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John M. Burman

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SHOULD FEDERAL JUDGES BELONG TO OR OPENLY SUPPORT ORGANIZATIONS THAT PROMOTE A PARTICULAR IDEOLOGY?

*John M. Burman**

I exploited every opportunity to promote respect for the law and the judiciary . . . the rule of law generally and in particular the judiciary should be respected.[1]

INTRODUCTION

The rule of law has existed in the United States and before, in the United Kingdom, for nearly 800 years.[2] That concept was enshrined in the Constitution of this country, which devotes a full article, Article III, to the judiciary. While the role and importance of the judiciary was not clarified for some fifteen years, it is now clear: the United States Supreme Court, and only that Court, has the ultimate authority to declare actions of the Congress or the President to be unconstitutional.[3]

* John M. Burman is the Carl M. Williams Professor of Law & Ethics, and Faculty Supervisor of the Legal Services Program, at the University of Wyoming College of Law. Thanks to Timothy R. Hancock (University of Wyoming College of Law, Class of 2011) and Emily Thomas (Class of 2013) for their valuable research assistance, without which this article could not have been written. Thanks also to the Carl M. Williams Faculty Research Fund at the University of Wyoming College of Law for helping support this project. Finally, thanks to Marilyn Paules Burman, and Lou Farley, who read and commented on drafts of this article. Their comments were very helpful, especially Marilyn's suggestion to look at the oath as a source of ethical standards.

[1] NELSON MANDELA, CONVERSATIONS WITH MYSELF 357 (2010).

[2] *See* John M. Burman, *The Role of Clinical Legal Education in Developing the Rule of law in Russia*, 2 Wyo. L. Rev. 89, 95–96 (2002). King John of England signed the Magna Carta in 1215, marking the first significant limitation on the power of the monarch in that country. *Id.* For a discussion of the development of the rule of law in the United States and the United Kingdom, see *id.* at 92–96.

[3] *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

While the primacy and the importance of the United States Supreme Court is plain, the rule of law depends, in large part, on the acceptance of and adherence to the orders of the thousands of judges who sit on other courts, whether federal, state, military, or municipal. Those courts' orders are the ones that affect millions of Americans every day. It was, after all, a federal district court judge in Arkansas who found then President Clinton in contempt of court in the Paula Jones case and assessed the other party's reasonable expenses against the President.[4] The court that entered the order had no military or other means to compel the President to obey. Yet he did obey—a far cry from what would have happened in many countries.[5]

Former President Clinton's decision to obey an order from a federal district judge in Arkansas is a profound example of the rule of law. Why did President Clinton, arguably the most powerful person on earth at the time, and the Commander in Chief of the world's most powerful military force, obey an order from a federal district judge in Arkansas? Because that is what Americans do. Americans generally obey court orders, even though the issuing courts cannot send out a military force to compel obedience.

The American legal system gets more than its share of criticism. As a society, however, Americans respect the system and many peoples throughout the rest of the world would love to exchange their legal systems for America's. The judicial system is, after all, one of the more visible components of the rule of law.

The American legal system includes federal, state, and municipal courts. While the federal system is relatively uniform, state and municipal systems vary significantly. Because of that variation, it would take a book to examine whether state or municipal court judges should belong to or openly support ideological groups. Among other differences, many state court judges are elected.[6] Furthermore, those judges take different oaths of office and are subject to different codes of judicial conduct. Municipal court judges have at least as many differences among them. Therefore, this article focuses on federal judges, as they are part of a relatively homogenous system.

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[4] *See* Jones v. Clinton, 36 F. Supp. 2d 1118, 1125 (E.D. Ark. 1999) ("In sum, the Court finds that the power to determine the legality of the President's unofficial conduct includes with it the power to issue civil contempt citations and impose sanctions for his unofficial conduct which abuses the judicial process.").

[5] Although the case was settled while on appeal, a federal district judge had granted summary judgment to President Clinton. *See* Jones v. Clinton, 990 F. Supp. 657, 662 (E.D. Ark. 1998). Interestingly, and in a true testament to the independence of the federal judiciary, that judge, Susan Webber Wright, had been appointed to the federal bench by then President George H. W. Bush, the man Bill Clinton had defeated in the 1992 presidential election.

[6] *See* Republican Party of Minnesota v. White, 536 U.S. 765, 790 (2002) ("39 States currently employ some form of judicial elections for their appellate courts, general jurisdiction trial courts, or both.").

President Clinton's decision to obey an order of a federal district court was the result, ultimately, of respect for the court—respect for the rule of law. Respect for the rule of law depends, in turn, on respect for the judiciary that enforces the law.[7] As the Code of Conduct for United States Judges (the Code) proclaims: "An independent and honorable judiciary is indispensable to justice in our society. . . . The provisions of this Code[, therefore,] should be construed and applied to further that objective."[8] This is so because the rule of law depends on deference to court orders, and "[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges."[9]

Public confidence in the integrity and independence of judges depends on the perception that the law will be fairly and uniformly applied by judges who strive to apply the law impartially.[10] If anything taints that perception, respect for the system will erode, and the rule of law will be damaged.[11]

This article is about whether members of the federal judiciary belonging to or openly supporting groups that espouse a certain ideological view damages the rule of law by diminishing respect for the judiciary. The analysis is based on the ethical standards applicable to all federal judges, as reflected in the oath that all federal judges take before assuming the bench, as well as the standards applicable to most federal judges as reflected in the Code. Part I discusses the politicization of the federal judiciary. Part II focuses on the oath of office that all federal judges must take, which incorporates important ethical concepts. Part III addresses the Code that regulates most federal judges' behavior. Part IV provides an overview of the two societies, the Federalist Society and the American Constitution Society, that are the dominant ideological groups to which federal judges belong or openly support. Finally, Part V argues that membership in or open support for an ideologically oriented group is inconsistent with judicial ethics.

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[7] Ming W. Chin, *Looking Ahead on the Journey to Diversity*, 48 No. 3 JUDGES' J. 18, 20 (2009) ("The public's *perception* of our legal system—its perception of our judges—is an important part of public trust and confidence.").

[8] CODE OF CONDUCT FOR U.S. JUDGES Canon 1 (2011), *available at* http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx.

[9] *Id.* Canon 1 cmt.

[10] Iyiola Solanke, *Diversity and Independence in the European Court of Justice*, 15 COLUM. J. EUR. L. 89, 112 (2009) ("The preservation of a public perception of fairness is crucial to all legal systems.").

[11] The importance of respect for the judiciary cannot be overstated. For example, it was recently reported by an assistant to the judge in the trial involving Mikhail Khodorkovsky, in Russia, that "the outcome of 'political cases' is usually decided in advance [of the trial], and a judge who refuses to go along with it usually faces dismissal." Alexandra Odynova, *Assistant: Judge Was Pressured on Yukos*, MOSCOW TIMES, Feb. 15, 2011, *available at* http://www.themoscowtimes.com/news/article/assistant-judge-was-pressured-on-yukos/431003.html (subscription required for full text).

I. THE POLITICIZATION OF THE FEDERAL JUDICIARY

When a justice of the United States Supreme Court resigns or dies, the person nominated to take his or her place quickly assumes center stage in what has become an intensely, and now almost solely, partisan debate, a debate that has nothing to do with the nominee's "qualifications," though it is often phrased in those terms.[12] The reality is that the President does not nominate someone to the Supreme Court because of that person's qualifications. Rather, one is nominated because one knows or is known by the President, and he or she is expected to reflect the views of the President who selected him or her for decades after being confirmed.[13] Accordingly, when the Senate reviews a nominee, that review is nothing more than a partisan debate about the nominee's (and the President's) ideological leaning.

The United States Supreme Court has become an intensely political body, and most Americans view it as one. The Court is often called upon to decide issues that bitterly divide the nation, Congress, and the occupants of the White House.[14] Such issues wind up, by default, in front of the Court, as the Court is often viewed as a means to achieve certain political ends.[15]

The Supreme Court eliminated any doubts about its political nature when the Justices chose to get involved in the Presidential election of 2000. The Court decided the *Bush v. Gore* case in a five to four decision, with the Court dividing on predictable ideological lines.[16] The decision favoring President Bush had little to do with the law and everything to do with politics. Justice Scalia is reported to

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[12] For example, the two justices nominated by President Obama were opposed by all Republicans in the Senate. Similarly, the two persons nominated by former President George W. Bush were opposed by many Democrats, including then Senator Obama. If one doubts that ideology and not qualifications makes the difference, ponder this: Would either of the two persons nominated by President Obama even have been considered by former President Bush? And would either of the two persons nominated by then President Bush even have been considered by President Obama? Of course the answer to both questions is a resounding "no." The difference is ideological, not experiential or intellectual.

[13] For example, Justice Clarence Thomas was forty-three when named to the Court. *See* André Douglas Pond Cummings, Grutter v. Bollinger*, Clarence Thomas, Affirmative Action and the Treachery of Originalism: "The Sun Don't Shine Here in this Part of Town*", 21 HARV. BLACKLETTER L.J. 1, 8–11 (2005) (stating that Justice Thomas was born June 23, 1948 and appointed as a U.S. Supreme Court Justice in late 1991). He has already served more than twenty years, and is a relatively young sixty-four years of age. *See id.* at 8.

[14] *See generally, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion rights); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (school desegregation).

[15] *See generally, e.g.*, JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (Anchor Books 2008).

[16] *See* Bush v. Gore**,** 531 U.S. 98 (2000). The decision is actually a "per curiam" decision, meaning that it was the opinion of the Court, and no individual author is identified, nor are the members of the Court who agreed with the majority identified. *See id.* at 100. The decision

have said: "'We had to do something, because countries were laughing at us . . . *France* was laughing at us.'"[17] Whether motivated by France's laughter or otherwise, the Court chose to do something about it. The Court issued the *Bush v. Gore* opinion, which was simply an ideologically motivated decision in which all the members of the Court did exactly what everyone expected—the justices ruled on ideological lines. The majority decision for President Bush, whether one supports it or decries it, was the apex of the Court's public evolution into an overtly political body. Any pretense that the Court based its decision on law,[18] and not ideology, cannot withstand serious scrutiny. As one observer has noted:

> In *Bush v. Gore*, the Supreme Court's most conservative justices, who are usually the least likely to uphold equal protection claims except in affirmative action cases—a potentially revealing signal in itself—all found merit in the equal protection argument asserted by the conservative Republican presidential nominee George W. Bush.[19]

After the decision, the backlash against the Court was reportedly so intense, that it left some members of the Court "shell-shocked."[20] Whether that is true is not particularly relevant. What is relevant is that the Court was widely perceived as having rendered a decision based on ideological grounds, not legal ones, thereby seriously damaging the Court's image of rendering decisions based on law.[21] The decision changed both the Court and the country, perhaps forever. Part of that change was that respect for the rule of law was called into question by this decision.

Of course, the *Bush v. Gore* decision was not the first time the Court had decided a case based on ideological rather than legal grounds. In 2000, however, the Court did not hide itself or its decision behind the veil of secrecy that has traditionally shielded the Court from intense public scrutiny. So, while deciding politically or ideologically charged cases was nothing new, intense public scrutiny and criticism were.

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includes, however, both concurring and dissenting opinions. Justices Scalia and Thomas joined the concurring opinion, written by Chief Justice Rehnquist. *See id.* at 111 (Rehnquist, C.J., concurring). Three dissenting opinions were written or joined by Justices Breyer, Ginsburg, Souter, and Stevens. *See id.* at 135 (Ginsburg, J., dissenting); *id.* at 129 (Souter, J., dissenting); *id.* at 123 (Stevens, J., dissenting). Since four justices dissented, five were in the majority. Though Justices Kennedy and O'Connor are not identified, their votes are obvious.

[17] TOOBIN, *supra* note 15, at 211.

[18] The opinion has had little significance in the Court's jurisprudence. "With one exception, the justices tried to put *Bush v. Gore* behind them and resume business as usual." *Id.* at 207.

[19] Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1006 n.141 (2009).

[20] TOOBIN, *supra* note 15, at 211.

[21] *See, e.g.*, Vijay S. Sekhon, *Maintaining the Legitimacy of the High Court: Understanding the "25 Years" in* Grutter v. Bollinger, 3 CONN. PUB. INT. L.J. 359, 370 (2004) ("The Court's decision in *Bush* . . . was seen as a politically motivated one.").

Since its inception, the Court has been a secretive body. Its public pronouncements (its opinions) are traditionally cloaked in the sometimes arcane and almost indecipherable language of the law. For centuries, it seemed like every effort had been made to uphold the "appearance" of impartiality.[22] That appearance was a reflection of the notion that the Supreme Court operates on a higher, non-political level. That notion, of course, has always been a "magnificent illusion."[23] The Court is and has always been a product of our democracy, which, like any democracy, is "messy."[24] Therefore "[w]e can expect nothing more, and nothing less, than the Court we deserve."[25]

While it may be acceptable for the Supreme Court to act like and to be seen as a political body, it is dangerous for that perception to spillover to other federal courts (civilian or military). If the public ceases to view federal courts as impartial arbiters of the law and perceives them instead as political or ideological entities deciding cases based on considerations other than the law and the facts of a given case, the rule of law is damaged. Unfortunately, Congress now focuses the ideological scrutiny once reserved primarily for the Supreme Court on all nominees for federal judgeships. While members of circuit courts of appeal do interpret law, [26] trial judges have less discretion.[27] They are to follow the law as

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[22] As discussed below, Canon 2 of the Code directs federal judges to "avoid . . . the appearance of impropriety . . . ." *See infra* notes 66–68 and accompanying text.

[23] *See* TOOBIN, *supra* note 15, at 395.

[24] As former United States Senator Chuck Hagel observed, "[d]emocracy is messy." *McCain: Public Thinks Campaign Funding 'Corrupt'*, CNN POLITICS (Mar. 19, 2001), http://articles.cnn.com/2001-03-19/politics/campaign.finance.02_1_soft-money-mccain-feingold-john-mccain?_s=PM:ALLPOLITICS. And as Winston Churchill observed, "[d]emocracy is the worst form of Government except all those other forms that have been tried from time to time." NAACP, Inc. v. City of Niagara Falls, N.Y., 65 F.3d 1002, 1019 n.20 (2d Cir. 1995) (citation omitted).

[25] TOOBIN, *supra* note 15, at 395. One may argue that the Court's decision upholding President Obama's healthcare reform law represents a step back from the Court as a political entity. It is true that Chief Justice Roberts surprised many people, including the author, by voting to uphold the Patient Protection and Affordable Care Act. *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012). There are two reasons, however, that suggest not much has changed. First, it should not be news that a judge voted differently than expected. Second, the other eight justices voted just as expected. The other four appointed by Republican presidents voted against the Democrats' law. The four appointed by Democratic presidents voted in favor of the Act. And perhaps that is how it should be, at least for that court.

[26] The notion that judges do not interpret (sometimes significantly) the law is simply wrong. They have to. They have to because it is impossible to write a statute, or a constitution, that is not ambiguous in some way. Perhaps the most straightforward language imaginable is in the First Amendment to the United States Constitution: "Congress shall make no law . . . ." U.S. CONST. amend. I. Yet that seemingly unambiguous language has given rise to a host of disputes about what it means. Other areas of law are, by definition, judge-made law. For hundreds of years, (first in the United Kingdom and then the United States, which adopted the British common law in large part) for example, the law of Torts has been composed of common law. Common law is judge-made law, not law passed by a legislative body.

[27] It is true that challenges to federal actions, such as the numerous legal challenges to President Obama's health reform act, start in federal district courts. Those challenges did, however, ultimately

set forth by appellate courts, whether the Supreme Court or the applicable court of appeals. Thus, while it may make sense to be concerned about the ideological leanings of nominees for federal appellate courts, it does not make sense to apply ideological litmus tests to federal district judges. Unfortunately, for whatever reason, that is happening and rulings by federal district judges seem to be increasingly motivated by ideology.

Both major political parties now apply their own ideological standards to nominees for all federal judgeships, with the result that talented men and women are denied judgeships because of non-legal (usually ideological) factors. In addition to losing talented individuals who lack the prevailing ideological purity, another cost of demanding ideological conformity is that respect for the judiciary suffers. Those individuals who are ultimately confirmed are viewed more and more as ideologues and not as impartial decision-makers dedicated to applying the law.

As the judiciary has become viewed more frequently as a method of achieving certain ideological goals, the rule of law has suffered. Courts have become tools for achieving ideological goals. One issue that has arisen is that with increasing frequency, judges[28] are selected or not selected, at least in part, because they belong to or openly support certain groups—groups that openly profess adherence to certain ideological goals—and continue to belong to or openly support those groups after assuming the bench.

Two of the most common and influential groups are the Federalist Society and the American Constitution Society.[29] The former is dedicated to what are generally considered "conservative" goals, while the latter espouses positions generally considered "liberal." Whatever the merits of either society, the mere fact that a federal judge belongs to or openly supports one society or the other is tantamount to wearing a banner that says "conservative" or "liberal." While wearing such a banner is perfectly appropriate for a politician or a lawyer, it is ethically problematic when the wearer of the banner is a member of the judiciary.

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wind up in front of the Supreme Court. Unfortunately, federal district judges are increasingly being viewed as political operatives, rather than as impartial arbiters of the law. *See, e.g.*, *Dead or Alive?: Another Blow for Barack Obama's Health Reforms is Struck by the Courts,* ECONOMIST, Feb. 5, 2011, at 37, *available at* http://www.economist.com/node/18070406 ("But political prejudice already seems to be impinging on the lower courts' consideration of the health-care law: the two judges who have given it the nod were both appointed by Democrats, whereas the two who have found fault with it were both appointed by Republicans.").

[28] In this article, the term "judge" is used broadly and includes justices and other members of the federal judiciary.

[29] For a more detailed analysis of the Federalist Society and the American Constitution Society, see *infra* Part IV.

II. THE OATH OF OFFICE

Whether a federal judge has acted ethically generally begins with an analysis of the judge's conduct in light of the Code. There are three problems with this approach. First, before assuming the bench, all federal judges must take an oath, an oath that contains important ethical concepts and is binding on those who take it.[30] Second, not all federal judges are bound to follow the Code (the notable exception is the United States Supreme Court).[31] Finally, there was no code of ethics for federal judges until 1973. Surely, one would not suggest that the federal judiciary had no ethical standards for nearly two-hundred years. It is appropriate, therefore, to begin an ethical analysis by evaluating the oath of office (the Oath) that all federal judges, including members of the Supreme Court, must take. The Oath has been around since 1789, and it contains, and contained from its inception, important ethical concepts.

Many people take oaths, often as a legal requirement before assuming a governmental position. Many others, such as lawyers, take oaths before they are allowed to receive a license or other benefit.[32] Others, such as witnesses in court, must also take oaths. Oaths are so common in fact, that we often do not think about taking them or even listen to, let alone take to heart, the words in them.[33] We just take them.

Taking oaths was likely more important to the founding fathers than it is today.[34] The Constitution they created contains two provisions for oaths, one in

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[30] The oath is contained in 28 U.S.C. § 453 (2012).

[31] *See* CODE OF CONDUCT FOR U.S. JUDGES Introduction (2011) ("This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges."). *See also* Sarah Schultz, Note, *Misconduct or Judicial Discretion: A Question of Judicial Ethics in the Connecticut Supreme Court*, 40 CONN. L. REV. 549, 568 (2007) ("[T]he United States Supreme Court remains the one court in the United States not subject to a Code of Judicial Conduct."). Perhaps it is appropriate that the Supreme Court is not subject to the Code. After all, the Code applies to "judges," and the behavior of the members of the Supreme Court is often more similar to that of politicians. The members of the Court are still, however, subject to the Oath.

[32] For example, a lawyer who wishes to be admitted to practice before the United States District Court for the District of Wyoming "shall take the oath . . . ." D. WYO. R. 83.12.2(a). Persons who wish to practice in the State of Wyoming must take an oath specified by rule. *See* WYO. ADMISSION TO PRACTICE L. R. 110 ("I _____, do solemnly swear that I will support, obey and defend the Constitution of the United States and the Constitution and laws of the State of Wyoming, and that I will faithfully and honestly and to the best of my ability discharge the duties of an Attorney and Counselor at Law.").

[33] For example, I have taken oaths for admission to the bars of two states, at least five different federal courts, including the United States Supreme Court, and while I have read and thought about many of them recently, I gave no thought to them when I raised my hand and swore to do various things. Perhaps I am unique, but I do not think so. I suspect the same is true of judges.

[34] *See generally, e.g.*, Steve Sheppard, *What Oaths Meant to the Framers' Generation: A Preliminary Sketch*, 2009 CARDOZO L. REV. DE NOVO 273 (2009).

Article Two, for the President (the language of the oath is in the Constitution), and one in Article Six, for legislators and executive and judicial officers.[35] The Article Six requirement for oaths did not contain the language of the oath. The first Congress quickly rectified that omission in 1789 when it passed implementing legislation specifying one oath for non-judicial officials and another for judicial officials. The oath for judges was part of the Judiciary Act of 1789. Although there have been minor changes to the oath, it is essentially unchanged to this day.[36] Since 1948, the Oath has said:

> I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.[37]

While taking oaths may have become a formality, it should not be. In his first inaugural address, Abraham Lincoln discussed the oath of office he would shortly take. "'I take the official oath today,'" he said, "'with no mental reservations, and no purpose to construe the Constitution or laws, by any hypercritical rules.'"[38] The oath, he continued, would limit his actions. After taking it, others would remain free to take whatever political position they wished (on the dominant issue of dissolution of the nation). "'I,'" Lincoln said, however, "'cannot alter my course of action'" from seeking to preserve the union, which he would soon swear to do.[39]

Although Lincoln was discussing the presidential oath, the Oath judges must take is no less important. Not only should they take it "without mental reservation," but the Oath binds them as well. Judges too must "alter" their

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[35] *See* U.S. CONST. art. II, § 1, cl. 7; *id.* art. VI, cl. 3; *see also* Sheppard, *supra* note 34, at 273.

[36] The original oath said:

> I, [_____], do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as [judge/justice], according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.

Sheppard, *supra* note 34, at 274.

[37] 28 U.S.C. § 453 (2012). For the legislative history of this section, see Judicial Improvements Act of 1990, H.R. 5316, 101st Cong. § 404 (1990).

[38] William Lee Miller, PRESIDENT LINCOLN: THE DUTY OF A STATESMAN 25 (Vintage Books 2009).

[39] *See id.*

course, if necessary, to comply with what they have sworn to do.[40] The need to alter behavior applies to judges' personal as well as professional lives.

The Oath incorporates important ethical concepts. When taking the Oath, a judge swears to: (1) "administer justice without respect to persons;" (2) "do equal right to the poor and to the rich;" and (3) "faithfully and impartially discharge . . . all the duties incumbent upon" him or her.[41]

First, the admonition to "administer justice without respect to persons" seems intended to prohibit discriminatory treatment of any person or group of persons.[42] This concept of equal treatment and impartiality is reiterated in the Code.[43]

Second, wealth (or the lack thereof) is not to be a basis for a judge's actions. A judge is to "do equal right to the poor and to the rich."[44] Equal treatment of all is a fundamental ingredient of the Constitution's mandate that all are entitled to "equal protection" of the law.[45]

Finally, in language that is in part identical to the Code's, the Oath requires that all federal judges act "faithfully and impartially." The third word, "impartially," is perhaps the most basic concept in the Code.[46] The notion of "impartiality,"

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[40] The Code recognizes that judges may have to act differently than others to preserve the integrity of the judiciary: "A judge must . . . accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen." CODE OF CONDUCT FOR U.S. JUDGES Canon 2(A) cmt. (2011).

[41] *See* 28 U.S.C. § 453.

[42] *See id.* Similarly, the Code expressly addresses avoiding bias, or even the perception of bias, by proscribing judges' membership in groups that practice discrimination. "A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." CODE OF CONDUCT FOR U.S. JUDGES Canon 2(C) (2011).

[43] CODE OF CONDUCT FOR U.S. JUDGES Canon 3 ("A Judge Should Perform the Duties of the Office Fairly . . . .").

[44] 28 U.S.C. § 453. The Code restates the importance of equal treatment. "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the . . . judiciary." CODE OF CONDUCT FOR U.S. JUDGES Canon 2(A) (2011).

[45] U.S. CONST. amend. XIV, § 1.

[46] *See, e.g.*, CODE OF CONDUCT FOR U.S. JUDGES Canon 2(A) (2011) ("A judge . . . should act at all times in a manner that promotes public confidence in the integrity and *impartiality* of the judiciary.") (emphasis added); *id.* Canon 3 ("A Judge Should Perform the Duties of the [Judicial] Office Fairly, *Impartially* and Diligently.") (emphasis added); *id.* Canon 3(C)(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ."). Although "impartial" is defined in the American Bar Association's Model Code of Judicial Conduct, that definition is not part of the Code. *See* ABA MODEL CODE OF JUDICIAL CONDUCT Terminology (2010) ("Impartial" means the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.").

does not, however, come from the Code. Rather, it predates the first version of the Code by nearly 200 years. The importance of the concept of "impartiality" was embedded in the Oath specified by Congress in 1789, the Oath that has been taken by and is binding upon every judge who has ever taken the federal bench, including every member of the United States Supreme Court.

III. THE CODE OF CONDUCT FOR UNITED STATES JUDGES

The Judicial Conference of the United States has adopted a Code of Judicial Conduct based on the ABA's 2007 Model Code. Initially adopted in 1973, the Code has been revised several times since then; the current Code was adopted in March 2009 and became effective July 1, 2009.[47] Interestingly, the Code applies to most, but not all, United States judges. It applies to "United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. Certain provisions of this Code apply to special masters and commissioners . . . ."[48] In addition, "[t]he Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code."[49] While the Code does not expressly apply to military judges, the ABA's Model Code binds them.[50] The only members of the federal judiciary who do not appear to be subject to the Code or the Model Code are the members of the United States Supreme Court.[51]

The Code differs from the Model Code in some notable respects. First, the Code is organized very differently. The Code does not contain sections on Scope, Preamble, Terminology,[52] or Application.[53] Second, the Code has five canons, rather than the four that are in the Model Code. Though there are differences, the

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[47] *See* CODE OF CONDUCT FOR U.S. JUDGES Introduction (2011).

[48] *Id.*

[49] *Id.*

[50] James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 208 n.147 (2002) ("Military judges are subject to the ABA Code of Judicial Conduct . . . .").

[51] *See supra* note 31. Although the Code does not list the members of the Supreme Court among the judges to whom the Code applies, the Code itself does not carve out an exception for the Supreme Court. *See* CODE OF CONDUCT FOR U.S. JUDGES Introduction (2011). In the section entitled "Compliance with the Code of Conduct," the Code says: "Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for purposes of this Code. All judges should comply with this Code . . . ." *Id.* That language seems to include Justices of the Supreme Court.

[52] Rather than including all definitions in a "Terminology" section, the Code has definitions scattered throughout. For example, the definition of "political organization" is in the commentary to Canon 5. *See* CODE OF CONDUCT FOR U.S. JUDGES Canon 5 cmt. (2011).

[53] Instead of a section entitled "Application," the Code has a section entitled "Compliance with the Code of Conduct." *See* CODE OF CONDUCT FOR U.S. JUDGES Compliance with the Code of Conduct (2011).

five Canons in the Code include the same concepts as the four in the Model Code. Furthermore, the Model Code has many discrete parts that contain important concepts. While many of those discrete parts are not in the Code, their substance is contained in other parts of the Code.

As Canon 1 declares, "[a]n independent and honorable judiciary is indispensable to justice in our society."[54] Accordingly, while there are judges, such as the Justices of the United States Supreme Court, to whom the Code might not directly apply,[55] "[a]ll judges should comply with this Code [of Conduct for United States Judges] . . . ."[56] The reason is that, as the Model Code says, "judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system."[57]

One or more comments follow each Canon, yet the Code does not describe the comments' function. The Model Code does explain the function of its comments, which are similar to those in the Code. According to the Model Code, comments have two functions. First, the comments "contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct."[58] Second, the comments "identify aspirational goals for judges."[59] The reason for such goals is that, "[t]o implement fully the principles of this [Model] Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office."[60] Although the comments provide useful explanation and illustration, "[c]omments neither add to nor subtract from the binding obligations set forth in the Rules [of the Model Code]."[61]

While the disciplinary aspect of any code of judicial conduct is important, the ultimate goal of a code, a goal to which all judges should aspire, is the admonition in Canon 1 of the Code. "An independent and honorable judiciary is indispensable to justice in our society. [Accordingly,] [a] judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved."[62]

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[54] CODE OF CONDUCT FOR U.S. JUDGES Canon 1 (2011).

[55] Schultz, *supra* note 31 ("[T]he United States Supreme Court remains the one court in the United States not subject to a Code of Judicial Conduct.").

[56] CODE OF CONDUCT FOR U.S. JUDGES Compliance with the Code of Conduct (2011).

[57] ABA MODEL CODE OF JUDICIAL CONDUCT Preamble [1] (2010).

[58] *Id.* Scope [3].

[59] *Id.* Scope [4].

[60] *Id.*

[61] *Id.* Scope [3].

[62] CODE OF CONDUCT FOR U.S. JUDGES Canon 1 (2011).

As indicated earlier, the Code begins with Canon 1: "A Judge Should Uphold the Integrity and Independence of the Judiciary."[63] This Canon continues on to note that the admonition applies to both the professional and personal activities of a judge. In addition, the Canon says, "[t]he . . . Code should be construed . . . to further that objective [of promoting the integrity and independence of the system]."[64]

The commentary to Canon 1 articulates the importance of having and maintaining a legal system that will promote the rule of law. "Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn on their acting without fear or favor."[65] In other words, a judge must act impartially, just as he or she swore to do when taking the Oath.

Canon 2 continues the theme: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities."[66] "Appearances" are so important that the commentary defines the term. "An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired."[67] Accordingly, any behavior by a judge, whether on or off the bench, that creates "the appearance of impropriety," is damaging to the rule of law. "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges."[68]

While independence, impartiality, and the appearance thereof are vital to a judge, judges must be guided by one external influence: a judge must have "[r]espect for [the] [l]aw."[69] A judge must, in other words, "respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[70] The only permissible external influence on a judge, therefore, is the law, and "[a] judge should not allow . . . social [or] political . . . relationships to influence judicial conduct or judgment."[71]

Not only should a judge comply with the law, it should appear that the judge's decisions are not unduly influenced by any source other than the law. Thus, while

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[63] *Id.*

[64] *Id.*

[65] *Id.* cmt.

[66] *Id.* Canon 2.

[67] *Id.* Canon 2(A) cmt.

[68] *Id.*

[69] *Id.* Canon 2(A).

[70] *Id.*

[71] *Id.* Canon 2(B).

"judges should be independent, they must comply with the law . . . ."[72] Adherence to the primacy of the law, and appearing that one is doing so, "helps to maintain public confidence in the impartiality of the judiciary."[73]

By taking the Oath, a person who becomes a judge may have to change his or her behavior significantly—judges are, in short, held to a higher standard than non-judges, whether the non-judges are lawyers or non-lawyers. As the Code says: "[a] judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen."[74] Such restrictions may extend to membership in or open support for groups that promote certain ideological positions.

Because of the importance of appearances, a judge needs to evaluate membership in or open support for a group from a different perspective than a non-judge. The question for a judge should be whether membership in or open support for a group enhances the integrity and the appearance of impartiality of the judiciary, not whether the group promotes a political or ideological agenda with which the judge agrees.

A judge should consider the perspective of a litigant who will be appearing before that court, hoping for and believing justice will be done. After all, as the Code notes, the "appearance of impropriety" exists when a "judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired."[75] The rule of law ultimately depends on deference to and acceptance of rulings by judges. Such deference and acceptance, in turn, depend on "public confidence in the integrity and independence of judges."[76] Maintaining public confidence, therefore, and not furthering a particular ideology, should be a judge's concern.

Part of preserving public confidence in the federal judiciary requires that federal judges not use or be perceived as using their positions to further any goal other than promoting the rule of law. Therefore, "[a] judge should avoid lending the prestige of judicial office to advance the private interests of . . . others."[77] Accordingly, "[a] judge should be sensitive to possible abuse of the prestige of office."[78]

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[72] *Id.* Canon 1 cmt.

[73] *Id.*

[74] *Id.* Canon 2(A) cmt.

[75] *Id.*

[76] *Id.* Canon 1 cmt.

[77] *Id.* Canon 2(B) cmt.

[78] *Id.* It is hard to imagine how a Justice of the United States Supreme Court is not lending prestige to an ideological society when that society openly plays up that Justice's support for the group. For example, I recently received a "Membership and Benefits" brochure from the Faculty

While the apartheid regime that formerly ruled South Africa is an extreme example of how a group can twist the rule of law to serve evil ends, the regime relied heavily on the law to justify its existence and its suppression of black Africans. After a so-called trial, much of the leadership of the African National Congress, including Nelson Mandela, was sentenced to life in prison. Many years later, Mandela wrote of the importance of the rule of law and how it can be debased. "The apartheid regime," he wrote, "had put law and order in disrepute."[79] Instead of disrepute, there should be respect. "[T]he rule of law generally and in particular the judiciary should be respected."[80] The question for a judge, therefore, is whether membership in or open support for an ideological group enhances or decreases respect for the judiciary.

Canon 4 of the Code addresses judges' extrajudicial activities other than the political activities addressed in Canon 5. Canon 4 says: "A Judge May Engage in Extrajudicial Activities that Are Consistent with the Obligations of Judicial Office."[81] Such activities must not, however, "detract from the dignity of the judge's office . . . [or] reflect adversely on the judge's impartiality . . . ."[82] The Code contains specific provisions about "Law-related Activities," which may include participating in or supporting "Organizations."

"Law-related Activities" include "activities concerning the law, the legal system, and the administration of justice."[83] A judge is allowed to speak, write, lecture, teach, and participate about or in such activities.[84] The overriding concern for a judge, however, should be that the judge's "impartiality is not compromised."[85]

Division of the Federalist Society. The inside-cover of the brochure features a photograph of Justice Antonin Scalia. He is quoted as having said (at the Twenty-fifth Anniversary Gala, in 2007):

> I was cultivating the Federalist Society when it was just a seed. I served as faculty sponsor for the student group of that name formed at the University of Chicago. We thought we were just planting a wildflower among the weeds of academic liberalism and it turned out to be an oak.

THE FEDERALIST SOCIETY, FACULTY DIVISION, MEMBERSHIP AND BENEFITS (received Mar. 15, 2011, on file with the author).

[79] MANDELA, *supra* note 1.

[80] *Id.*

[81] CODE OF CONDUCT FOR U.S. JUDGES Canon 4 (2011).

[82] *Id.*

[83] *Id.* Canon 4(A)(1).

[84] *Id.*

[85] *Id.* Canon 4 cmt. Interestingly, the concern expressed in the Code, "impartiality," is the same concern contained in the oath of judicial office, in which a federal judge swears to act "impartially." *See supra* note 37 and accompanying text.

Similarly, "[a] judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice . . . ."[86]

The above provisions regarding "Law-related Activities" and participating in or supporting "Organizations" would permit federal judges to belong to or openly support either the Federalist Society or the American Constitution Society, except for the nature of the societies. Their nature brings them, and those who belong to or openly support them, into the political arena,[87] which makes judges' conduct subject to Canon 5's prohibition on various forms of political activity.

Canon 5 of the Code addresses judges' political activities: "A Judge Should Refrain From Political Activity."[88] While membership in or open support for an organization that promotes particular ideological views may not seem to run afoul of that Canon, some of the subparts and the commentary to the Canon are much more on point.

As noted earlier, the Code strives to preserve the independence of the judiciary.[89] One way it does so is to curtail judges' political activities. Paragraph A of Canon 5 contains "General Prohibitions." Under its provisions, "[a] judge should not . . . make speeches for a political organization . . . ."[90] Further, "[a] judge should not . . . pay an assessment . . . to a political organization . . . ."[91]

The key to the applicability of the Code's prohibition on political activity is whether an ideologically focused group is a "political organization" as the Code uses that term. If so, the prohibition applies. If not, the prohibition appears not to. As discussed below, the Code defines the term.[92] Though the definition is helpful, difficulty arises when an organization does not fall squarely within the definition but maintains a political agenda nonetheless.

A "political organization" is "a political party [or] a group affiliated with a political party . . . ."[93] The phrase "affiliated with a political party" raises the question of whether the affiliation must be formal, or whether it includes informal support for a political party or the party's goals.

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[86] CODE OF CONDUCT FOR U.S. JUDGES Canon 4(A)(3) (2011).

[87] *See infra* Part IV.

[88] CODE OF CONDUCT FOR U.S. JUDGES Canon 5 (2011).

[89] *See, e.g.*, *supra* notes 63–65 and accompanying text.

[90] CODE OF CONDUCT FOR U.S. JUDGES Canon 5(A)(2).

[91] *Id.* Canon 5(A)(3).

[92] *See infra* note 93 and accompanying text.

[93] *Id.* Canon 5 cmt.

What then does "affiliated with" mean? While both the Federalist Society and the American Constitution Society can legitimately assert they are independent entities having no formal affiliation with either major political party, it is undeniable that there is a significant overlap in membership and ideology with the two major political parties. Any informed observer knows the Federalist Society generally supports the ideological tenants of the Republican Party.[94] Moreover, during the administration of President George W. Bush, the Federalist Society attained significant power in selecting nominees for federal judgeships.[95]

At the same time, the congruence between the ideological goals of the Democratic Party and those of the American Constitution Society is just as clear.[96] The protestations of either group to the contrary are pure sophistry. Both groups quite openly make their ideological leanings known, yet both hide behind the fiction that they are non-partisan educational groups.

The Code expressly says, "[a]n independent and honorable judiciary is indispensable to justice in our society."[97] The Code also mentions that "[a] judge should maintain and enforce high standards of conduct . . . ."[98] Further, a judge "should personally observe those standards, so that the integrity and independence of the judiciary may be preserved."[99] Canon 2 essentially repeats this standard: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities."[100]

A critical aspect of independence and avoiding the appearance of impropriety is impartiality. Canon 3 proclaims that concept of impartiality: "A Judge Should Perform the Duties of the Office Fairly, *Impartially*, and Diligently."[101] The word "impartially" is in italics to indicate its importance, and to indicate it is also part of the Oath.[102]

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[94] *See, e.g.*, *infra* notes 106–09 and accompanying text (discussing the Federalist Society's 25th Anniversary Tribute Video, in which all of the non-judges who spoke are members of the Republican Party, the members of the judiciary who spoke were all appointees of Republican presidents, and the speakers openly paid homage to one President, Ronald Reagan).

[95] *See infra* note 134 and accompanying text.

[96] *See infra* Part IV.

[97] CODE OF CONDUCT FOR U.S. JUDGES Canon 1 (2011).

[98] *Id.*

[99] *Id.*

[100] *Id.* Canon 2.

[101] *Id.* Canon 3 (emphasis added).

[102] *See supra* notes 36–37 and accompanying text.

IV. THE FEDERALIST SOCIETY AND THE AMERICAN CONSTITUTION SOCIETY

There are, of course, many groups that adhere to and profess ideological positions, ranging from religious to secular, avowedly political (usually referred to as "parties") to narrowly focused (such as pro-life and pro-choice) to "conservative" or "liberal" groups. The two that have drawn the most attention in the legal world, both of which are openly interested in the methods or policies that judges use to interpret the law, are the "Federalist Society" and the "American Constitution Society" (ACS).

One does not have to wonder about the composition or objectives of either the Federalist Society or the ACS. They do not attempt to hide either. Both are refreshingly candid, especially the Federalist Society, about who and what they are.

The Federalist Society for Law and Public Policy (the Federalist Society) is a self-described "group of conservatives and libertarians interested in the current state of the legal order."[103] According to the Federalist Society's website, under the "Our Purpose" section, the Federalist Society was "founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be."[104]

The Federalist Society was founded in 1982 to combat what it refers to as the liberal orthodoxy being taught at America's law schools.[105] On its twenty-fifth anniversary, the Federalist Society produced a video, which is available on

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[103] *About Us*, FEDERALIST SOC'Y, http://fed-soc.org/aboutus/ (last visited Dec. 2, 2012).

[104] *Id.*

[105] I find the repeated references to the "liberal orthodoxy being taught" in law schools to be both interesting and unpersuasive. I attended the University of Minnesota School of Law from 1978 until 1981. Perhaps I missed it, but I do not recall any particular orthodoxy being taught at that school (as with most law students, I was just trying to survive; I was not worried about any particular "orthodoxy"). For the last twenty-three years I have taught at the University of Wyoming College of Law. I do not believe that the faculty has, or could, agree that we should teach any particular ideological viewpoint. I have always been free to teach what I want, the way I want to teach it. I know there are persons on the faculty with strongly held ideological beliefs, myself among them. A good teacher does not, in my view, allow those beliefs to influence his or her teaching. Preaching dogma is a poor substitute for teaching students to think for themselves.

It may be that the "liberal orthodoxy" to which the Federalist Society refers is or was prevalent at the elite schools, such as Harvard, Yale or Stanford, which are the primary source of justices of the United States Supreme Court; according to the Court's website, five justices graduated from Harvard Law School, two from Yale, and one from Columbia—Justice Alito's law school is not listed. *See Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/biographies.aspx (last visited Dec. 4 2012). Perhaps the problem is really that so many justices come from a handful of law schools. If they came from a wider array of schools, including "lesser"—and I use "lesser" only to indicate rankings in U. S. News

its website and on YouTube.[106] While the video makes much of the importance of "open" debate,[107] there is no doubt about how the society would like the debate to end. The society favors "limited constitutional government," commends the ideas of former President Ronald Reagan, and near the end of the video, the Honorable E. Spencer Abraham, one of the founders of the society—a lawyer, a former United States Senator, and former Secretary of Energy under President George W. Bush—says "our side is the one with momentum."[108]

The reference to "our side" can only mean that there is a "their side," which is openly and critically referred to as the liberals. Former Attorney General Meese, for example, speaks of the importance of the Federalist Society in providing a "counterpoint" to some of the "liberal approaches of the American Bar Association," and the society, he says, is a "watchdog" over the ABA.[109] So while the Federalist Society properly takes credit for expanding debate on law school campuses, there is little doubt about how the society wants the debate to end, and that the society believes, at least for now, the debate is ending in its favor.

The ACS takes a similar though ideologically opposite view. The organization was founded in 2001.[110] The ACS proclaims its mission is "to ensure that fundamental principles of human dignity, individual rights and liberties, genuine equality, and access to justice enjoy their rightful, central place in American law."[111] The ACS does not make its philosophy as clear as the Federalist Society. "ACS is a non-partisan, non-profit educational organization. We do not, as an organization, lobby, litigate or take positions on [specific initiatives], cases,

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and World Report, not to suggest that those rankings have any merit; they are, if anything, very misleading—schools, such as the University of Wyoming, we would all benefit from such diversity. While the ethnic and gender diversity on the Court has improved significantly, the diversity that would be provided by justices coming from a variety of law schools is getting worse. It now appears that the vast majority of lawyers and judges, those who did not attend a so-called elite law school, will never be on the Court. The diversity that comes with differing legal educational backgrounds is sadly lacking.

In any event, not having seen or sensed the "liberal orthodoxy" that the Federalist Society gives as a justification for its being, I cannot help but question its motives, or those of the ACS either.

[106] FEDERALIST SOC'Y, *Federalist Society's 25th Anniversity Tribute Video*, YOUTUBE (Apr. 22, 2011), http://www.youtube.com/watch?v=PEsxcuP-Sv4&feature=player_embedded#. This video is also available at http://fed-soc.org/aboutus/. The video features three Justices of the United States Supreme Court (Antonin Scalia, Clarence Thomas, and Samuel Alito), a nominee for the Court (Robert Bork), and former U. S. Attorney General Edwin Meese.

[107] *Id.*

[108] *Id.* The Honorable E. Spencer Abraham makes the statement approximately nine minutes and seven seconds (9:07) into the video.

[109] *See id.*

[110] AM. CONST. SOC'Y, STUDENT CHAPTER HANDBOOK 3 (2012), *available at* http://www.acslaw.org/STUDENT%20CHAPTER%20HANDBOOK,%202011-2012.pdf.

[111] *Id.* at 27.

legislation or nominations. We do encourage our members to express their views and make their voices heard."[112] The society's ideological bent becomes more apparent when one reviews a list of the ACS's recent speakers. With exceptions, the list of speakers is heavily weighted on the liberal side.[113]

Speaking at an ACS or Federalist Society function is not inappropriate unless either is considered a "political organization,"[114] of course, and judges should probably be more public about their generally secretive existence.[115] The foregoing reference to a list of ACS speakers is only to suggest that the ACS has a clear ideological view.

The ACS's ideological leaning becomes clearer when, for example, one listens to the discussion of the Supreme Court's 2009–2010 term in a video on the ACS website.[116] The most telling comment, made more than once, is about "conservative civil rights."[117]

Both societies promote particular methods of legal analysis, especially constitutional analysis, as the true and correct approach, and both societies generally support one of the two major political parties (the Federalist Society generally supports the Republican Party, while the ACS generally supports the Democratic Party). Somewhat ironically, each society proclaims that its view will promote the rule of law.

Both societies emphasize that they are primarily educational groups with a focus on promoting debates over current issues. Each provides a forum in which new lawyers and law students have an opportunity to meet with judges and experienced lawyers—the websites for both organizations list most of their activities as presentations and discussions over dinner or beverages.

Neither the Federalist Society nor the ACS engages in explicit political actions. Their meetings generally discuss legal concepts. There are exceptions, however. In a recent ACS meeting, Judge Calabresi likened George W. Bush to

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[112] *Id.* at 3, 28.

[113] *See, e.g.*, AM. CONST. SOC'Y, ACS 2012 CONVENTION SCHEDULE, *available at* http://www.acslaw.org/sites/default/files/pdf/ACS_conv_bk12_schedule_D%20(2).pdf.

[114] *See supra* notes 90–93 and accompanying text.

[115] *See, e.g.*, CODE OF CONDUCT FOR U.S. JUDGES Canon 4 cmt. (2011) ("Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives.").

[116] *See ACS Panel Discussion: 2009–2010 Supreme Court Review*, AM. CONST. SOC'Y (July 1, 2010), http://www.acslaw.org/news/video/acs-panel-discussion-2009-2010-supreme-court-review.

[117] *See id.*

Hitler.[118] This seems to be an aberration, however, as most ACS meetings do not promote politics, except to promote political participation.[119] Perhaps, the exception proves the rule.

While neither society engages in overt political activity, both do participate covertly. The ethical concern is not that judges speak at the events of either society but rather that some members of the judiciary are members of the group, actively support the group, or both. Membership, far more than appearing at a forum, implies a greater degree of sympathy or support for an organization's objectives. Such an expression of support is ethically problematic.

V. MEMBERSHIP IN OR OPEN SUPPORT FOR AN IDEOLOGICAL SOCIETY IS INCONSISTENT WITH THE OATH AND THE CODE

The standards of the Oath and the Code are not precise. It is neither possible nor even desirable to list everything a judge should or should not do. General principles are both more useful and more practical. Goals, not specifics, should guide a judge's behavior.

Given the general principle in the Oath that a judge should act "impartially," along with the principle in the Code that a judge should avoid even "the appearance" of professional impropriety,[120] one can easily conclude that membership in or active support for one of these societies creates the impression that one is neither impartial nor independent. First, these societies encourage one viewpoint and discourage the "other side's" viewpoint rather than encouraging objective decision-making and impartiality.[121] A judge may lose sight, or at least be perceived to have lost sight, of the other side of an argument because of his or her membership in or open support for a particular ideological group. With membership or active support may come either explicit or implicit pressure from other members or the society. After all, as the argument goes, how could a member or supporter of the Federalist Society side with a "liberal" view of interpreting the constitution, or

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[118] Julia Preston, *U.S. Judge Apologizes for Equating Victories of Bush and Hitler,* N.Y. TIMES, June 24, 2005, http://www.nytimes.com/2004/06/25/nyregion/25judge.html.

[119] *See* STUDENT CHAPTER HANDBOOK, *supra* note 110, at 8.

[120] The appearance principle formerly applied to lawyers (it still applies to those in the few states that have in effect a version of the ABA Model Code of Professional Responsibility). Canon 9 of the ABA Model Code of Professional Responsibility (which was replaced in 1983 by the Model Rules of Professional Conduct) said: "A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY." MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1980). That provision was omitted from the Model Rules, which went into effect in 1983, and versions of which have been adopted in the vast majority of jurisdictions.

[121] Perhaps the clearest example of each society's one-sidedness is the comment of the Honorable E. Spencer Abraham, a founder of the Federalist Society, that "our side is the one with momentum." *See supra* note 108 and accompanying text.

how could a member or supporter of the ACS take a "conservative" perspective on an issue of constitutional interpretation? As a consequence, a judge who openly professes support for either society loses the appearance of being "open mind[ed]," part of the definition of "impartiality" in the ABA Model Code.[122]

Second, one can argue that a judge who belongs to or openly supports a society may worry about the impact of a decision on his or her standing with the society rather than ensuring he or she makes the best possible decision in a particular case, regardless of whether the result is "conservative" or "liberal." While all judges need to be concerned about the long-term effects of their decisions, their ultimate concern should be with the rights of the parties, not with whether the decision is in accord with a particular ideology.

Perceived outside pressures can create the impression of bias, even if that pressure does not actually influence a judge. In addition to the impression, such pressures may mean a judge is not making an independent decision.

Third, the overlap between the membership and ideologies of these societies and those of the major political parties may lead to the impression of partial decision-making in favor of or against a particular party. If membership in or open support for a society leads to even the perception of partial decision-making, it violates both the Oath and the Code. More importantly, it threatens the integrity of the judicial system, the keystone of the rule of law.[123]

One may argue that these societies do not actively support a particular party or ideology, and that any partiality as a result of membership or open support would be slight. The counter-argument, however, is that the Code states: "A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved."[124] Further, "[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. . . . Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary."[125]

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[122] *See* ABA MODEL CODE OF JUDICIAL CONDUCT Terminology (2010).

[123] Ultimately, the rule of law depends on public confidence in the system. A major issue in Russia, for example, is that no one trusts the legal system. As a result, Russians of means wish to have their legal disputes decided in other countries, such as in the United Kingdom, where the system is viewed much more favorably. *See, e.g.*, Lucy Warwick-Ching, *Moscow's Rich Buy £1m Entry into UK*, FT (Nov. 30, 2012, 9:04 PM), http://www.ft.com/intl/cms/s/0/a0d6be06-3aff-11e2-b3f0-00144feabdc0.html#axzz2E96w5StR.

[124] CODE OF CONDUCT FOR U.S. JUDGES Canon 1 (2011).

[125] *Id.* Canon 1 cmt. "Impartiality," of course, is part of the oath of judicial office for all federal judges. *See supra* notes 37, 41 and 47 and accompanying text.

The Oath and the Code suggest that if membership in or active support for these societies is ethically questionable, a judge should not participate in either ideological group because judges must aspire to the highest standards. In addition, belonging to or openly supporting an ideological group does not further the goal of promoting public confidence in the impartiality of the judiciary. The appearance is best illustrated with an example. "The Political Graveyard" is a website that bills itself as "the Internet's Most Comprehensive Source of U.S. Political Biography."[126] The listing of "Federalist Society Politicians" includes the following entry:

> John Glover Roberts, Jr. (b. 1955)—also known as John Roberts—Born in Buffalo, Erie County, N.Y., January 27, 1955. Son of John Glover Roberts, Sr. (1928–2008) and Rosemary (Podrasky) Roberts. Lawyer; Judge of U.S. Court of Appeals for the D.C. Circuit, 2003–05; Chief Justice of U.S. Supreme Court, 2005–. Catholic. Member, Federalist Society. Still living as of 2009.[127]

The entry for Samuel Alito also indicates Federalist Society membership; the entries for Justices Scalia and Thomas are silent as to membership.[128]

Given the foregoing entry (which was probably made without the knowledge or consent of either the Federalist Society or Chief Justice Roberts) someone wants to broadcast Chief Justice Roberts's alleged connection with the Federalist Society (there appear to be no Democrats listed among the Federalist Society members on the list; some entries do not identify a political party). Most entries make the person's alleged party affiliation clear, as well as his or her connection with the Federalist Society. For example, the website also includes an entry for "John David Ashcroft." The website lists him as a former U. S. Senator and former U. S. Attorney General and lists his party affiliation as "Republican." The website also includes "William Jefferson Clinton," who is listed as a "Democrat."

Although "The Political Graveyard" lists more than just Federalist Society members, a fundamental problem remains. Judges should not be listed as politicians. Doing so diminishes the appearance of impartiality that is critical to the judiciary. Ultimately, classifying judges as politicians weakens the rule of law.

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[126] POLITICAL GRAVEYARD, http://politicalgraveyard.com/group/ (last updated Oct. 2, 2012).

[127] *Federalist Society Politicians*, POLITICAL GRAVEYARD, http://politicalgraveyard.com/group/federalist-soc.html (last updated Oct. 2, 2012).

[128] *See id.*; *id. Index to Politicians*, http://politicalgraveyard.com/bio/thomas2.html; *id.* http://politicalgraveyard.com/bio/scadden-schafe.html. The entries for Justices Breyer, Ginsburg and Kennedy do not indicate membership in either the Federalist Society or the ACS. Neither Justice Kagan nor Justice Sotomayor have entries.

No comparable list was found for the ACS. Perhaps that is because the ACS is newer than the Federalist Society and has not been as successful in recruiting members or having members named to the federal bench. Whatever the reason, the same concern would exist for judges who belong to or actively support the ACS. The appearance of impropriety would be present. (While accurate totals are difficult if not impossible to find, it appears that, as of 2009, at least forty-two members of the federal bench were also members of the Federalist Society).[129]

Concern about the influence of either or both of the societies can easily decrease public confidence in the judiciary. Such concern flies directly in the face of the Code's mandate that a judge is to avoid "the Appearance of Impropriety in All Activities."[130] An appearance of impropriety exists "when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired."[131]

While it is always difficult to determine the outcome of a standard incorporating the "reasonableness" test, when it comes to ethics, any doubts should be resolved in favor of the ethical standard involved, regardless of whether it applies to judges or lawyers. This is because a fundamental principle of the Code is that "[a]n independent and honorable judiciary is indispensable to justice in our society."[132]

In short, the Oath (for all federal judges) and the Code (for most) establish the floor beneath which a judge may not sink, and the ceiling above which a judge may not go. In between is a large area within which a judge may decide how he or she will act. In making that decision, however, the judge should be guided by the notion that appearances are as important as reality. Therefore, a judge must abide by the Oath and, in most cases, the Code as well. Regardless of whether the judge looks to the Code, the Oath remains. Perhaps its cardinal principle, repeated often in the Code, is that every member of the federal judiciary shall discharge his or her judicial duties "impartially."[133] A judge should not skate close to the ethical edge. He or she should strive to enhance the profession. If an issue is questionable,

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[129] Judges were counted as members if they were listed in two of the following sources: POLITICAL GRAVEYARD, http://politicalgraveyard.com/group/federalist-soc.html (last visited Nov. 21, 2012); RIGHT WING WATCH, http://www.rightwingwatch.org/content/federalist-society (last visited Nov. 21, 2012); or Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62 POL. RES. Q. 366 (June 2009).

[130] CODE OF CONDUCT FOR U.S. JUDGES Canon 2 (2011).

[131] *Id.* Canon 2(A) cmt.

[132] *Id.* Canon 1.

[133] For a discussion of the Oath, see *supra* notes 30–46 and accompanying text.

such as membership in or open support for an ideological group, the answer is simple. Do not openly support or be a member. Be a judge whose integrity and impartiality cannot reasonably be questioned.

CONCLUSION

While the Federalist Society proclaims itself to be an educational and non-partisan organization, the reality is that during the administration of former President George W. Bush, it became much more. The society was so involved in the selection of federal judges that "it was common knowledge that the Federalist Society was the primary vetter of appointees" to the federal bench.[134] By itself, the change from an educational group to one with a political agenda raised additional ethical concerns. "The changing nature of some organizations . . . make[s] it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated . . . ."[135] Since the organization changed, a reasonable view of membership in or open support for the group changed too. What may have been ethically permissible before ceased to be permissible afterward.

Thus far, there is no indication that the ACS is playing a similar role in the Obama Administration. If it does, such a role would raise the same ethical concerns.

The Code defines "political organization" as "a political party, a group affiliated with a political party . . . , or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office."[136] Given the Federalist Society's close relationship with the Bush administration, it is disingenuous to argue that the society is not affiliated, at least indirectly, with the Republican Party. It seems plain, therefore, that the Federalist Society was a "political organization" within the meaning of the Code, at least during the administration of President George W. Bush.

One may argue, and the Federalist Society surely would, that its "principal purpose" is to educate, not to secure the election of certain individuals. If that were true, the society would engage only in educational activities and would not have assumed a primary role in selecting federal judges during the Bush administration. Perhaps now that the Republican Party does not control the White House, the

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[134] Malvina Halberstam, *Judicial Review, A Comparative Perspective: Israel, Canada, and The United States*, 31 CARDOZO L. REV. 2393, 2405 (2010) (quoting Professor Marci Hamilton); *see also* Steve Bachmann, *Lawyers, Law, and Social Change—Update Year 2010,* 34 N.Y.U. REV. L. & SOC. CHANGE 499, 557 n.334 (2010) (citing STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 158–60 (2008)) (referencing the "prominent role Federalist Society leaders played in advising the Bush White House on judicial appointments").

[135] CODE OF CONDUCT FOR U.S. JUDGES Canon 4(B) cmt. (2011).

[136] *Id.* Canon 5 cmt.

society's role is principally educational. It seems reasonable to expect, however, that when a future President is a Republican, the society will want to have the kind of influence it did under President George W. Bush. Its "principal purpose," or at least "a principal purpose," will become influencing the selection of federal judges through the election of the Republican candidate for President.

Perhaps the ultimate response to an argument over the "principal purpose" of the Federalist Society, or the ACS, is that the rule of law depends as much on appearances as on anything else. Any argument that neither society is affiliated with a political party and that its "principal purpose" is educational depends on arguing about the letter of the law (the Oath and the Code) and ignoring its spirit.

Rather than arguing over appearances, judges should do the right thing: follow high ethical standards. Doing so will enhance public confidence in the judiciary, the key to the rule of law. Acting otherwise will "diminish[] public confidence in the judiciary and injure[] our system of government under law."[137] The question, therefore, for any judge who belongs to or openly supports either society is whether doing so "ensures the greatest possible public confidence in" the judiciary?[138] If the answer is "no," the judge should not belong to or actively support the organization. If the answer is "maybe," the judge still should not belong to or support the organization. Only if the answer is a clear "yes" should the judge be a member of or openly support the group. With both the Federalist Society and the ACS, the answer will never be a clear "yes." Membership in or open support for either group, therefore, is not ethically appropriate.

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[137] *Id.* Canon 1 cmt.

[138] *See* ABA MODEL CODE OF JUDICIAL CONDUCT Preamble[2] (2010) ("Judges . . . should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.").