DORF ON LAW

LAW, POLITICS, ECONOMICS, AND MORE FROM MICHAEL DORF, NEIL BUCHANAN, SHERRY COLB, DIANE KLEIN, ERIC SEGALL, AND (OCCASIONALLY) OTHERS

TUESDAY, MARCH 06, 2018

When Shouid Liberals Try to Remove Judges From the Bench?

by Neil H. Buchanan

Judges inevitably make some decisions that outrage people. The timeless question is when a decision crosses a line into territory that rightly calls for a judge's removal from the bench. Calls for judges to be deposed have more typically been heard among conservatives in the U.S., but the question comes up regularly among liberals as well.

Even in states where judges are elected, those judges are in various ways protected from the prevailing political winds through a number of counter-majoritarian measures (nonpartisan elections, appointment followed by retention elections, and so on). Non-elected judges are even more politically independent, especially at the federal level, where the standards for impeachment were quite deliberately set at a high level.

In the abstract, therefore, everyone accepts the idea that judges cannot simply be politicians in robes. Three recent incidents, however, provide potentially useful insights in addressing the question of when (not if, because there seems to be no serious argument that a judge should never be removed for misconduct on the bench) a judge must go.

The most recent story involves a state judge in Oklahoma who approved a settlement of a case in which a 13-year-old girl had been raped. After pleading guilty to first-degree rape, forcible sodomy and rape by instrumentation, the defendant received no jail time. According to *The Washington Post*:

> "More than 102,000 people have called for [the presiding judge's] removal from the bench in an online petition. Calls for Coppedge's removal escalated further after an Oklahoma lawmaker filed a resolution in the House seeking to remove Coppedge, though it has yet to be voted on."

It is not clear what will happen next, but for now we can at least say that people are understandably incensed about the apparent leniency of the sentence ("15 years probation, two years with an ankle monitor and a lifetime on the sex offender

registry"). If one is at all inclined to view substantive decisions as a reason to fire a judge, this could be Exhibit A.

As *The Post*'s article notes, that Oklahoma case naturally brings to mind another recent case, where a California judge sentenced a man convicted of three counts of sexual assault to six months in jail and three years of probation, based on what appear to be some rather questionable notions of "not wanting to ruin the young man's life," or something like that. In response to that decision, the judge has been besieged by calls to step down, and he is the subject of a recall effort to force him off the bench.

The leader of that effort is Stanford law professor Michele Dauber, who has now received multiple rape threats from enraged male supremacists. Included with one of those mailed threats was some white powder, resulting in parts of the law school's building being evacuated. Dauber has announced that she is undeterred.

Dauber's determination to remove this judge from the bench, however, is not shared by everyone on the political left. No less a superstar than Berkeley law dean Erwin Chemerinsky has weighed in against the recall effort, writing in an op-ed that this is a very bad idea that could "backfire." What is the proper remedy?

> "If there is disagreement with a judge's decision, the appropriate remedy is to appeal the ruling, not to seek removal of the judge. Such recall efforts are a serious threat to judicial independence as judges will fear that unpopular rulings will cost them their jobs. Justice, and all of us, will suffer when judges base their decisions on what will satisfy the voters."

The natural response from the pro-recall side is that there has to be some limit to what the people can tolerate from judges. Not every bad decision is going to be reversed, simply because over-worked appellate judges sometimes miss the mark themselves. And even so, litigants on either side of a case might feel forced to accept unfavorable terms that would not be subject to appeal, simply because both sides develop their litigation and settlement strategies in the shadow of what is known about the presiding judge.

Having articulated that point, however, I am nonetheless not taking a position here on that particular recall effort. I am saying that this is a tough one, and Chemerinsky's warning is certainly important. People on the left should be especially worried about turning the courts -- and in particular the criminal courts -- into venues where public passions can sway judges. "Hanging judges" and overzealous prosecutors and law enforcers (recall the impunity with which oft-reelected Arizona sheriff Joe Arpaio acted for decades) can be seen as the modern equivalent of lynch mobs.

The point that Chemerinsky is making, of course, is the familiar slippery slope

Problem

► February (24)

► January (22)

► 2017 (325)

► 2016 (291)

► 2015 (288)

► 2014 (277)

► 2013 (284)

► 2012 (270)

► 2011 (263)

► 2010 (275)

► 2009 (326)

► 2008 (382)

► 2007 (488)

► 2006 (110)

WHO ARE THE MAIN BLOGGERS?

Neil H. Buchanan

Sherry F. Colb

Michael C. Dorf

Antonio M. Haynes

Robert Hockett

Anil Kalhan

Diane Klein

Lisa Tucker

Eric J. Segall

argument. *If we allow ourselves the indulgence of attacking this judge*, he admonishes us, *we will soon live to regret having opened that door to highly unappealing attacks on judicial independence*. And sure enough, we soon saw what would seem to be a prime example of what Chemerinsky was warning us about.

The Pennsylvania Supreme Court recently delighted opponents of gerrymandering by issuing a ruling that forced the Republican-dominated state legislature to redraw its congressional district map in a way that would more closely reflect the actual partisan balance in the state. Because the Republicans had so successfully "packed and cracked" liberal-leaning voters, they had essentially stolen four seats in Congress, attempting to give a purple state an all-but-permanent 13-5 advantage for Republicans in its congressional caucus. When the state's Republicans refused to redraw the map, the court did so for them.

Because the court's holding was based on the state constitution, the decision -- which could, to be clear, allow Democrats to pick up 4 out of the 24 seats that it needs nationwide to win back the House in 2018 -- is essentially final. (State court decisions are, of course, sometimes reversible by the U.S. Supreme Court, but this appears not to be such a case.) Happy outcome for liberals, right? Justice is done.

Of course not. Pennsylvania's Republicans, including those holding national office (such as the state's arch-conservative U.S. senator, Pat Toomey), are now talking about impeaching all of the offending judges on their state's supreme court. The arguments are notably specious, with one state legislator having written a letter "arguing that the court's majority 'engaged in misbehavior in office' because the ruling "overrides the express legislative and executive authority' to create laws," according to *The Post*.

That the court's ruling was applauded by outside experts, of course, means nothing to these Republicans. They are essentially saying that they stole those seats fair and square, and they want them back.

Meanwhile, Chemerinsky's warning rings in our ears. Another law school dean, Vikram Amar of the University of Illinois, wrote a nice piece on *Verdict* explaining what was happening in Pennsylvania and elsewhere, noting that majoritarian trampling of minority rights is essentially inevitable in our system, especially at the state level. In the end, Amar says, liberals need to do a better job of winning state-level elections.

Even though that is good advice, the question here is whether liberals need to worry about setting a dangerous precedent by attacking judges for bad decisions. The Oklahoma rape case seems to have a non-partisan cast, whereas the California rape

case has a liberal cast, and the response to the Pennsylvania gerrymandering case is partisan to its core. Do we liberals doom ourselves to Pennsylvania-like situations if we approve of Oklahoma-like situations that then lead us to approve of California-like situations?

One possible response, as I have discussed occasionally here on *Dorf on Law* (most recently, here), is that slopes simply are not especially slippery. When we turn the switch in our minds to "lawyer mode," we can convince ourselves that any supposedly unbounded principle can lead us immediately to ruin and regret; but the fact is that the political process has limits that typically prevent parades of horribles from going on the march.

Another response is that worries about such niceties amount to unilateral disarmament. When I was in law school, I took a course from the famed and brilliant feminist legal theorist Catharine MacKinnon. During one class meeting, a student (yes, it was me) asked her about the possibility of setting a bad precedent by using the legislative process in a way that conservatives could abuse when they inevitably regained power.

MacKinnon's response was essentially that conservatives were going to do what they wanted to do, no matter what liberals had once done. Restraint on liberals' part was hardly going to constrain conservatives who might find an opportunity to exploit a political or legal opening. I suspect that U.S. Supreme Court Justice Merrick Garland might nod knowingly at MacKinnon's prescience.

Even so, it might be possible to imagine that conservatives could justify themselves to skeptical centrists by saying, "Well, the Democrats do it, too." This, indeed, is how they have attempted to deflect criticism over their hyper-politicization of the Supreme Court, wrongly invoking the Robert Bork fight as proof that "liberals started it."

But that merely demonstrates that Republicans have no hesitation in attempting to rewrite history, claiming that what was a scrupulously fair process for Bork was the opposite. I suspect that MacKinnon not only would be unmoved; she would view this as proof of her point. Democrats acted with restraint, yet now we have Clarence Thomas and Neil Gorsuch on the Court.

Still, there is every reason to think that liberals who decry conservative attacks on Pennyslvania's supreme court will be told that "you do it, too, ya know." Attacking judges makes it difficult to argue that judges should not be attacked.

In a way, this is a cousin of an argument that Michael Dorf recently offered regarding the *Heller* decision, in which the Court's 5-4 conservative majority said

that the Second Amendment provides an individual right to own guns. Even though Justice Scalia's opinion made clear that the right could be limited in a variety of ways, that is not what people "heard" the court to say. Here, liberals can say all they want that they are only attacking judges in extreme situations, but people will only remember that liberals attacked judges

Even so, that might still lead to the conclusion that liberals should go ahead and attack judges when appropriate and then deal with the political consequences as they arise. As I noted above, even the most rigid defenders of judicial independence (including those who wrote the U.S. Constitution's protections for federal judges) do have their limits. Nothing is absolute.

In the end, therefore, liberals should admit that we cannot -- and should not -- pretend to believe in something that we do not believe in. If we are going to argue that conservatives are going too far or are being too partisan, we can do that by pointing to our greater restraint and less partisan departures from a pure independence ideal, not by maintaining the fiction that we never depart from that ideal. We might not win all of those arguments, but we will not lose all of them, either.

POSTED BY NEIL H. BUCHANAN AT 11:50 AM

28 COMMENTS:

Joe said...

Judges generally should be removed from the bench when they are found to have committed wrongdoing -- the impeachment approach, basically. There will be cases where that is warranted, including judges who misuse their office somehow.

But, opposition to judgments alone is problematic, especially one shot deals. For instance, the Brock Turner judge is subject to a recall effort.

https://www.mercurynews.com/2018/02/06/5045019/

"Recall opponents note that Persky's six-month sentence for Brock Turner was lawful and followed a probation department recommendation, noting that Turner must also register as a sex offender for the rest of his life under California law."

In fact, the recommendation report was written by a woman (fwiw, I guess, but the idea his decision was sexist or whatever looks a bit more hazy). I

saw a reference that allegedly this wasn't a one time deal, I don't know, but seems like the attention is on this one case. Recalling judges because they make wrong calls to me is dubious.

I sort of understand if people thought a case like Bush v. Gore warranted impeachment but mere ideological opposition (which some put out there) is not a great reason. We saw that when state judges were voted out of office in large part because their ruling in support of same sex marriage. Proposals to expand the Supreme Court (Eric Segall wants to reduce it!) and so on might be problematic too.

But, removal of judges for ideological reasons is generally not a good idea. It probably won't be pragmatically that useful either, at best successfully used to remove the random judge, which very well might be balanced by "our" judges losing out too.

12:08 PM

Shag from Brookline said...

Query: Within a court system, are there means for evaluating egregious decisions by judges calling for some sort of judicial reprimand? I'm not talking about appeals, rather I'm thinking of some sort of judicial code of responsibility within a court system, a procedure in which the powers that be within the court system become aware of a particular judge making egregious decisions evidencing a bias. Her in MA back in the late 1950s, 1960s, certain municipal judges had established judicial fiefdoms that attorneys became aware of and eventually the media.

Regarding a judge making what appears to some to be one bad decision, threats of impeachment may impact other judges in particular cases. Of course the 1st A is available to those who wish to let it be known that a particular judge made a bad decision.

4:27 PM

John Barron said...

In theory, there is. In practice, there may not be a bar for judicial conduct on the planet set lower than the one established by the Tenth Circuit. In the Washington Post, Professor Ronald Rotunda observes:

"[Judge] John Kane (who gave me permission to quote his e-mail), wrote, "I've been a district judge for 29 years and think the federal judicial house has brought this legislation on itself." He sat on the 10th Circuit Judicial Council when the first complaint about a judge came up for consideration:

A district judge was trying to coerce counsel into establishing a library on product liability cases in honor of the judge.

Judge Kane's e-mail is worth quoting at length. He voted for discipline. The vote was 3 to 3, "and so the Chief Judge voted against sustaining the complaint because it was the first such complaint and he thought a close vote was too slender a reed upon which to proceed. As we were leaving the meeting, one of the judges who had voted to dismiss collared me and said, **'John, think about it. The next time it could be you or me. We've got to stick together.'""**

Ronald D. Rotunda, "The Courts Need This Watchdog," Washington Post, Dec. 21, 2006 at A-29.

In Missouri Plan states, judicial discipline is a farce. By way of example, in Kansas, 679 complaints—including 28 alleging bribery or corruption!—were filed in a year, but reportedly, the state judicial qualifications commission did not act on a single one. http://www.johnsoncountykansas.net/JudicialDCommission.htm (visited May 7, 2004). Colorado's commission reveals an equally sterling record, not acting on a single complaint in two years. Colorado Commission on Judicial Discipline: 2002 Annual Report, Colo. Lawyer, June, 2003, Vol. 2, No. 6, p.27, available at http://www.cobar.org/tcl/tcl_articles.cfm?Article-ID=2763 (visited May 8, 2004). The California-based watchdog group, Jail 4 Judges, adds that over a ten-year period, only seven judges were removed from the bench as a result of 9,529 judicial abuse complaints in that state, despite the fact that at least three state judges were convicted of taking bribes and committing RICO violations during that period. Frank York, "'Jail 4 Judges' Targets Judicial Corruption," WorldNetDaily, Aug. 30, 1999, at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=17180 (visited May 8, 2004) (whereas WND isn't a reliable source of news, J4J is). [cont.]

8:20 PM

John Barron said...

[cont] And to be blunt, the feds almost make the Trump Administration seem honest. As Galveston Daily News editor Heber Taylor caustically writes, in 'connecting the dots' regarding disgraced United States District Judge Samuel B. Kent:

"*In 2001, there was grumbling about favoritism in Kent's court on Galveston Island. The Southern District removed 85 cases from the court.*

The attorney on all 85 was Richard Melancon, Kent's close friend and the host of the reception for the judge's wedding.

The judicial system looked into it and moved the cases. ***The judges in charge told the public the reason was a heavy caseload****. …*

Last week, after Kent was sentenced to prison for lying about the assaults, the House Judiciary Committee agreed to conduct an inquiry to determine whether he should be impeached.

That response is inadequate because it's incomplete. ***What's missing is an inquiry into the way the judicial system itself responded to complaints****. …*

*Before the judicial council took any significant action against Kent—action, say, that would have cost him a single paycheck—****The Daily News found that 671 complaints had been filed against judges in the 5th Circuit since 2000. Not one had resulted in formal discipline.***

We wonder whether members of Congress have faith in that system. We wonder how they could possibly ask us—the people who are served by this court—to trust it."

Heber Taylor, Judicial Discipline Needs a Full Probe, Galveston County Daily News (TX), May 15, 2009 (accessed via NewsBank; copy on file; emphasis added)

Let's put this in perspective. Eighty-five litigants. Eighty-five litigants, denied their constitutional right to have their cases heard by a fair and independent tribunal. Eighty-five separate acts of honest services mail fraud. E.g., United States v. Welch, 327 F.3d 1081 (10th Cir. 2003) (elements of honest services mail fraud). And one felony, committed by judges charged with ensuring that incidents like these do not happen.

Misprision of felony has four elements: (1) commission of the felony alleged; (2) the accused had full knowledge of that fact; (3) the accused failed to notify authorities; and (4) the accused took an affirmative step to conceal the crime. United States v. Baez, 732 F.2d 780 (10th Cir. 1984). But being a federal judge means never having to obey the law; that's how we got Edward Nottingham, Manuel Real, and Thomas Porteous, among others. "Heavy caseload?" No. **The judges on the Fifth Circuit obviously knew what they were doing, and that what they were doing was committing a felony.**

[cont.]

8:25 PM

John Barron said...

It is unsurprising that judicial scandals are under-investigated, as judges are highly motivated to squelch reports of corruption -- which can hit them where they live. In connection with the Tampa, Florida scandal, which has claimed at least four judges (and may also claim whistle-blowing judge Greg Holder), Christopher Goffard reports:

"The unease extends even to judges untainted by scandal. . . . Some think [Holder's] crusade has smeared every judge there. They blame him, as much as they blame Alvarez, for the jokes they still hear at cocktail parties, the arched eyebrow when they mention where they work. A judge? In Tampa? How interesting."

Most complaints about judicial corruption are relegated to the Internet, as state enforcement mechanisms are essentially non-existent, and 'self-enforcement schemes,' even worse. Judicial corruption is almost certainly under-reported, says Florida State University professor Bruce Benson, on account of the institutional need to persuade the general public that the system 'works' -- even when it doesn't. Bernard Cardinal Law can sympathize….

And then, there is the judicial rogues' gallery -- led by Judge David Lanier, who seemed to think it was his God-given right to force a litigant whose child custody case he had before him to perform oral sex on him. He is joined by paragons of virtue like Washington Supreme Court Justice Bobbe Bridge -- who, after apparently winning a chug-a-lug contest at a local watering-hole, plowed into another car and then tried to drive away; her blood-alcohol level was nearly three times the legal limit. Just try that one at home.

Day in and day out, Michigan's judicial blotter is the most consistently amusing. One alcoholic judge recently insisted that he hadn't been drinking when he managed to plow his SUV into a convenience store. Another got busted for lighting up a doobie at a Rolling Stones concert. Others include a judge who reportedly referred to himself as God, another caught fixing traffic tickets in exchange for sexual favors, and another suspended for lying to investigators about her love affair with an attorney now serving life in prison for murdering his wife. Still, my favorite was the married judge

who exposed himself in an airport men's room, apparently while soliciting anonymous gay sex (he 'got off' -- because district attorneys try hard not to prosecute judges).

And the hits just keep on coming. A complaint recently filed by the Oklahoma Attorney General claims that Judge Donald Thompson was observed by his court reporter masturbating with a "penis pump" on a number of occasions, while presiding over trials on the bench! As they used to say on the '60s TV show Laugh-In, "Here cum da judge!"

What's more, the judges' union can be especially brutal on anyone who might be tempted to curb abuses in the system. Judge McMillan's experience stands as a cautionary tale, as does the punitive action Colorado Supreme Court Chief Justice Mary Mullarkey took against former District Judge Jesse Manzanares for reporting his suspicions regarding a colleague's alleged cocaine abuse to authorities -- replacing the accuser with the accused as the chief judge of that circuit! Bottom line, while Mullarkey and our local Sopranos don't mind giving law licenses to convicted felon cocaine dealers who have the requisite political connections, the only Colorado judge who has been 'whacked' (quite obviously, in a figurative sense) in the past three years was a whistle-blower. And in so doing, Mullarkey has made Colorado's bench safe for cocaine abusers, as the evidence has this nasty habit of disappearing …and an unproven accusation, even made in good faith, is now a professional death sentence.

[old material, but nothing has changed]

8:35 PM

John Barron said...

My point in all this is that when judges go off the reservation in a decision, it is usually attributable to some form of favoritism or corruption. It seems to go hand-in-hand with judicial peccadilloes--based on his EIGA forms and his sudden departure, CJ Edward Nottingham of the District of Colorado was taking bribes so that he could afford to patronize high-class hookers on a weekly basis. Judge Kane's anonymous judge was in the obvious market for a quid pro quo, and Judge Kent was just doing favors for his pallie.

The problem, of course, is that this kind of corruption is hard to spot, as explained by the LA Times in its Juice v. Justice series. But Judge Kozinski of the Ninth Circuit gives us an excellent barometer--egregious and inexplicable error constitutes judicial misconduct:

"Judicial action taken without any arguable legal basis … is far worse than simple error or abuse of discretion; it's an abuse of judicial power that is "prejudicial to the effective and expeditious administration of the business of the courts." See 28 U.S.C. § 351 (a); Shaman, Lubet & Alfini, supra. § 2.02, at 37 ("Serious legal error is more likely to amount to misconduct than a minor mistake. The sort of evaluation that measures the seriousness of legal error is admittedly somewhat subjective, but the courts seem to agree that legal error is egregious when judges deny individuals their basic or fundamental procedural rights."); In re Quirk, 705 So. 2d 172, 178 (La. 1997) ("A single instance of serious, egregious legal error, particularly one involving the denial to individuals of their basic or fundamental rights, may amount to judicial misconduct." (citing Jeffrey M. Shaman, Judicial Ethics. 2 Geo. J. Legal Ethics 1, 9 (1988))).

In re Complaint of Judicial Misconduct, 425 F.3d 1179, 1185 (9th Cir. 2005) (Kozinski, J., dissenting).

8:49 PM

robert moss said...

If the sentences clearly went beyond what the law allows, the delivering judge should be impeached. Otherwise, the law should be changed. Those on the left worry about the adverse effects of mandatory minimums, but as far as I can tell, those effects occur because lawmakers are lazy and incompetent. Laws prescribing penalties are too broadly drawn---definitions of offenses cover too much. Should be easy to fix.

Gerrymandering is more difficult. The US Supreme Court should have found it to be an equal protection violation from the first case. Objectively, the right-wing Injustices are wrong. How can (Scalia?) say there is no principled standard for determining that a district is irrationally drawn, other than for the illegitimate purpose of increasing a party's representation beyond what it would get with proportional representation? It's a simple formula: compare the ratio of a district's actual perimeter to its area, with the ratio if the district were a circle.

What to do in gerrymandering cases, and kindred abominations such as Bush v. Gore? We must rise up and unceasingly demand the resignation of these Injustices, always ready to demonstrate objectively that they violated their oaths of office. The problem is, this only would have a chance of working if right-wing lawyers, who applaud these violations, joined in the chorus of condemnation. Not gonna happen. Thus, our Constitutional

system will soon collapse under the weight of incessant criticism of judges from the right, and their attendant removal. Our only solace will be that the right will be at fault.

1:18 AM

Walt Tuvell said...

Thanks be to John Barron for his fine analysis. Especially a propos is his cite to Kozinski's famous dissent (which remains wonderfully relevant/valid, regardless of any other aspect of the Kozinski saga).

But, let us please bear in mind too, that while the judges themselves certainly shoulder the brunt of the self-preservation onus, the ENTIRE REST OF THE LEGAL PROFESSION meekly acquiesces in the judge-protection practice/racket too. Without a whimper. Or, at most, timid internal whining, but no external action.

I submit my own case-in-point, CURRENTLY in-process, and documented in full on my website (below). As it proves beyond quibble, the judges in my case (District, Appellate, Judicial Council) have "taken judicial action without any legal basis" (quoting Kozinski), over and over and over again. Beginning with the Smoking Gun (on my website, cited below).

I have contacted hundreds (literally) of lawyers, judges, law professors, legal journalists/bloggers, etc. -- the "whole legal profession." I have sought from them, NOT any kind of legal or financial help, but rather merely a hope they'd commit to some level of "Brandeis sunlight," or even a simple attaboy pat on the head for encouragement.

Nothing. Zero. Zip. Zilch. Nicht. None. Nein. Nada.

If the Legal Profession refuses to speak up in a case as clear-cut/slam-dunk as mine, what hope is there that it will ever speak up about anything of true import for Justice?

If all the women were lawyers, #MeToo would never have happened. If all the students were lawters, #NeverAgain would never have happened.

"Everything seems impossible, until it is done" (Nelson Mandela, attrib.).

--- Walter Tuvell (PhD, MIT & U.Chicago, Math & CompSci -- hence, "not-a-crank")
--- http://JudicialMisconduct.US (esp.,

.../CaseStudies/WETvIBM#smokinggun and environs)
*** Contact me, publicly or privately (walt.tuvell@gmail.com). "Ask Me Anything." ***

7:33 AM

John Barron said...

Dr. Tuvell, fellow MIT grad Kay Sieverding (M.S., iirc) feels your pain. Google her tale. Pro se litigants are the dirty ni66ers of America's legal system, but you will never hear anyone in the academy talk about it.

The late Judge Roger Miner of CA-2 reminds us that "one of the most important societal duties of lawyers is the duty to criticize the courts. It is my premise that informed criticism of the courts and their decisions is not merely a right, but also an ethical obligation imposed on every member of the bar." Roger J. Miner, Criticizing the Courts: A Lawyer's Duty, 29^4 Colo. Lawyer (Apr. 2000). But in the real world, practitioners are literally too scared to speak out against judges, because they know that "bastards have brothers." Here's an amusing account from DKos:

"*Prominent Republican lawyer and maven of morality Dan Caplis hosts a local radio show on one of our extremely right-wing Clear Channel outlets, and as was to be expected, he went ballistic on Eliot Spitzer Monday. But when a caller confronted him regarding Judge "Naughty," his spine collapsed in record time:*

'First and foremost, I'm a trial lawyer, and my obligation is to my clients. And that's why there are going to be times when a judge -- a local judge -- deserves criticism and I won't offer it on-air, because I don't want to compromise my clients' interests.'

His radio partner, former district attorney and Democrat Craig Silverman, agreed:

'[B]ut we're also attorneys, and we don't know when a case bars, or one of our partners is going to be in front of Judge Nottingham, so if you perceive a little hesitancy on my part, that it accurate. ... For me personally, it is sort of dicey for me to be talking about Judge Nottingham -- it's a delicate situation for Denver lawyers.'

What their remarks say about our local courts -- and our bar in particular -- is positively damning. Local attorneys refuse to criticize local judges publicly because ***they know that local judges only follow the law when it***

takes them exactly where they want to go. *And thus by implication, the Constitution and Bill of Rights are completely null and void in Colorado because our judges, like Captain Barbossa in Pirates of the Caribbean, see "the [United States] Code" as more like 'guidelines.'"*

Conservative columnist Max Boot calls it "gavelitis." The entire courtroom procedure -- from the "respectfully submitted" documents to the elevated bench -- is designed to foster an illusion of infallibility. Furthermore, it is constantly fed by that legion of craven invertebrated called lawyers who, as a species, have abandoned principled advocacy in favor of shameful servitude. And when you treat someone as though he is omniscient for long enough, he might begin to believe his own press clippings. Professor Carl Bogus wryly observes:

Some people are more vulnerable to a lack of criticism than others, and among the most vulnerable are judges. ... Saying that lawyers treat the judges with deference failes to capture the interaction; it is more accurate to say that lawyers bow and scrape. Some lawyers have elevated fawning to an art form, pulling it off with subtle elegance. But few tell a judge she is wrong. [Carl T. Bogus, "Culture of Quiescence," 9 Roger Williams U.L. Rev. 351, 352 (2004).]

It is a culture of arrogance and privilege--where judges are tempted to see themselves as gods. The trials and tribulations of the common man are simply not their concern.

But what has always puzzled me is the remarkable silence of the academy. Judges like Posner, Kozinski, and Wald are often brutally candid, but lawprofs are insulated from retaliation, and should be able to speak freely.

9:42 AM

Shag from Brookline said...

While I may have opened the door for what followed my comment, the comments that followed were interesting. Back here in MA, Gov. Mike Dukakis was instrumental in putting in place processes for improving MA's judicial system particularly in the manner of appointment of judges/justices. But no process is perfect. We are a government of laws, not of men, but it is men (and women now) who do the judging. So there will be weaknesses in the judicial system. John relates a lot of pent up grievances and there may very well be many more similar events. It takes only a few bad apples in the judiciary to taint those judges who do their jobs properly. And Walt makes the telling point of the part the legal profession may play in all this. We

lawyers are officers of the court, it is said, but we are mere men and women and we might find it difficult blowing the whistle. I've got my own stories from my experiences during my years of practice, but feel compelled not to disclose them because of client confidentiality. But the subject raised by these comments should be addressed, maybe in a special blog setting. The ideal of the independent judiciary is vital to our democracy.

10:03 AM

Shag from Brookline said...

My 10:03 AM comment was in process and posted before I became aware of John's 9:42 AM comment, which picks up on Walt's point about the legal profession. As to John's point on the legal academy, it's not clear to me that it has the opportunity to focus on such issues as do practicing attorneys. I wonder if law schools today address the judiciary problems discussed here. This was not discussed back in the early 1950s when I was in law school. I thought the judicial process was basically pure.

10:16 AM

Joe said...

"I thought the judicial process was basically pure."

When they took the oath, did judges back then get dipped into the Jordan River?

10:50 AM

Shag from Brookline said...

Early in my practice here in MA I was in Suffolk Probate Court in an uncontested divorce session. I was down on the list and watched other mostly young attorneys "try" their cases. Judge Wilson was getting angry as the attorneys were not readily presenting the necessary elements for a divorce, berating the attorneys for not being prepared, a responsibility they had, and that he had as a Judge, pointing out that a Judge is merely an attorney who knew a Governor. When my turn came, I presented all the necessary elements through witnesses and Judge Wilson complimented me on doing so. I responded that I was following what he had laid out in a Boston Bar Journal article a few years earlier on how to try an uncontested divorce case. I kept in mind Judge Wilson's statement about who is a judge throughout my career. At the federal level substitute a president for a governor. Now how such an attorney gets to know a governor or a president, I won't go into that. But compare this with some states that elect judges. Politics can enter into either way judges are selected.

By the way, the nearby Charles River here in the Boston area had long been in need of purification. And as the first President Bush pointed out in the 1988 campaign Gov. Dukakis' Boston Harbor was not in great shape either. Which reminds me of Tenean Beach in the Dorchester section and the property interests of a local municipal court judge. Tides do not always wash away the ills of man.

11:25 AM

Walt Tuvell said...

John: Thanks again for your thoughts. You've got great knowledge/insight about this stuff (I bow down to you). I will certainly read up on Kay Sieverding. But if the reason you cited her is her pro se status, please be aware that I was NOT pro se (at least when my case started). In fact, I spent >$340,000 in legal fees before my case was deep-six'd by insane judges.

Did I say "insane?" Well yes: the judges (all of them) "ruled/decided" that, at Summary Judgment, there is NO REASON FOR THE COURT TO CONSIDER THE PLAINTIFF/NONMOVANT'S VERSION OF THE FACTS. They're quite explicit/baldfaced about it (spend 5 minutes with the Smoking Gun on my website).

I said I wasn't pro se "when my case started." I only became pro se when my lawyers refused to confront (i.e., state in on-the-record) the courts/judges with the fact that their "rulings/decisions" were contrary to all known law/rule/precedent. They were nutless, that is, they "feared to speak truth to authority." No doubt, to save their own skin/ass. So I became pro se only out of necessity. Nevertheless, I stand by everything I've written about my case, from a strictly-rigorously-legal point-of-view, or any other. (Anyone wanting to debate that point, contact me privately if you wish.)

Let me emphasize: When I speak of the "whole legal profession", I'm speaking of the "Legal Establishment as currently instantiated (in modern-day America)," not "the classic/ancient concept of law/justice," nor "the architecture/design of American law, by the Founders." Too, I emphasize: It's not every-single-individual lawyer I speak about, but rather the profession-as-a-whole-as-it's-evolved. No doubt there are many lawyers who entered into the law starry-eyed, only to learn the dirty truth later after was too late. (It seems there may be some "good ones" lurking nearby.) As Shag says: "IN LAW SCHOOL, he thought the judicial process was basically pure." Yep, me too, when I started my case.

Shag also floats the idea of a blogsite devoted to this kind of discussion. I have a website, but I haven't implemented a blog feature yet. Any interest? Just a half-dozen participants is more-than-enough to get it off the ground.

Shag's observation about the legal academicians is also keenly felt by me, since I've contacted many dozens of them, to no avail. Even some of the biggest names in the business, who you'd think would chomp at this bit (e.g., Sperino & Thomas, authors of the recent terrific book, "Unequal"). If we could get these folks to spill their guts on a blogsite, say anonymously, that could be a real catalyst.

--- Walter Tuvell (PhD, MIT & U.Chicago, Math & CompSci -- hence, "not-a-crank")
--- http://JudicialMisconduct.US (esp., .../CaseStudies/WETvIBM#smokinggun and environs)
*** Contact me, publicly or privately (walt.tuvell@gmail.com). "Ask Me Anything." ***

11:46 AM

John Barron said...

I took a quick look at Walt's case, and have kind-of seen this rodeo before. And yes, it involves one of my favorite rogue judges.

A magistrate reportedly advised a plaintiff as follows:

The biggest problem with your case is that Judge Nottingham hates employment cases and there's nothing you can do about it. It's random. Now don't get me wrong, he's a fine judge, but he just hates employment cases. That's why he will try to find any way in the summary judgment briefs to say there's no material issues and grant summary judgment, and if he doesn't, he will make it tough at trial, and you won't win ... I'm going to look you right in the eye and tell you that you're gonna lose.

Pl.'s Mot. For Recusal of Judge Nottingham Pursuant to 28 U.S.C. §144 and §455(a) and (b)(1) [Dkt. #59], Phillips v. Pepsi Bottling Group, No. 05-cv-01322-EWN-KLM (filed Nov. 1, 2007) at 2.

Judge Nottingham's comments in dismissing that motion shock the conscience:

Even accepting Plaintiff's affidavit as true and further assuming the magistrate's statements to be accurate, my "judicial leaning" is an

improper basis upon which to premise a recusal motion.

Additionally, the sufficiency of Plaintiff's section 144 affidavit is undermined by the fact that ***it is based entirely on hearsay*** *and conclusory opinion. Where, as here, the hearsay statements fail to demonstrate personal bias and, moreover, are tenuously corroborated only by Plaintiff's own conclusory assertion that I "had [sic] personal bias or prejudice" against him, an affidavit is patently insufficient. Moreover,* ***the context in which the magistrate's comments were made further impugns their reliability: they were made in an attempt to persuade Plaintiff to accept a settlement offer****.*

Order and Memorandum of Decision, Phillips v. Pepsi Bottling Group, No. 05-cv-01322-EWN-KLM (filed Nov. 13, 2007), slip op. at 9-10 (emphasis added).

First and foremost, Judge Nottingham concedes that Magistrate Mix had made those remarks in a settlement conference, while acting as his direct and immediate subordinate. As it was made in her representative capacity, it is emphatically not inadmissible hearsay. Fed. R. Evid. 801(d)(2)(D). And to compound insult to injury, **the Court is asserting that it is permissible for judges to lie in settlement conferences and even blackmail parties into accepting an inadequate or unjust settlement offer.**

[cont]

12:14 PM

John Barron said...

[cont] And there's more. By way of example:

"*It might appear that Judge Nottingham's womanizing from the bench goes all the way back to his first years as a federal judge:*

Early this afternoon, I tracked down one Colorado attorney, who has some interesting recollections of our jurist sensation, Edward Nottingham. Joe Losavio–now retired in Lenno on beautiful Lake Como in Italy–is currently visiting the States and consented to be cited for this story.

Losavio recalls that, on a Friday, April 26, 1991, the last day of a trial in Settle v. Centel Electric, a stately tall blonde entered the courtroom gallery. Nottingham immediately took notice, stopped the proceedings, scribbled something on a Post-itTM note, handed the note to the bailiff with

instructions to give it to Centel's attorney, Bill Mattoon. The note inquired as to who was the blonde. When Mattoon informed him that it was Losavio's wife, the disappointed judge resumed the proceedings, Losavio said.

In that same case, Losavio recalled that Nottingham refused to cause the clerk record the jury's $172,465 verdict, which should have been a purely ministerial act. Losavio repeatedly followed-up with the clerk in an effort to get the judgment entered. Losavio's client, Don Settle, eventually filed a judicial misconduct complaint. Nottingham issued a written response in which, Losavio recalls, he accosted Losavio for his persistence.

I also spoke with Losavio's client, Don Settle. Settle, who also witnessed the passing of the note, says that he lost approximately fifty-thousand dollars as a result of Nottingham's refusal to enter the jury's judgment. Settle says Nottingham justified his usurpation of the jury's verdict because "he didn't like the precedent" that might be established for at-will employee discharge cases and, as a result, the jury's verdict was never honored."

Sean L. Harrington, New Details About Judge Nottingham Emerge from Interview with Retired Attorney, KnowYourCourts.com, Mar. 22, 2008.

"[John Holcomb, professor of legal studies at the University of Denver] said Nottingham tends to be toughest on employment-law plaintiffs who must clear a high bar of proof before the case can go forward."

Felisa Cardona, Nottingham Is Being Viewed from Both Sides, Denver Post, Apr. 1, 2008.

The thread that ties these three incidents together, apart from the pattern of obvious judicial misconduct Judge Nottingham has engaged in throughout his career, is that they all involve incidents of discrimination against employment law plaintiffs, and the knowledge by all who should know that he indulges in it. This pattern, of course, is seen on a much larger scale with respect to the animus judges of the District have displayed against pro se litigants. See generally, Sean L. Harrington, Disparate Treatment of Pro Se Litigants: A Justification for Resort to Inappropriate Self Help?, Knowyourcourts.com, copy on file).

Nothing in the Constitution nor the oath of office authorizes a federal judge to disobey the law whenever it suits his or her purpose. Even Judge Nottingham agrees. Al Lewis, Nacchio: A Man For All Seasons, Denver Post, Jul. 27, 2007 (transcript of Chief Judge Nottingham's lecture on morality to former Qwest CEO Joseph Nacchio at sentencing). Yet, he has

made a career out of imposing the whim of his gavel upon the unfortunate citizens of Colorado, with his colleagues' knowledge and sub rosa support.

12:30 PM

John Barron said...

Walt, show me a pro se litigant, and I'll show you a man who ran out of money.

This is the way our legal system works. If the judge likes you or your case, you will win. In the Stanford swimmer rape case, it just so happens that Judge Aaron Persky was a Phi Beta Kappa from ... wait for it ...

STANFORD!

What happened to you is pervasive, Walt. While judges are invested with de facto fact-finding discretion [cf., Suja Thomas's work on summary judgment], “finding the facts you need to get rid of a case to streamline your docket” is profoundly unethical and presumably, outside the scope of that discretion. Senior Judge Mark "Terminator" Bennett of the Northern District of Iowa admitted that he had indulged in it at the outset of his career [iirc, they were all employment law cases], confessing that it "is something I am not proud of." Mark W. Bennett, Essay: From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective, 57 N.Y.L. Sch. Rev. 685, 688 & n. 11 (2012-13). Retired Judge Nancy Gertner, complaining about the shoddy treatment employment law cases receive in federal courts, asserts that judges are quite literally trained on “how you get rid of [pro se civil rights] cases.” Nancy Gertner (blog reply), Civil jury trials, summary judgment, employment cases and the Northern District of Georgia study–preliminary observations, Hercules and the Umpire (blog of Senior Judge Kopf of the District of Nebraska), Oct. 22, 2013.

And they all use the same boilerplate.

While our nation’s courts work diligently to preserve the illusion that the system functions as designed in higher-profile cases involving wealthy litigants, e.g., Marshall v. Marshall, 547 U.S. 293 (2006) (re: Anna Nicole Smith) and corporate titans, e.g., United States v. Nacchio, 519 F.3d 1140 (10th Cir. 2008) (former Qwest chairman), those of lesser means are subjected to a form of judicial triage which, at times, can even be life-threatening. Just as the name “Tyrone” made you well-qualified for

janitorial positions only, the phrase “pro se” invariably seals your fate in Judge Blackburn’s court. Pro se cases are always shunted to the magistrate, who then hands his opinion to Judge Blackburn, who summarily affirms the decision, apparently without even looking at the pleadings, in a boiler-plate opinion bearing no objective evidence that he has reviewed the matter at all. E.g., Shell v. Devries, No. 06-cv-00318-REB-BNB (D.Colo. Jan. 30, 2007); Signer v. Pimkova, No. 05-cv-02039-REB-MJW (D.Colo. Nov. 30, 2006); Baldauf v. Garoutte, No. 03-RB-01104 (D.Colo. Jul. 20, 2006). His decisions are bereft of factual findings, containing this stock paragraph:

As required by 28 U.S.C. § 636(b), I have reviewed de novo all portions of the recommendation to which objections have been filed, and have considered carefully the recommendation, objections, and applicable caselaw. In addition, because plaintiff is proceeding pro se, I have construed his pleadings more liberally and held them to a less stringent standard than formal pleadings drafted by lawyers. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). The recommendation is detailed and well-reasoned. Plaintiff's objections are imponderous and without merit. Therefore, I find and conclude that the arguments advanced, authorities cited, and findings of fact, conclusions of law, and recommendation proposed by the magistrate judge should be approved and adopted.

Order Overruling Obj. To and Adopting Recommendations, Hale v. Ashcroft, No. 06-cv-00541-REB-KLM, 2008.DCO.004359, ¶ 9 (D.Colo. Sept. 24, 2008) (Versuslaw) (same boilerplate used in all cases cited). [cont]

1:35 PM

John Barron said...

[cont] The words “pro se” were the kiss of death in Blackburn’s court—even if you were a graduate of Yale and Georgetown School of Law with over forty years’ experience at bar who presented a completely novel argument never raised in any American court. Cogswell’s argument cuts at the heart of representative government, alleging that the Senate’s delay in filling judicial vacancies in the District of Colorado denied him reasonable access to the courts, arguing that Congress further acknowledged that an adequate number of judges are required to ensure

"reasonably prompt consideration of all cases filed," to "efficiently and expeditiously handle the business brought before them," to promote "just, speedy, and inexpensive resolution of civil disputes" and to resolve "intolerable strains" on the bulwark of a limited constitution, namely the federal judiciary. The reasons offered to justify increasing the number of

judgeships do, by Congress' own words and admission, become the reasons why meaningful access to the judiciary is denied when the appointed judges do not equal the number of judgeships found to be necessary.

Pl's. Obj. to Proposed Findings and Recommendations of Magistrate [Dkt #25] at 4, Cogswell v. United States Senate, No. 08-cv-01929-REB-MEH (D.Colo. Mar. 2, 2009).

When Cogswell filed his lawsuit, there were three full-time federal district judges to service a population of approximately five million people.

Put this in perspective. You have a veteran lawyer from a first-tier law school, raising a novel issue that speaks to the very notion of rights under law. For if the government can slam the doors of the courthouse at will, we no longer have rights, as we have no remedy at law. And that lawsuit was without merit?

1:39 PM

John Barron said...

With that foundation laid to the point of overkill--that isn't a tithe of what I can document, but anything more is cumulative--Dean Chemerinsky's concern can be addressed:

NHB: "What is the proper remedy?

"If there is disagreement with a judge's decision, the appropriate remedy is to appeal the ruling, not to seek removal of the judge. Such recall efforts are a serious threat to judicial independence as judges will fear that unpopular rulings will cost them their jobs. Justice, and all of us, will suffer when judges base their decisions on what will satisfy the voters." [Chemerinsky]

The natural response from the pro-recall side is that there has to be some limit to what the people can tolerate from judges. Not every bad decision is going to be reversed, simply because over-worked appellate judges sometimes miss the mark themselves. And even so, litigants on either side of a case might feel forced to accept unfavorable terms that would not be subject to appeal, simply because both sides develop their litigation and settlement strategies in the shadow of what is known about the presiding judge."

Problem is, we have a man in the audience who was fucked out of $350,000 and his day in court because a Harvard elitist was too damn lazy to do her

job. While Dean Chemerinsky can afford to be magnanimous when the other guy's ox is being gored, you know what he would say if he were asked to reimburse Walt for his injuries out of his own pocket.

How DO you ask Walt to "take one for the team"?

Judicial independence is a little like a good Merlot: A couple of glasses is good for the heart, but chugging three bottles will get you into trouble.

Justice Kagan called it the “Problem of Platonic Guardians.” RW columnist Max Boot called it “gavelitis.” The notion that America wants a King—that America needs a King—and that “I should be your King.” Justice O’Connor commits this “original sin” of judicial hubris:

"*The importance of the judicial branch to citizens of every country, and the crucial need for an independent judiciary free from political and private pressure, was eloquently expressed by John Marshall long ago: “The Judicial Department comes home in its effects to every man’s fireside. It passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that [the judge] should be rendered perfectly and completely independent, with nothing to influence him but God and his conscience?”*

Sandra Day O’Connor, The Majesty of the Law: Reflections of a Supreme Court Justice 248 (2d ed. 2004).

My answer to America's first Affirmative Action judge--an intellectual lightweight of mortifying proportion--is no.

Change the word “judge” to “Adolf Hitler,” “Saddam Hussein,” or “King George III,” and you should see the problem. While a dictatorship may be nice if you are the dictator, it’s not that great if you are one of his thralls. We want judges who are independent of the government, but not judges who are above the law.

The most obvious solution is to sue the judges as agents, and the government as their principal. Dean C agrees that the judge-made law of sovereign immunity has no grounding in either COTUS or common sense. The next is to remove the offending judge from the bench pursuant to the Good Behavior Clause (which I have already written about in some depth); when a bad judge costs the government money, they will be motivated to fix the problem. The third is private criminal prosecution.

Yes, you are leaving the decision in the hands of the people. But can their decision be that much worse than that of our arrogant and out-of-control judiciary?

2:27 PM

John Barron said...

With all due respect, Professor Buchanan, there ain't no such critter as an "overworked" federal judge. Many judges moonlight as lawprofs; Michael McConnell taught at three law schools--including Harvard!--while on CA-10. They're always giving speeches, accepting saccharine awards given by the slavering sycophants we call "lawyers," and judging moot courts that one almost wonders how they find time for their day jobs--until they 'fess up to what they do on their day jobs.

Judge Kozinski openly admitted that the panels in his circuit may issue 150 rulings per three-day session, Alex Kozinski, Letter (to Judge Samuel A. Alito, Jr), Jan. 16, 2004, p. 5 -- that's less than ten minutes per decision! But even they are total slackers compared to the late Judge Richard Arnold, who confessed that he participated in a two hour conference which decided fifty appeals. Perfunctory Justice; Overloaded Federal Judges Increasingly Are Resorting to One-Word Rulings," Des Moines Register, March 26, 1999, at 12. Judge Posner recently went postal, turning state's evidence on both CA-6 and CA-4. Over 90% of federal appeals are decided by their clerks, in decisions that they rubber-stamp--often without reading! We caught Michael McConnell in an epic fail. as well.

But they don't hold a candle to SCOTUS. Scalia was the worst offender, parlaying his position and the celebrity attending it into a way to travel the world in resplendent fashion on other people's money: Berlin. Warsaw. Rome. London. Zurich. Lisbon. Jerusalem. Istanbul. Tokyo. Copenhagen. Reykjavik. Dublin. Lima. Innsbruck. Melbourne. See Antonin Scalia, Form AO-10 (Financial Disclosure Report for Calendar Years 2003-2009), as reprinted at http://www.judicialwatch.org/judge/scaliaantonin. Nor did he neglect North American vacation spots: Banff. Fairbanks. Beaver Creek. Indian Wells. Jackson Hole. Honolulu. Id. And even while the Court was in session, and we were paying his salary, he took a nine-day vacation halfway around the world. Antonin Scalia, Form AO-10 (for Calendar Year 2004) at 4 (attending conference in Auckland, NZ from Oct. 19-27, 2004).

Other notable examples of Justices indulging in extracurricular activities include the officiating of a moot court competition, Jessica Martin, Students Argue Before Chief Justice Roberts, The Record (Washington Univ.) Jan.

15, 2007, writing books (e.g., My Grandfather's Son), rubbing elbows with the Queen, Queen Elizabeth II Opens New UK Supreme Court, Associated Press, Oct. 17, 2009), attending a “secret” junket offered by the Federalist Society, Brian Ross, Supreme Ethics Problem, ABC News.com, Jan. 23, 2006 (Scalia), and duck hunting with Dick Cheney, Cheney v. United States District Court for the District of Columbia, 541 U.S. 913 (2004) (Scalia, J., in chambers; fortunately, he managed to keep his head down).*Quack! Quack!!!*

Federal judges may be many things--lazy, pompous, arrogant, incompetent--but they can never be accused of being "overworked."

3:12 PM

Walt Tuvell said...

John, I see you've got some free time on your hands today. All the better for us/me! (You're overwhelming me with great cites -- keep it up, and I'll catch up!)

You mention pro se's "running out of money." Yes, that happened to me alright, but more to the point, I "ran out of lawyers." My then-lawyers refused to "speak truth to power/authority" as I mentioned, but then so did all other lawyers I contacted (I was "radioactive" for daring to insist on the promisorial-justice guaranteed by all the solemn Constitutional/legal/rule advertised/publicized/promulgated precedent). Silly me, I can only read/understand official/formal proclamations, not mind-read the dark recesses of criminals.

FWIW, I've now scanned the Kay Sieverding case. There's a lot of "stuff" about it online, but it's all disjointed/smushed into one-sided/self-serving vignettes. At least, the freely available stuff is (and I'm not willing to spend my precious PACER chits on it [though maybe I should check RECAP?]). So, I've contacted/emailed Kay, asking if she has a more coherent/readable account. We'll see if she responds. This is exactly why I've published my WHOLE case on my website: Who can trust only ONE side of any dispute? If "you" (i.e., Kay/anybody) have nothing to hide, publish BOTH sides, and let the Court of Public Opinion decide. [I'm gratified John hasn't scotched my case, at least not yet on superficial perusal ...]

As for Cherminsky's "appropriate remedy is appeal": Agree. Done that. Didn't work. Hence now into Judicial Misconduct proceedings. Judicial Council fucked-up, hence latest/current filing is currently in-process at Judicial Conference

(http://judicialmisconduct.us/drupal/sites/default/files/2018-01/JConfPetition.pdf). [Yes, Cherminsky is one of the many academics I've contacted, but he's as nutless as the others, when it comes to his laying his own neck on the line. Big talk; no walk.]

[BTW, John, I don't know who your "favorite rogue judge" is, but if it's in the First Circuit I'd love to know who it is (Casper??), and why. On my website I discuss various cases of Judicial Misconduct, only one of which is mine, Tuvell v. IBM (though, IBM is out of the current picture, having nothing to do with the Judicial Misconduct aspects, except possibly for a backdoor payoff, which I have no way of claiming/proving).]

--- Walter Tuvell (PhD, MIT & U.Chicago, Math & CompSci -- hence, "not-a-crank")
--- http://JudicialMisconduct.US (esp., .../CaseStudies/WETvIBM#smokinggun and environs)
*** Contact me, publicly or privately (walt.tuvell@gmail.com). "Ask Me Anything." ***

3:20 PM

Shag from Brookline said...

Speaking of the late Justice Scalia's off-court travels, here's a reprise from my past:

***

Shag from Brookline June 25, 2008 at 11:32 am #

Here’s a “Scalia” I posted at another blog (De Novo) earlier:

“JE NE RECUSE!”

In that duck blind
Lady Justice unveils
Her traditional blindfold
For these bonding males:
Scalia and Cheney,
Shotguns at attack,
Taking aim at Justice,
“QUACK, QUACK, QUACK!”

***

I think our hosts have been kind to us. Perhaps a dedicated blog might be appropriate. Over my years of practice, I have been for the most part satisfied with the judicial system. There have been rogue judges. The judiciary has a role to play and must do better. Usually in a particular community, there is an awareness of rogue judges. The press plays a vital role, as does the legal profession. But the judiciary has the most responsible role. Where there are rogue judges, certain attorneys may benefit, which case, why speak up? So bar associations should serve as watchdogs, just as they do over lawyers. The Warren Court addressed the right to counsel in criminal matters for indigents. Some conservatives in the legal profession/academia thought this was a step too far. But justice does not result automatically.

4:23 PM

John Barron said...

Shag: "I think our hosts have been kind to us."

Conversations are organic. As for relevance, Walt puts a live face on what I have been documenting for over a decade, and it is certainly germane to the questions of when and for what reasons that we should remove judges from the bench.

Judicial misconduct is NOT a victimless crime.

Shag: "Over my years of practice, I have been for the most part satisfied with the judicial system."

Both you and the hosts harbor a remarkably "Republican" attitude toward the problem: As long as you don't get eaten, you are willing to turn a blind eye toward the wolves that are feasting in plain sight.

For those attorneys and lawprofs out there who would doggedly defend our hopelessly corrupt and profoundly dysfunctional legal system, I would ask: **How much arsenic can you tolerate in YOUR drinking water?** Just as Judge Kane's colleague observed that the "next time, it could be you or me," the next time, it could be you. The incomparable Gerry Spence laments:

"In this country we embrace the myth that we are still a democracy when we know that we are not a democracy, that we are not free, that the government does not serve us but subjugates us. Although we give lip service to the notion of freedom, we know the government is no longer the servant of the people but, at last has become the people's master. We have stood by like

timid sheep while the wolf killed, first the weak, then the strays, then those on the outer edges of the flock, until at last the entire flock belonged to the wolf. We did not care about the weak or about the strays. they were not a part of the flock. We did not care about those on the outer edges. They had chosen to be there. But as the wolf worked its way towards the center of the flock we discovered that we were now on the outer edges. Now we must look the wolf squarely in the eye. That we did not do so when the first of us was ripped and torn and eaten was the first wrong. It was our wrong."

As Judge Miner observed, this is a duty that comes along with the privilege of being an officer of the Court. A duty to speak where and when we can, and to not tolerate even a scintilla of corruption on our benches.

When our judges commit crimes on the bench--and they do it on an industrial scale--real people suffer irrevocable injuries. Matrimonial judge Gerald Garson was convicted of taking bribes several years ago; one of his many victims had a chance to confront him at trial:

""Mr. Garson, you stole my children," she said, referring to a decision granting custody of the two oldest boys to her husband. "You stole them from their two sisters and their younger brother. You stole them from their grandparents, their aunts and uncles.

"I didn't get what I deserved in your courtroom, but I hope and pray that you get what you deserve in this courtroom today."

I return to the Framers' original remedy: enforcement of good behavior tenure by the aggrieved litigant. As Judge Kozinski writes, whenever a judge goes off the rails, it tends to be pretty obvious. And I would trust the good sense of a jury over that of judges afflicted by what Justice Breyer calls "excessive guild favoritism."

This is why I despise your Living Constitution: You can't give any person the kind of power that would try a saint and remove all accountability, and expect things to not go wrong.

8:52 AM

John Barron said...

Without the rule of law, Shag, we literally have nothing. We are reduced to a mean state of servitude, as we only have a tenancy at will in our "inalienable" rights. What Sir Francis Bacon wrote four centuries ago is equally true today:

[I]t is the unjust judge that is the capital remover of landmarks, when he defineth amiss of lands and property. One soul sentence doth more hurt than many foul examples. For these do but corrupt the stream, the other corrupteth the fountain. So saith Solomon, Fons turbatus, et vena corrupta, est justus cadens in causa sua coram adversario [A righteous man falling down before the wicked is as a troubled fountain or a corrupt spring.].

Judges are public officials, who swore solemn oaths to follow the law. "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." Cooper v. Aaron, 358 U.S. 1, 18 (1958). Indeed, there could be no offense more pernicious than that committed by public officials under color of law. As one federal appellate judge observed,

...those who receive society's commission to go forth and capture transgressors may not themselves transgress. A free society can exist only to the extent that those charged with enforcing the law respect it themselves. There is no crueler tyranny than that which is exercised under cover of law, and with the colors of justice." United States v. Janotti, 673 F.2d 578, 614 (3d Cir. 1982) (Aldisert, J., dissenting; quoting Montesquieu, De l'Esprit des Lois (1748)).

(You will note that when judges stand on principle, it is ALWAYS in dissent.)

Where else but in America can a judge sit in judgment of her own tort case? That won't even fly in freakin' Zimbabwe, for cry-iy! A system that dysfunctional cannot serve as a reliable repository for rights under law.

I'm losing a friend--in her 50s--to Stage 4 lung cancer. One of the many victims of the war on drugs and the financial collapse, she didn't seek proper care in time because she had to decide whether to seek it or eat. And now, thanks in no small part to abominable foot-dragging by her parasitic insurance company, her battle is all but lost.

Whether it is a catastrophic failure of our health care or legal system, the Republican says, "if it doesn't happen to me, who gives a flyin' fuck?"

Shall I come to your residence and help you change your registration, Shag?

9:13 AM

Walt Tuvell said...

Guys(/gals):

I'm totally looking into implementing a forum on my website. "Forum" = "blog, except that regular users (not just administrators/owners) can create new topics, as well as comment on them." [As is standard nowadays, users will unfortunately need to register, and click a Captcha when posting, else the anonymous spammers/spambots will troll us mercilessly.]

It'll take me a little while to learn the nuts-and-bolts web-admin for this (I use Drupal), but it should be up/running next week.

Please, anyone reading this, consider joining and contributing! And, please do feel free to tell/invite any of your interested friends too. I'll be light-touch on the moderating, but won't be slow to kill the trolls.

Sure would be great to kickoff a #MeToo-like movement for Judicial Misconduct, wouldn't it?.

I'll post an announcement right here (in this topic/comment-stream) when the new forum is ready. If you don't hear from me next week, it'll just mean this stream is closed to comments, so in that case please contact me directly.

Cheers!

--- Walter Tuvell (PhD, MIT & U.Chicago, Math & CompSci -- hence, "not-a-crank")
--- http://JudicialMisconduct.US (esp., .../CaseStudies/WETvIBM#smokinggun and environs)
*** Contact me, publicly or privately (walt.tuvell@gmail.com). "Ask Me Anything." ***

10:00 AM

Shag from Brookline said...

John, at 2;27 PM you suggest solutions:

"The most obvious solution is to sue the judges as agents, and the government as their principal. Dean C agrees that the judge-made law of sovereign immunity has no grounding in either COTUS or common sense. The next is to remove the offending judge from the bench pursuant to the Good Behavior Clause (which I have already written about in some depth); when a bad judge costs the government money, they will be motivated to fix the problem. The third is private criminal prosecution."

that ultimately might be a tad anarchic.

I'm satisfied with my registration. But I don't walk in lockstep with the Democratic Party. I'm a progressive. I feel bad for your friend and all others who are deprived of health care as well as those denied fairness and justice. Even with Medicare, I have issues with how the medical community addresses the elderly, a battle I can fight for myself. Perhaps you should come out of the closet under the banner of John Barron for your principled stands, which may or may not be universal. We are guests at this Blog and I respect our hosts/posters, whether or not I agree with them. But at 87 I am just an old lawyer, and old lawyers never die, they just smell that way.

As to the rule of law, alas, it is applied by men - and women - who may have biases, faults, etc. Your solutions, first and second, likewise, but the third may suggest insurrection.

10:01 AM

John Barron said...

Shag: "that ultimately might be a tad anarchic..."

...but still, a massive improvement on the status quo. The impeached Justice Samuel Chase responds:

"*Where law is uncertain, partial, or arbitrary; where justice is not impartially administered to all; where property is insecure, and the person is liable to insult and violence, without redress by law,* ***the people are not free, whatever may be their form of government***."

Samuel Chase, Grand Jury Instructions (manuscript), May 2, 1803, reprinted in Charles Evans, Report Of the Trial Of the Hon. Samuel Chase 60 (1805) (emphasis added).

Discretionary power in the hands of a judge is like a rope in the hands of a hangman, according to Lord Coke. "Wherever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command to compass that upon the subject which the law allows not, ceases in that to be a magistrate, and acting without authority may be opposed, as any other man who by force invades the right of another." Locke, § 202. And to leave a man defenseless in the face of judicial tyranny is to make him a slave. As Justice Bradley observed:

it is a right, an inestimable right, that of invoking the penalties of the law upon those who criminally or feloniously attack our persons or our property. Civil society has deprived us of the natural right of avenging ourselves, but it has preserved to us all the more jealously the right of bringing the offender to justice. By the common law of England, the injured party was the actual prosecutor of criminal offenses, although the proceeding was in the King's name; but in felonies, which involved a forfeiture to the Crown of the criminal's property, it was also the duty of the Crown officers to superintend the prosecution.

To deprive a whole class of the community of this right, to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; ***is to leave their lives, their families, and their property unprotected by law****. It gives unrestricted license and impunity to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case.*

Blyew v. United States, 80 U.S. 581, 598-99 (1871) (Bradley, J., dissenting) (emphasis added).

Sic semper tyrannis. The victim has every legal and moral right to empty the contents of an AR-15 into the home of his oppressor (the real purpose for the 2Am), as tyrants forfeit the protections of law (murder requires an unjustified killing). Given that stark alternative, yours truly would prefer a little bit of anarchy.

Private criminal prosecution exists in some form throughout most of the civilised world --and even Zimbabwe!--and the world hasn't flown off its axis. These are all sensible remedies, embedded in the Framers' COTUS. Whether they are prudent is, therefore, beside the point. Moreover, they change Judge Posner's Bayesian equation, by forcing judges to consider the consequences of their acts.

We tried it your way. Didn't work.

11:27 AM

Walt Tuvell said...

John says: "Judicial Misconduct is not a victimless crime." Agree, and in fact I used that exact phrase in the Judicial Conference Petition I filed recently (and comprises the best single-document summary of my J.M.

case), currently in-progress. http://judicialmisconduct.us/drupal/sites/default/files/2018-01/JConfPetition.pdf at p. 18.

Shag wonders if criminal prosecution might be too draconian/anarchic/insurrection. I don't think so, and have written-up my thoughts in my "Judicial Twilight Zone" essay at http://judicialmisconduct.us/drupal/sites/default/files/2017-04/08_JudicialTwilightZone_0.pdf. And indeed, I have every expectation I'll be forced to travel that route. For, that's the only logical/possible path left, after District ➜ Appeal ➜ Supreme ➜ Judicial Council ➜ Judicial Conference (which is where I am now).

BUT: Any guesses how easy it'll be to persuade to the FBI to investigate, and the DOJ PIN (the relevant agency, https://www.justice.gov/criminal/pin) to prosecute?

ANS: Nearly impossible.

Which leaves ... social media "insurrection." Hello?!

1:26 PM

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