

**Overview of the Contemporary Challenges of the Independence of
Judges and Lawyers**

The Hon. Allyson K. Duncan

February 11, 2019, 6:30-9:00 p.m.

New York Bar Association

United Nations Basic Principles: Panel Discussion Points

February 2019

1. Independence of the Judiciary	
Principle #	Theme
<p>UNBP 1</p> <p><i>Providing that all “governmental . . . institutions [must] respect and observe the independence of the judiciary”</i></p>	<p>[1.1] Funding the judiciary: government shutdown</p> <ul style="list-style-type: none"> • Congress, with its power of the purse, has the power to fund as well as defund the government. While our system of checks and balances is critical in allowing for judicial independence, in this context, impasses in Congress can affect the judiciary significantly. • In particular, the United States faces the dilemma of whether constitutional protections for <i>judges</i> are adequate to protect the functioning of the <i>judiciary</i>. This issue was particularly salient in the recent shutdown of the U.S. government. <ul style="list-style-type: none"> ○ The constitutional guarantee of compensation for judges does not sufficiently protect the functioning of the judiciary as a whole during a government shutdown. Although federal judges are constitutionally guaranteed pay, the judiciary relies on staff who are <i>not</i> guaranteed pay; e.g., jurors, the clerk’s office, staff attorneys in OSC, bailiffs. ○ The mere <i>planning</i> for the potential shutdown impacts day-to-day operations. For example: <ul style="list-style-type: none"> ▪ Judges must address motions to continue by the government; ▪ The court must determine which members of the court system are “essential employees;” ▪ Supplies are limited – in an effort to conserve supplies, which cannot be replenished, judges and staff must consider whether to, e.g., print out briefs ▪ IT is affected – limited access to systems support impacts both day-to-day operations (e.g., accessing the network or phone systems) and internal and external court communications and filings. ▪ Representation is disrupted – court-appointed attorneys are not paid, which particularly disrupts representation of indigent defendants.

<p>UNBP 3</p> <p><i>Providing that the judiciary “shall have jurisdiction over all issues of a judicial nature”</i></p>	<p>[3.1] Jurisdiction stripping</p> <ul style="list-style-type: none"> • Congress has acted to limit judicial discretion in certain areas. What role do or should judges have in determining what issues are of a “judicial nature” over which they can exercise jurisdiction? For example: • Immigration: the REAL ID Act of 2005¹ amended the Immigration and Nationality Act (“INA” of 2005) to severely limit judicial review over proceedings for the removal of immigrants. <i>See</i> INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B). • Sentencing: the Federal Sentencing Guidelines, which were first promulgated following the Sentencing Reform Act of 1984, have removed much of judges’ discretion in sentencing decisions.
<p>2. Freedom of expression and association</p>	
<p>Principle #</p>	<p>Theme</p>
<p>UNBP 8</p> <p><i>Providing that “members of the judiciary are . . . entitled to freedom of expression, belief, association and assembly”</i></p>	<p>[8.1] What is the role of judges or the judiciary generally to respond to criticism?</p> <ul style="list-style-type: none"> • Case study: President Trump recently called a federal judge an “Obama judge,” stating that “they have a much different point of view than the people who are charged with the safety or our country.” In response, Chief Justice Roberts released a statement to establish the independence of the judiciary asserting that judges are independent.² • Can judges speak out without affecting their appearance of impartiality?

¹REAL ID Act, P.L. 109-13, 119 Stat. 231 (May 11, 2005).

²In his statement, Chief Justice Roberts stated: “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.”

	<p>[8.2] Association with institutions like the ABA and the Federalist Society</p> <ul style="list-style-type: none"> • While members of the judiciary are entitled to freedom of association, how does involvement with organizations such as the ABA³ or the Federalist Society--which play significant roles in the appointments process and who may be associated with particular political or ideological leanings--impact judicial independence and the public perception thereof?
	<p>[8.3] Recusals and elected judges (cross-listed at p.6, 14.1)</p> <ul style="list-style-type: none"> • To maintain a neutral judiciary and avoid the veneer of partiality, judges should recuse themselves. However, because such recusals are often self-driven, it may lead to a public perception of a biased judiciary, particularly in the context of state elected judges. Recent examples include: <ul style="list-style-type: none"> ○ In West Virginia, a coal titan was accused of “buying” a W.V. Supreme Court justice. <i>Caperton v. A.T. Massey Coal Co.</i>, 556 U.S. 868 (2009). In this case, the CEO of Massey Energy, the fourth-largest coal mining company in the nation, spent \$3 million on advertisements that ultimately helped elect Justice Brent D. Benjamin to the West Virginia Supreme Court. After winning the election, Justice Benjamin declined to recuse himself in a case against Massey, and joined the 3-2 majority that threw out a \$50 million jury verdict against the company. The Supreme Court held that his failure to recuse himself violated the Due Process clause of the Fourteenth Amendment.

³The ABA’s Standing Committee on the Federal Judiciary has conducted independent peer evaluations of the professional qualifications of nominees to the federal bench since 1953. At the request of the president, the Standing Committee may conduct evaluations on *prospective* nominees to lower federal courts. The Standing Committee is composed of fifteen members (two members from the Ninth Circuit, one member from each of the other federal circuits, and the Chair of the Committee), who are appointed by the President of the ABA for staggered three-year terms. See American Bar Association, *Standing Committee on the Federal Judiciary: What It is and How It Works*, <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.pdf>.

3. Qualifications, selection, and training																																																			
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<p>UNBP 10</p> <p><i>“Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination . . . on the grounds of . . . political or other opinion.”</i></p>	<p>[10.1] The appointment process.</p> <ul style="list-style-type: none"> • The nomination and confirmation of judges has become increasingly controversial in recent years. This is particularly true of appointments to the Supreme Court. • The politicization of the Supreme Court nominations, however, has not always tracked nomination to the circuits. <table border="1" style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th style="text-align: center;">Justice</th> <th style="text-align: center;">Year</th> <th style="text-align: center;">SCOTUS vote</th> <th style="text-align: center;">Year</th> <th style="text-align: center;">Circuit vote</th> </tr> </thead> <tbody> <tr> <td>Clarence Thomas</td> <td>1991</td> <td>52-48</td> <td>1990</td> <td>(D.C. Cir.)</td> </tr> <tr> <td>Ruth B. Ginsburg</td> <td>1993</td> <td>96-3</td> <td>1980</td> <td>(D.C. Cir.)</td> </tr> <tr> <td>Stephen Breyer</td> <td>1994</td> <td>87-9</td> <td>1980</td> <td>80-10 (1st Cir.)</td> </tr> <tr> <td>John Roberts</td> <td>2005</td> <td>78-22</td> <td>2003</td> <td>Unanimous (D.C. Cir.)</td> </tr> <tr> <td>Samuel Alito</td> <td>2006</td> <td>58-42</td> <td>1990</td> <td>Unanimous (3d Cir.)</td> </tr> <tr> <td>Sonia Sotomayor</td> <td>2009</td> <td>68-31</td> <td>1998</td> <td>67-29 (2d Cir.)</td> </tr> <tr> <td>Elena Kagan</td> <td>2010</td> <td>63-37</td> <td>N/A</td> <td>N/A</td> </tr> <tr> <td>Neil Gorsuch</td> <td>2017</td> <td>54-45</td> <td>2006</td> <td>Unanimous (10th Cir. 2006)</td> </tr> <tr> <td>Brett Kavanaugh</td> <td>2018</td> <td>50-48</td> <td>2006</td> <td>57-36 (D.C. Cir.)</td> </tr> </tbody> </table> <ul style="list-style-type: none"> • Democratic accountability? The system of presidential appointments for federal judges--and elections for some state judges--reflect the notion that the judiciary should have some democratic accountability. Some key questions include: <ul style="list-style-type: none"> ○ What are the contours and limits of that accountability? What obligations does the judiciary itself have to safeguard the professional and technical nature of its work? What obligations does it have to understand prevailing social attitudes and mores? 	Justice	Year	SCOTUS vote	Year	Circuit vote	Clarence Thomas	1991	52-48	1990	(D.C. Cir.)	Ruth B. Ginsburg	1993	96-3	1980	(D.C. Cir.)	Stephen Breyer	1994	87-9	1980	80-10 (1st Cir.)	John Roberts	2005	78-22	2003	Unanimous (D.C. Cir.)	Samuel Alito	2006	58-42	1990	Unanimous (3d Cir.)	Sonia Sotomayor	2009	68-31	1998	67-29 (2d Cir.)	Elena Kagan	2010	63-37	N/A	N/A	Neil Gorsuch	2017	54-45	2006	Unanimous (10th Cir. 2006)	Brett Kavanaugh	2018	50-48	2006	57-36 (D.C. Cir.)
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	<p>[10.2] Public misperceptions: Relationship between the judiciary and other branches of government</p> <ul style="list-style-type: none"> • Perceived bias: Judges may be perceived as carrying the political leanings of their appointing party. Comments from government officials, both in official statements and on social media, play a role this perception that the judiciary is not insulated or independent from partisanship. Examples include: <ul style="list-style-type: none"> ○ A Canadian senator publicly challenged a decision by the Superior Court authorizing the disclosure of the identity of a source by a journalist. Other Canadian politicians criticized the acquittal of two individuals accused of the murder of Indigenous people, where the jury was all white and predominately white. • The relationship between the judiciary and the democratically-elected branches of government has deteriorated as well--a deterioration likely exacerbated by the pervasiveness of social media. • Yet, the tension has always existed to some degree given that nature of the judiciary as a counter-majoritarian force. • Does the goal of judicial independence create a need for judges to be involved in civics education?
4. Conditions of service and tenure	
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<p>UNBP 11</p> <p><i>Providing that judges shall receive “adequate remuneration . . . secured by law.”</i></p>	<p>[11.1] Payment of federal judges</p> <ul style="list-style-type: none"> • The <i>Barker</i> litigation: <i>Barker v. United States</i>, No. 12-826 (Fed. Cl. Filed Nov. 30, 2012) (2013) <ul style="list-style-type: none"> ○ In <i>Beer v. United States</i>, 696 F.3d 1174 (Fed. Cir. 2012), the Federal Circuit held that denying certain cost-of-living adjustments to judges was an unconstitutional deprivation of judicial compensation. This holding was applied to all Article III judges in <i>Barker v. United States</i>. Following these decisions, Congress updated federal judges’ salaries to include the missed adjustments. ○ Although federal judges are constitutionally entitled to receive cost-of-living adjustments, other employees of the judiciary (or “general schedule” employees), including law clerks, are not.

	<p>This year, for example, President Trump set the January 2019 adjustment for GS base rates at zero, pursuant to his authority under 5 U.S.C. 5303(b). This provision authorizes the president to provide for alternative adjustments in GS base rates due to a “national emergency or serious economic conditions affecting the general welfare.” 5 U.S.C. 5303(b).⁴</p>
<p>UNBP 14</p> <p><i>Providing that the assignment of cases to judges “is an internal matter of judicial administration”</i></p>	<p>[14.1] Recusals (<i>see</i> p.3, 8.3)</p>
<p>5. Discipline, suspension and removal</p>	
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<p>UNBP 18</p> <p><i>Providing that “Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties”</i></p>	<p>[18.1] Workplace issues</p> <ul style="list-style-type: none"> • While for-cause removal is critical to judicial independence, events like the Me Too Movement raise questions about the removal process and judicial conduct. • While all federal judges must comply with the Code of Conduct for Federal Judges, the Code does not apply to justices of the Supreme Court.

⁴<https://www.fedsmith.com/2018/10/18/opm-assumes-no-pay-raise-2019>.