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PROGRAM IV: JUDICIAL ETHICS AND THE RULE OF LAW -- ANTHONY M. KENNEDY*

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SUMMARY:

... These conventional standards for assessing the wisdom of a court decree are quite irrelevant, however, if the court which issues the judgment is not recognized as an institution governed by a strict ethical code. ... When the public turns its attention to the judiciary, will its view be one of condemnation and cynicism? Or will it be one of admiration? My esteemed colleague Justice Breyer and other distinguished members of this conference spoke yesterday about judicial independence. ... For there can be no judicial independence if the judiciary, both in fact and in the public perception, fails to conform to rigorous ethical standards. ... Furthermore, all too often the appearance becomes the reality. ... The tales of personal hostility that emerge are inaccurate because the law clerks have not yet practiced long enough to know the difference between a professional disagreement and a personal one. ... Judges must know and remember that we have a language, a logic, a structure, a tradition, a principled discourse, and a link to ancient teachings that transcends the political process. ... In the federal system, we have structures both for the enforcement of ethical rules and for the advice and consideration of ethical questions. ... Finally, this process embodies a vital principle: Enforcement of judicial ethics should remain within the judiciary itself, lest judicial independence be threatened. ... If we honor our professional ethic, others will admire the law that we enforce. ...

TEXT: [*1067]

The power of a court, the prestige of a court, the primacy of a court stand or fall by one measure and one measure alone: the respect accorded its judgments. How does a court earn respect for its judgments and continued respect from year to year and from generation to generation? That question refers us to the full scope of the law, the study of a lifetime. Respect for a judgment depends upon its coherence, its logic, its intellectual force, its fairness, its common sense, its roots in ancient principles of law and justice, and its continued vitality in a world of change. These conventional standards for assessing the wisdom of a court decree are quite irrelevant, however, if the court which issues the judgment is not recognized as an institution governed by a strict ethical code. A court's judgments will be given no serious consideration, no examination at all, if the public is not confident that its judges remain committed to neutral and principled rules for the conduct of their office.

We live in a time in which the public seeks to become better informed about governmental institutions. When the public turns its attention to the judiciary, will its view be one of condemnation and cynicism? Or will it be one of admiration? My esteemed colleague Justice Breyer and other distinguished members of this conference spoke yesterday about judicial independence. Today's session concerns judicial ethics. The two subjects are intertwined. For there can be no judicial independence if the judiciary, both in fact and in the public perception,

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fails to conform to rigorous ethical standards. Judicial independence can be destroyed by attacks from without, but just as surely it can be undermined from within. There is no quicker way to undermine the courts than for judges to violate ethical precepts that bind judicial officers in all societies that aspire to the Rule of Law.

Three important principles must be observed if a judiciary is to establish and maintain high standards of judicial ethics, consistent with preserving its independence. First, judges must honor, always, a personal commitment to adhere to high standards of ethical conduct in the performance of their official duties and in their personal and social relations; second, the judiciary itself must adopt and announce specific, written codes of conduct to guide judges in [*1068] the performance of their duties; and third, there should be adequate mechanisms and procedures for the judiciary itself to receive and investigate allegations of misconduct and to take action where warranted, so that the public has full assurance that its interest in an ethical judiciary is enforced and secured. In the federal judiciary, we have been successful, for the most part, in adhering to these precepts.

It is a delicate task to address lawyers or judges on the subject of ethics. We might prefer to follow our own consciences without help from outside interference such as statutory requirements. But it is our duty to define, to explore, and to state in clear terms just what our ethics are and ought to be. I will not undertake today to offer a comprehensive code of ethics for judges. Attached to these pages is an example of one of these codes, the Code of Conduct for United States Judges.

I believe it was Learned Hand, a judge of our United States Court of Appeals from 1924 until 1961, and one of the common law's greatest judges, who once said, "Here I am an old man in a long nightgown making muffled noises at people who are no worse than I am." Hand's view may be too self-deprecating for us to embrace in full, but he does convey the essential point that judges are, if nothing else, fallible. A specific, accepted code of conduct acknowledges this reality.

In order to maintain judicial independence, ethics ought to be enforced by judges with a minimum of political intervention. It does not follow from this premise, however, that each judge is free to define his or her own ethical standards. If that were the case, we would exempt ourselves from the principle we enforce against others: that definite, specific standards of moral and ethical behavior are essential in human undertakings. The ethical responsibilities of judges ought to be announced with clarity and precision.

Some codes of conduct for judges tend to sound grandiloquent or pompous. Critics might say that they do no more than state vague platitudes. There must be a beginning point, however. If general statements do not suffice to give necessary guidance, more specific rules will be demanded. That, in fact, happened to United States judges when we did not follow specific rules respecting conflicts of interest. Considering our earlier standards were vague, Congress rushed in with restrictive and burdensome rules on conflict of interest, rules that now have become permanent features of the judicial code of conduct.

My discussion touches today upon three areas of concern with respect to judicial ethics. First,

rules guiding judges in all their relations with attorneys and parties in litigation; second, rules governing judges in their relations to other judges; and third, rules governing the judge's activities in society. [*1069]

I. Introduction

The essential rule of judicial relations concerning lawyers and litigants is this: a judge must be fair and impartial. All sides to a controversy must be given a full and fair hearing. As a consequence, a judge may not meet with an attorney or a party without the opposing attorney or parties present. The very nature of fair and open justice precludes either the fact or the appearance of a system in which essential communications occur without all sides present. We undermine respect for the judiciary if we allow it to be charged with adopting secret understandings or private agreements. Of course, emergencies arise when a judge must be contacted by one party, there being no time or opportunity to notify opposing counsel. And there are some instances in which law enforcement and prosecuting authorities must meet in private with the judge, for instance in the application for search warrants. Furthermore, there may be occasions when certain administrative details, such as scheduling hearings or the routine filing of papers, requires communication between the judge and one party. These instances must be kept to a minimum, however; the meetings must be a matter of record; notice must be given the other party of what transpired and the opposing party must be given opportunity to respond.

Of course, judges cannot be isolated. At Washington social affairs, we may see attorneys who have matters before us. We greet them and enjoy their company, but there is a very clear understanding that cases must never be discussed. We are careful to ensure that other persons are present while we visit together, so that only appropriate conversations take place and so there is no suspicion otherwise.

Another specific rule designed to ensure impartiality is that a judge, and his or her family, must have no financial interest in the proceedings. Because Congress believed that judges had not gone far enough, or at least had not been specific enough about the rules, it enacted a restrictive statute to control our conduct. n1 In the federal system, a judge is disqualified from sitting on a case where the judge, his or her spouse or minor child owns even a single share of stock in a corporation involved in the litigation. n2 And, unlike members of the Executive or Legislative Branch, judges may not have so-called blind trusts (trusts holding assets consisting of companies and investments unknown to the judge).

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n1. 28 U.S.C. 455(b) (1994).

n2. 28 U.S.C. 455(b)(4), (d)(4) (1994).

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A congressional requirement designed to enforce disqualification rules is the law that requires all

United States judges and other high level officials to make annual public disclosure of their assets, holdings, and outside income and [*1070] those of their spouse. It is embarrassing for some judges to disclose how much they have and for others to disclose how little they have; the disclosure rules can be so onerous and objectionable as to discourage well-qualified and successful attorneys from seeking federal judicial positions. Yet it is imperative that we maintain the appearance as well as the reality of impartiality. So, I see no likelihood that our conflict of interest or disclosure rules will be made less onerous.

At this point it is well to note that, just as appearances count in most human affairs, so too in judicial ethics. The public must have confidence that its judges are committed to impartiality, and for that reason the appearance, as well as the fact, of judicial neutrality must be maintained. Confidence in the entire system is eroded when the public sees a judge violating simple rules, for instance by communicating with only one party or by hearing a case where there is a conflict of interest. Furthermore, all too often the appearance becomes the reality. If we do not maintain the appearance of neutrality, small deviations become the accepted norm, and as a consequence undermine the integrity of the judiciary.

Most judges believe they are incorruptible and that no harm can come from a brief private discussion or by hearing a case where a judge has a remote financial interest, because the judge has sufficient discipline to keep an open mind. But that is beside the point. Judges need rules just as do the citizens whose cases we hear. In the Federalist Papers, written to urge ratification of the Constitution, James Madison said, "If men were angels, no government would be necessary." n3

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n3. The Federalist, No. 51, at 322 (James Madison) (Clinton Rossiter, ed., 1961).

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A further responsibility of the judge consists in the duty to conduct himself or herself with the utmost civility, courtesy, and respect to all attorneys and all parties. If it is to endure, the law must teach; and the law's teaching begins with the proposition that a society built upon the rule of law is a society that insists upon decency, decorum, and respect for its fellow members. Judges must follow this essential rule in their own conduct. Strict rules of civility and deportment must prevail in all judicial proceedings. Judges must behave with discipline, moderation, and restraint.

Sometimes it is necessary to reprimand an attorney, and of course a judge must not tolerate incivility, disrespect, or shoddy practice in his or her courtroom. But if an attorney is to be reprimanded, it must be in a restrained and professional way, lest the court itself become subject to censure or derision. Attorneys, of course, can try our patience, but patience is one of the attributes that justifies our holding judicial authority. Judicial reprimands must be confined to rare instances; and when they are necessary, they must be cast [*1071] in terms that preserve the dignity of the court, making all due allowance for those frailties that are latent in us all.

II. Judicial Relations with Colleagues

From time to time, writings about my own Court circulate in the press and the book trade. We are sometimes portrayed as being hostile and unfriendly to one another. This is myth. The myth arises because reporters and writers often get their information from the young clerks who have just left us. Those clerks have an oath of confidentiality, but in a few instances they have ignored or misunderstood it. The tales of personal hostility that emerge are inaccurate because the law clerks have not yet practiced long enough to know the difference between a professional disagreement and a personal one. On our Court, and I venture to say on yours, most of our differences are of the professional kind. We do well, however, to remind ourselves of the distinction. Of course, we disagree about cases and legal issues. We are supposed to do that. We would violate our professional oath were we not to express our own views and conclusions. We are sworn to disagree with our colleagues when our own conscience and our own understanding of the law leads us to conclude that our colleagues are mistaken. From these very disagreements the law will emerge. It is destructive, though, for the public, or for the judiciary itself, to forget the distinction between personal and professional disagreements.

As in many questions of ethics, it is easier to state the ideal than to live the reality. It can be difficult to accept the fact that a colleague with whom we disagree has approached the case with the same open mind that we did. Nonetheless, it is the ethical duty of every judge to examine and to re-examine his or her own first premises, and we must presume that our colleagues adhere to the same principle. Biases and prejudices are dangerous for the very reason that they are disguised and subtle. It is the duty of a judge to read, to inquire, to teach, to learn, so that his or her own mind remains open to an honest plea from all sides in a dispute, including from his or her own colleagues.

To avoid personal disagreements and those petty animosities which might lead to more permanent hostility, courts have certain rules, customs, and traditions. In the federal courts, one custom followed in order to eliminate small disputes is the rule of seniority, by which judges with longer tenure take precedence in discussion and in various other ways, such as in the assignment of the responsibility to write the court's opinions. Perhaps seniority is not the ideal rule, but it does diminish the force of politics, ideology, and ad hoc alliances within the judicial hierarchy. And in practice, the judges in the federal system are solicitous of the views of colleagues with less tenure, allowing them full opportunity to exercise the authority to which their commission entitles them. This custom is but one example. I find it is useful [*1072] to cling to every custom and rule of judicial etiquette as a means of maintaining the collegiality requisite to a great court.

The collegiality of the judiciary can be destroyed if we adopt the habits and mannerisms of modern, fractious discourse. Neither in public nor in private must we show disrespect for our fellow judges. Whatever our failings, we embody the law and its authority. Disrespect for the person leads to disrespect for the cause.

III. Judicial Relations with Society

Much of what we have discussed with reference to demeanor and civility also applies to our communications and interchange with the public at large. The life of a judge can be difficult.

Neutrality requires detachment, and detachment is often not compatible with social discourse and community participation. In the United States, a very exciting and rewarding part of social life revolves around the support and participation in charitable enterprises and endeavors. One of the splendid, distinguishing marks of American society is its commitment to charitable and eleemosynary endeavors, including the support of hospitals, universities, and societies for noble causes of every sort. Much of this activity, however, requires the raising of monies. Federal judges who participate in these activities, however, violate the Code of Conduct for federal judges. The rule is based on the premise that judges must not be in the position of asking members of the community to support a cause by pledging monies, no matter how worthy that cause is. This puts judges at a significant disadvantage in many of society's most rewarding endeavors. Our withdrawal from these activities is sometimes misunderstood and misinterpreted. But that cannot be helped.

There are other aspects of the judge's ethical duties with reference to public communication, but I shall mention just two. One concerns outside employment. Congress has placed limits on the types of outside employment that judges and other officials may undertake. Even though there is a long tradition of judges serving as law faculty - to the benefit of both the judges and students - Congress has placed an upper limit on the amount of income federal judges may earn from teaching courses, and prohibited them from taking any money for speaking honorarium, as opposed to a teaching salary.

A second aspect that has been the subject of some recent debate is the question of whether it is proper for a judge to take his or her grievance with the judicial system, usually a grievance originating from the decision of a higher court, to the press. That is, is it proper for a judge who disagrees with a decision to run to the press to lament the outcome?

In my view, the answer to this question is no. The judge who appeals his case to the press is, first of all, unfair, for he or she knows that judges of different ethical sensibilities are restrained from responding. And in a larger [*1073] sense, a judge who runs to the press with his or her grievances is announcing, in effect, that the judicial system is incapable of analyzing the cases it hears in a calm, dispassionate, rational and neutral way. Few charges could be more calculated to cast disrespect upon the judiciary and its members.

As we have discussed, there will be disagreements among us, which is as it should be. The more fundamental point, however, is that the very essence of judicial power, the very essence of respect for judicial judgments, is that by our language and by our traditions, we have the power to go over the head of the press to the people. The rule of law is based on the proposition that reason, fairness, and neutrality in decision-making will lead to a rational exposition of the truth. Judges must know and remember that we have a language, a logic, a structure, a tradition, a principled discourse, and a link to ancient teachings that transcends the political process. Our institutions and our exposition of the law is within a different framework than the discussion of issues in the popular press or even in the political branches of the government. That is not to say that we are superior to the political process or to public opinion, for in many respects we must be subordinate to their deliberations if a democratic society is to prevail. But our processes and our discoveries are different and distinct from other institutions, and are valuable for that reason. Individual

judges from time to time will be frustrated by the system. But in a fair and open judicial system such as ours, judges must confine their disagreements to the judicial forum, with its own superb vocabulary and traditions.

IV. Elaboration of Judicial Ethics in the Federal System

In the federal system, we have structures both for the enforcement of ethical rules and for the advice and consideration of ethical questions.

I referred earlier to the Code of Conduct for federal judges. The United States Judicial Conference adopted this Code in 1973 and has amended it several times since then. The Code is based on a model code promulgated by the American Bar Association. Forty-seven of the fifty states, and the District of Columbia, have adopted codes based on the American Bar Association model. The three other states have adopted their own rules of judicial ethics.

There are a few things you need to know about the Code. First its canons are advisory. Judges are expected to comply with them, but there is no sanction if they do not. Of course, to the extent the Code's philosophy is reflected in specific statutes, such as disqualification for ownership of stock, the judge is obligated to comply by law.

Although compliance with the Code is not mandatory, almost all federal judges are most diligent in conforming their conduct to its provisions. Our judges want to follow high ethical standards, and they regard the Code as an appropriate and essential guide. [*1074]

An important additional development with respect to the Code is the existence of procedures by which judges can ask for interpretive opinions as they confront specific problems. The Code's canons are general and, by their terms, do not reach many of the specific ethical decisions with which a judge might be faced. For this reason - and to keep the Code up to date - the Judicial Conference has created a Committee on the Codes of Conduct. The Committee offers confidential advice to judges about interpreting the various canons. At least twenty-two states have also established some means by which judges can seek guidance as to the application of the Code that applies to judges of that state's courts. Suppose, for instance, a judge has done substantial work in a case when he discovers for the first time that a relative owns stock in a corporation which is a party. What choices does the judge have? Suppose the son or daughter of a judge is employed in a prosecutor's office. May the judge hear cases from that office so long as the son or daughter is not the counsel of record? When these and myriad other questions arise, we find it most useful to have a source to consult for guidance. The correspondence between the Committee and the requesting judge is kept confidential, though from time to time the Committee publishes its opinions, using a general frame of reference that does not identify the judge who asked the question. The procedure provides guidance both to individual judges and to the federal judiciary as a whole.

V. Dealing with Charges of Judicial Unfitness

In the American judiciary, both federal and state, there are systems for taking some action in those

rare circumstances in which a judge so misbehaves that some response is necessary. In the United States, considering both the federal and state court systems, there are three broad types of mechanisms. First, the federal Constitution provides that the president, vice-president "and all civil Officers of the United States" - this includes judges - "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." n4 Most states have similar provisions. We are proud to say that in the more than 200 years of federal judicial history, only eight judges have been removed from office after impeachment.

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n4. U.S. Const. art. II, 4.

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Second, election of judges is still common in our state court systems, and in those rare instances that a sitting judge is challenged in an election, an alleged ethical infraction might be the basis for the challenge.

Third, the federal and all of the state governments have established commissions or panels to receive citizen complaints of judicial unfitness. All [*1075] but one of the state commissions include a combination of judges, attorneys, and non-lawyer, citizen members. The commissions' sanctions range from private admonitions to removal from office. These state commissions have become so omnipresent that one of the leading court reform organizations in the country, the American Judicature Society, has established a Center for Judicial Conduct Organizations, which publishes a Judicial Conduct Reporter.

The federal system does not have a judicial conduct organization similar to those in the states. Rather, there is in each of our twelve regional circuits, a statutory Judicial Council with an equal number of appellate and district judges, chaired by the chief judge of the court of appeals of the circuit. The Council has responsibility to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." n5 In 1980, Congress provided that

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n5. 28 U.S.C. 332(d)(1) (1994).

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any person alleging that a circuit, district or bankruptcy judge, or magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint.... n6

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n6. 28 U.S.C. 372(c)(1) (1994).

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The statute provides a broad ground for complaints. They need not be based on a specific statute, and are rarely based on specific provisions of the Code of Conduct.

The statute establishes procedures by which the chief judge may dismiss the complaint as frivolous or provide for its reference to the Judicial Council, which in turn may dismiss the complaint. Procedures are provided to protect the object of the complaint, who is to receive a copy of the complaint and any findings in writing.

The experience in the United States yields four lessons. First, at least on the federal level, the procedure does not appear to have posed a threat to judicial independence. A Federal Judicial Center investigation examined the 2,405 complaints brought under the statute between 1980 and 1991. It found that the great majority of complaints were dismissed because they involved the merits of a judge's decision. The researchers also subjected a sample of the complaints to a more thorough analysis. That analysis uncovered, in the words of their report, "no matter that can be considered to have directly interfered with or seriously threatened independent judicial decision-making," although it found "two instances ... that appeared to implicate judicial independence" - both involving corrective action requested by chief circuit judges for comments judges made during hearings to determine criminal sentences to impose on defendants. [*1076]

Second, even though most complaints are dismissed, the very fact that there are public bodies to which citizens can submit complaints provides a measure of public confidence in the federal judiciary and the administration of justice.

Third, these bodies do confront occasional cases of judicial misconduct. The sanctions available in the federal system range from requesting corrective action, to certifying a judge's disability, to suspending temporarily the judge's caseload, to public censure. In extreme cases, the councils can recommend to the United States Judicial Conference that the Conference advise the House of Representatives that there may be grounds for impeachment.

Finally, this process embodies a vital principle: Enforcement of judicial ethics should remain within the judiciary itself, lest judicial independence be threatened.

VI. Conclusion

The ethical principles that shape and inform the judicial mission demand our scrupulous adherence. Judges and lawyers use the language of the law with an ease and familiarity that lead us to forget, from time to time, that it is a language with its source in ethical principles. Day-to-day immersion in the details of the law must not cause us to become indifferent to its underlying meaning. We must be conscious always of the truth that the law consists of words and

concepts that have an intrinsic ethical content, an objective moral force. Our duty to the law in this respect requires us to conform to specific and objective rules of ethical conduct in the performance of our duties.

Maintaining cordiality and collegiality with lawyers and with our fellow judges can be a trying task. We judges, however, are bound to each other in a splendid fellowship. Our guild is small, elite, committed to a noble cause and united together by experience in facing common difficulties and concerns. The ties, the bonds, the kinship among judges worldwide are palpable, tangible, real and essential to preserving the rule of law. If we honor our professional ethic, others will admire the law that we enforce. [*1077]

Appendix A

Code of Conduct for United States Judges

Canon 1. A Judge Should Uphold the Integrity and Independence of the Judiciary

Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

Canon 3. A Judge Should Perform the Duties of the Office Impartially and Diligently

Canon 4. A Judge May Engage in Extra-Judicial Activities To Improve the Law, the Legal System, and the Administration of Justice

Canon 5. A Judge Should Regulate Extra-Judicial Activities To Minimize the Risk of Conflict with Judicial Duties

Canon 6. A Judge Should Regularly File Reports of Compensation Received for Law-Related and Extra-Judicial Activities

Canon 7. A Judge Should Refrain from Political Activity