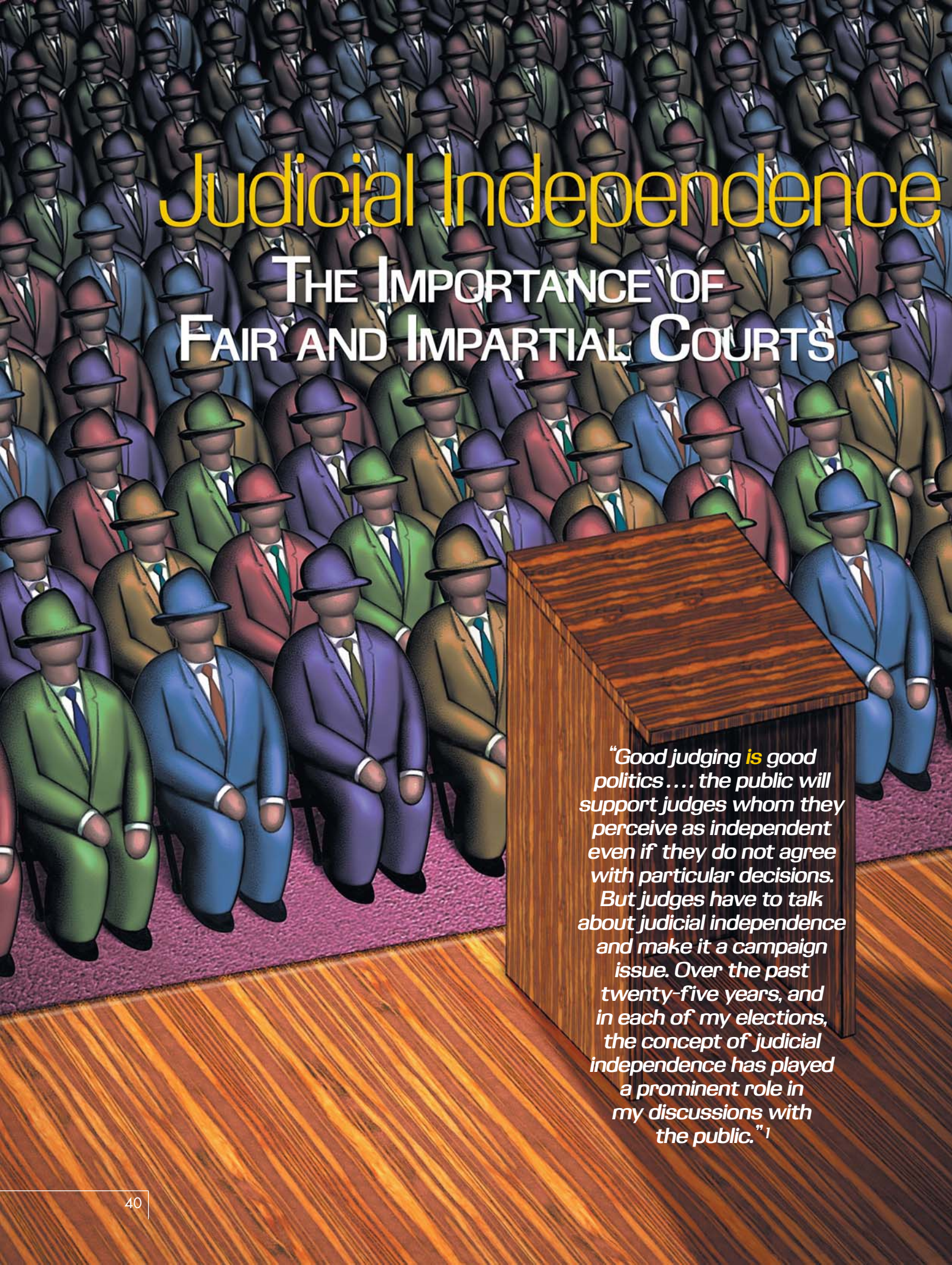


# Judicial Independence

## The Importance of Fair and Impartial Courts

*"Good judging **is** good politics . . . . the public will support judges whom they perceive as independent even if they do not agree with particular decisions. But judges have to talk about judicial independence and make it a campaign issue. Over the past twenty-five years, and in each of my elections, the concept of judicial independence has played a prominent role in my discussions with the public."*[1]

# as a Campaign Platform

## The Current State of Judicial Campaign Speech

Candidates campaign for public office by stating views and opinions on the hot issues of the moment. Nationally, 87 percent of all state judges face an election within 39 states.[2] Judicial elections, however, are different from executive or legislative branch elections because judges are different from other elected officials: Judges base their decisions on the facts and law presented in each individual case, not on their personal viewpoints on policy issues. Unlike other candidates, judges cannot campaign by making promises about how they'll decide issues. Constraints are placed upon judicial candidates in all states by canons of judicial conduct, and limits are placed on a judge's ability to sit on a case if the judge "decides" the case during a campaign. State codes of judicial conduct in states with judicial elections also limit the political activities of judges.[3]

Restrictions on judicial campaign speech were designed to maintain judicial impartiality and the perception of that impartiality. The traditional view is that if a judge comments on a pending or impending case, the comments will reduce the litigants' and the public's confidence in the impartiality and fairness of our courts.

In *Republican Party of Minnesota v White,*[4] decided on June 27, 2002, the United States Supreme Court held that the portion of Canon 5(A)(3)(d)(i) (2000) of the Minnesota Code of Judicial Conduct, providing that a "candidate for a judicial office, including an incumbent judge" shall not "announce his or her views on disputed legal or political issues," violates the First Amendment. In response to the United States Supreme Court decision in *White,* the American Bar Association amended its Model Code of Judicial Conduct.

Since the *White* decision, judicial candidates have been receiving more questionnaires than ever before from special interest groups asking them to reveal their views on a variety of issues. Sample questions include, "Have you ever cast a public vote relating to reproductive rights?" and "Do you support the death penalty?"

Many judicial candidates are choosing not to exercise their First Amendment rights fully because they are concerned they may tarnish the public's perception of fairness and impartiality, and may disqualify themselves from sitting on cases. But that reasoning does not require a judicial candidate to be silent during an election. Judges and judicial candidates can and *should* speak on the issue of judicial independence.

## Free to Speak on Judicial Independence

Judges and candidates are legally and ethically free to speak about the critical importance of judicial independence. In any judicial selection system, the best way to ensure judicial independence is to develop the public's understanding of, and respect for, the concept of judicial independence.[5] Lawyers and judges must educate the public on judicial roles and duties. Educational efforts should not be restricted to elections or times of crisis. Judges and lawyers must be community educators, using a variety of tools to reach the public, the media, and the executive and legislative branches of government. Public outreach efforts promote judicial independence because they enable citizens to evaluate critical attacks on judges and to value judicial independence.[6]

The points that should be addressed in this education effort are:

- What is judicial independence?
- Why is judicial independence important to you, the citizen?
- What are the threats to judicial independence?
- How can judicial independence be protected?

### What is Judicial Independence?

> *"The law makes a promise—neutrality. If the promise gets broken, the law as we know it ceases to exist."*
>
> —Supreme Court Justice Anthony M. Kennedy[7]

Judicial independence means that judges decide cases fairly and impartially, relying only on the facts and the law. Individual judges and the judicial branch as a whole should work free of ideological influence. Although all judges do not reason alike or necessarily reach the same decision, decisions should be based on determinations of the evidence and the law, not on public opinion polls, personal whim, prejudice or fear, or interference from the legislative or executive branches or private citizens or groups.

There are two types of judicial independence: decisional independence and institutional independence (sometimes called branch independence). Decisional independence refers to a judge's ability to render decisions free from political or popular influence; decisions should be based solely on the facts of the individual case and the applicable law. Institutional independence describes the judicial branch as a separate and co-equal branch of government with the executive and legislative branches.[8]

Any discussion of judicial independence needs, however, to be joined with a discussion of accountability. As Roger Warren, President Emeritus of the National Center for State Courts, stated, "the rule of law itself is a two-edged sword" because it not only ensures the protection of rights, but also enforces responsibilities.[9] The rule of law holds government officials accountable to those in whose name they govern to prevent abuse of power, and the judiciary is not exempt from accountability. Judges are accountable to the public to work hard, keep their dockets current, educate themselves

BY HON. SHIRLEY S. ABRAHAMSON

about changes in the law, and treat each person with respect and dignity. Judges are accountable to represent the judicial branch before the public and other branches of government and to advocate for court reform.

### Why is Judicial Independence Important to You, the Citizen?

Judicial independence is a means to an end—the end is due process, a fair trial according to law. Judicial independence thus protects the litigants in court and all the people of the nation.

### What are the Threats to Judicial Independence?

Historically, threats to judicial independence have come from the legislative and executive branches. Executive and legislative leaders have at times tried to influence judicial outcomes. Today, issues that have triggered such attempts include reapportionment, school funding, reproduction rights, gun control, tort reform, and affirmative action.[10] Other governmental threats to an independent judiciary are:

- Poor inter-branch relationships between the judiciary, the legislature, and the executive, marked by a lack of communication;
- Legislative limits on or curtailment of judicial jurisdiction;
- Legislative refusal to increase judicial salaries; and
- Chronic under-funding of the judicial branch and increasing workload.

More recently, non-governmental groups have threatened judicial independence using political, social, and economic resources to influence the selection and retention of judges.[11] The danger is that when individuals or groups are highly organized, ideologically driven, and well-funded, their self-interest in winning cases overcomes their interest in an independent judiciary.[12]

More specific threats to judicial independence by non-governmental groups include:

- Inappropriate threats of impeachment prompted by particular judicial decisions;
- Political threats intended to influence a judge's decision in an individual case; and
- Misleading criticism of individual decisions.

The best judges are those who resist threats to judicial independence and actively advocate judicial independence. The basic, underlying safeguard for judicial independence is popular support of the concept.[13]

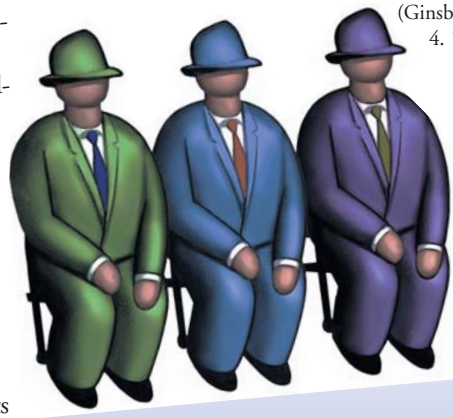
### How Can Judicial Independence Be Protected?

Public education efforts about judicial independence and judicial selection face a number of challenges, including limited public knowledge of courts and judges and limited resources to reach a broad public audience. Fortunately, experience has shown that the public is receptive to messages concerning the impartiality of the judiciary and that lawyers and judges are effective messengers, especially when partnering with non-lawyer membership organizations, like the League of Women Voters.[14]

If judges include judicial independence as a campaign issue in their election and retention campaigns, the public will respond with an eagerness to learn more. The public's appreciation of and respect for judicial independence is the best way to ensure that the judiciary will remain independent.[15] Campaigning on judicial independence can educate both judges and the electorate on the importance of protecting fair and impartial courts. ◆

*A similar version of this article has appeared in other State Bar publications.*

*Shirley S. Abrahamson, Chief Justice of Wisconsin, is immediate past chair of the Board of Directors of the National Center for State Courts and immediate past president of the Conference of Chief Justices. Chief Justice Abrahamson is recognized as a national leader in state courts issues, such as protecting judicial independence, improving interbranch relations, and expanding outreach to the public.*



## Fast Facts:

Restrictions on judicial campaign speech were designed to maintain judicial impartiality and the perception of that impartiality.

Judges and candidates are legally and ethically free to speak about the critical importance of judicial independence.

Judicial independence means that judges decide cases fairly and impartially, relying only on the facts and the law.

### Footnotes

1. Shirley S. Abrahamson, "Speech: The Ballot and the Bench," 76 NYUL Rev 973, 986 (2001).
2. Call to Action: Statement of the National Summit on Improving Judicial Selection, Expanded with Commentary, The National Center for State Courts 2002, www.ncsconline.org/D_research.
3. Effective Judicial Campaign Conduct Committees: A How-to Handbook, National Ad Hoc Advisory Committee on Judicial Campaign Conduct (2004). See also, *Republican Party of Minnesota v White,* 536 US 765 (2002) (Ginsburg, J., Dissenting).
4. The 8th Circuit has decided the remand in *Republican Party of Minnesota v White.* It has held unconstitutional the prohibition on judges personally soliciting campaign contributions and the Minnesota restrictions on partisan activity. You can find the opinion at http://www.ca8.uscourts.gov/opndir/05/08/994021P.pdf.
5. Shirley S. Abrahamson, "Speech: The Ballot and the Bench," 76 NYUL Rev 973, 977 (2001).
6. Shirley S. Abrahamson, "Speech: The Ballot and the Bench," 76 NYUL Rev 973, 993–4 (2001).
7. Address to the American Bar Assn Symposium, Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice, Dec. 4–5, 1998.
8. http://www.ajs.org/cji/cji_whatisji.asp.
9. Warren, R. (2003) "The Importance of Judicial Independence and Accountability," Unpublished speech in China available on the National Center for State Courts' Website: www.ncsconline.org/WC/Publications/KIS_JudIndSpeechScript.pdf.
10. Shirley S. Abrahamson, "Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence," 64 Ohio St LJ 3 (2003).
11. Id. at 9.
12. Id. at 9.
13. Shirley S. Abrahamson, "Speech: The Ballot and the Bench," 76 NYUL Rev 973, 990 (2001).
14. http://www.justiceatstake.org/contentViewer.asp?breadCrumb=2.
15. Shirley S. Abrahamson, "Speech: The Ballot and the Bench," 76 NYUL Rev 973, 977 (2001).