because of the comments. His latter opinion is well-reasoned, and it was based on new evidence the government offered. What worries me is that the comments made by members of the political branches might have made it difficult for Judge Baer to change his mind without looking like he was caving in. Essentially, it put him in a position that whatever he did—stay put, rehear the case, change his mind outright or recuse himself—he might be accused of yielding to political pressure.

When the political branches get involved in a specific case that's pending before the judge, or when the political branches start going after a judge or making threats in a way that affects

15. *See* Carol M. Ostrom, *Fuming Senators Ready to Carve Up the 9th Circuit*, SEATTLE TIMES, Nov. 2, 1997, at A1.

16. *Compare* 913 F. Supp. 232 (S.D.N.Y. 1996) *with* 921 F. Supp. 211 (S.D.N.Y. 1996).

ongoing cases, that interference oversteps the line of judicial independence. The political branches may well be right to stand that line and criticize judges. But they should not do so while cases or issues are still pending before the judge. If they do so, and the criticism cuts so deeply, as it may have done in the *Bayless* case, the best response is for the judge to step back from the case and recuse himself. He should do so not because he is going to be influenced by political threats,—I think few judges are, and I don't think Judge Baer was—but because the public perception is going to be that the latter decision—whether to stick to his original decision or to change his mind—will have been the result of political pressure.

Thank you.