

# IAJ/UIM

## Study Commission IV — 2022

### United States

#### Judicial Workplace and Judicial Independence

##### What is the impact on judicial independence of the judicial workplace (including nominations and appointments, independence in decision making, governance, assignments, fund and other resources)?

Judicial independence is critical to the function of the judiciary. An independent judiciary ensures both fairness in proceedings and public confidence in the institution.

In an independent judiciary, a judge analyzing the facts of a dispute in relation to the applicable law should not be influenced by other branches of government, the parties, or public and political opinion. The goal is to promote fairness across the judicial system by avoiding even the implication of personal bias in decisions.<sup>1</sup> A predictable and transparent system reflects the “rule of law” rather than, hypothetically, the “rule of judges.”

The United States Constitution, which provides for lifetime appointment (subject to good behavior) of federal judges, along with a proviso that their salaries may not be diminished, supplies a core

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<sup>1</sup> United States Courts, *Code of Conduct for United States Judges, Canon (2) (B)*, UNITED STATES COURTS (Mar. 12, 2019), [Link](#). “A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge.”

foundation for judicial independence. Judicial independence is supported by oaths and ethics codes as well as by statute. The Judiciary Act of 1789 provided a judicial oath for judges and Justices. That oath, which federal judges still take upon assuming office, as originally written states: “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 ... according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.”<sup>2</sup> This Act was followed by the first federal disqualification statute—28 U.S.C. § 455, which now provides in part that: “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>3</sup>

America’s first formal judicial ethics code emerged when an active federal judge also assumed the role of Commissioner of Baseball. In reaction to this conflict, the American Bar Association (ABA) formed the Committee on Judicial Ethics, which produced the 1924 ABA Canons of Judicial Ethics—a set of thirty-four canons that aimed to curtail the use of the office for personal ambitions. Importantly, the standard that emerged was the *appearance of impropriety*, notwithstanding the existence of actual bias or wrongdoing.

Around the 1970s, the Judicial Conference of the United States—the policy making body of the federal courts—directed judges to report any income received for nonjudicial services, such as teaching. In 1973, the Judicial Conference adopted the first federal ethics code, the Code of

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<sup>2</sup> Supreme Court of the United States, *Text of the Oaths of Office for Supreme Court Justices*, SUPREME COURT OF THE UNITED STATES (Jun. 15, 2022), [Link](#). The minimally revised version of the text can be found at 28 U. S. C. § 453 (2018).

<sup>3</sup> 28 U.S.C. § 455(a) (2018).

Conduct for Federal Judges. Notably, the Code does not require judges to lead a monastic life in isolation. While judges need to meet strict ethical standards, we neither expect nor want our judges to withdraw from society. Canon 4 reflects this sentiment: “A Judge May Engage in Extrajudicial Activities that are Consistent with the Obligations of Judicial Office.”<sup>4</sup> There is also a code of conduct for judicial employees.<sup>5</sup>

The United States participates in GRECO, the Council of Europe’s Group of States against Corruption. Like all members, the United States is subject to period review of its anti-corruption and good governance practices. The United States received a favorable review of its judiciary several years ago.<sup>6</sup>

## **I. Nominations and Appointments**

The structure of the judiciary as laid out in the U.S. Constitution contributes to the independence of the judiciary. Federal judges are nominated by the President and approved with the advice and consent of the United States Senate. In the law review article *Packages of Judicial Independence: The Selection and Tenure of Article III Judges* Harvard Law Professor Vicki C. Jackson explains the distinction between the political nomination process and the non-political post-confirmation independence: “The appointments process is a political one by constitutional design; it allows for a form of democratic participation, through elected

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<sup>4</sup> United States Courts, *Code of Conduct for United States Judges*, UNITED STATES COURTS (Mar. 12, 2019), [Link](#).

<sup>5</sup> United States Courts, *Guide to Judiciary Policy: Code of Conduct for Judicial Employees*, UNITED STATES COURTS (Mar. 21, 2022), [Link](#).

<sup>6</sup> Group of States Against Corruption, *United States Fourth Evaluation Round*, COUNCIL OF EUROPE (May, 2016), [Link](#).

representatives, in the selection of federal judges.”<sup>7</sup> After confirmation, the executive and legislative branches play no role because “Article III judges were designed to function with great independence—independence from political and popular pressures and independence to interpret and apply the law, including the Constitution, so as to resist encroachments by other branches of government.”<sup>8</sup>

## II. Independence in Decision Making

Although the nomination process is a political one, following confirmation, federal judges operate without influence of either the executive or legislative branches. While this separation of powers does not prevent sparring between the branches, it is critical to independent decision making.

Article III Section 1 of the U.S. Constitution provides additional safeguards for judicial independence: judges shall serve a life term while in “good Behaviour” and their salaries cannot be diminished; in other words, Congress cannot retaliate against the judiciary by lowering a judge’s wages.<sup>9</sup> Although removal of federal judges is very difficult and cannot be arbitrary, Congress can impeach a judge for “conviction of, treason, bribery, or other high crimes and misdemeanors.”<sup>10</sup>

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<sup>7</sup> Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965 (2007).

<sup>8</sup> Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1006 (2007).

<sup>9</sup> U.S. CONST. art. III, § 1.

<sup>10</sup> U.S. CONST. art. II, § 4.

Under the ethics Code, judges are required to “perform the duties of the office fairly, impartially and diligently.” Importantly, “a judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment.”<sup>11</sup>

The Code provides strict disqualification requirements to ensure impartiality. Obviously, a judge must recuse in any proceeding “in which the judge’s impartiality might reasonably be questioned.” Of particular significance, a judge must recuse if the judge or a member of the judge’s household has “a financial interest” in the subject matter of the controversy.” A financial interest includes even a single share of stock, but does not apply to mutual funds. By encompassing the judge’s close relatives, the canon realizes the ethical complications that can arise through family associations.

The canons also emphasize the independence of the judiciary from organizational interests, especially in the context of politics and partisan interests—a theme that runs through several ethical canons is that “A judge should be faithful to [...] the law and should not be swayed by partisan interests, public clamor, or fear of criticism”<sup>12</sup> and Canon 5 states that “A Judge Should Refrain from Political Activity.”<sup>13</sup> Judicial participation in politics is forbidden on the federal level, though notably in

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<sup>11</sup> United States Courts, *Code of Conduct for United States Judges, Canon (2) (B)*, UNITED STATES COURTS (Mar. 12, 2019), [Link](#).

<sup>12</sup> United States Courts, *Code of Conduct for United States Judges, Canon (3) (A)*, UNITED STATES COURTS (Mar. 12, 2019), [Link](#).

<sup>13</sup> United States Courts, *Code of Conduct for United States Judges, Canon (5)*, UNITED STATES COURTS (Mar. 12, 2019), [Link](#).

some jurisdictions state judges run for office in both partisan and non-partisan elections.<sup>14</sup>

In addition to separating themselves from ideological or organizational associations, judges should maintain distance from the influence of individual scholars and experts—whether that be counsel, acquaintances, or law professors. Here, again, it is the *appearance of impropriety* that constrains the judge: Canon (2) (B) reads “A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge.”<sup>15</sup> In other words, a judge cannot give even the “impression” of special favor or reliance.

### III. Governance

The Judicial Conference of the United States is the policy-making body for the federal judiciary. One of the statutory requirements of the Judicial Conference, under 28 U.S.C. § 331, is to “submit suggestions to the various courts that promote uniform management procedures and the expeditious conduct of court business.”<sup>16</sup> The Judicial Conference oversees

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<sup>14</sup> For an example of a non-partisan election: Washington Courts, *Judicial Elections: Washington State Primary Election Information*, WASHINGTON COURTS (July 13, 2012), [Link](#). “In Washington State, judges are elected in nonpartisan elections. When a justice of the Washington Supreme Court, a judge of the state Court of Appeals or a superior court resigns or dies during a term of office, the Governor appoints a new judge to fill that position. The appointed judge must run in the next election, which may be contested.”

<sup>15</sup> United States Courts, *Code of Conduct for United States Judges, Canon (2) (B)*, UNITED STATES COURTS (Mar. 12, 2019), [Link](#).

<sup>16</sup> United States Courts, *Governance and the Judicial Conference*, UNITED STATES COURTS (Jun. 15, 2022), [Link](#).

the Director of the Administrative Office and has specific powers to intervene in the administration of federal courts.

The Judicial Conference is headed by the Chief Justice of the Supreme Court, with membership from each circuit, including the circuit’s Chief Judge and a representative of the district courts in the circuit. The federal courts are divided geographically into twelve circuits plus the Federal Circuit, which hears patent appeals and certain appeals from claims against the government.

Chief Judges are not elected but chosen solely by seniority. This selection process takes politics and personal preference out of the process. Chief Judges serve for a term of seven years, unless the court agrees to a shorter term. Each court largely manages its own administrative and operational agenda. This allows a court to appoint support staff, supervise budget, and manage court operations independently. While the Chief Judge oversees administrative issues, the clerk of the court manages the day-to-day administrative tasks, such as filing. The clerk of the court is chosen by the judges.<sup>17</sup> Despite the opportunities for independent governance, policy-making bodies exist at both the national and circuit level to ensure accountability and consistency across the federal courts.

In addition, the federal circuits each have a Circuit Judicial Council that oversees the courts within the boundaries of that circuit. Members of the Circuit Judicial Council have broad authority to “make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.”<sup>18</sup> The Council reviews judicial conduct and disability processes as well as district court plans, such as jury selection.

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<sup>17</sup> United States Courts, *Administrative Oversight and Accountability*, UNITED STATES COURTS (Jun. 15, 2022), [Link](#).

<sup>18</sup> 28 U.S.C. § 332(d)(1) (2018).

The Administrative Office of the United States Courts (AO) is a government agency that organizes the nonjudicial administrative tasks of the federal courts. The AO is advised by the Judicial Conference and provides support and resources to the Judicial Conference as needed. The AO also creates the annual judiciary budget submitted to the President and Congress for approval.<sup>19</sup>

The Federal Judicial Center (FJC) is a key administrative resource for the judiciary. The FJC is comprised of the Chief Justice of the Supreme Court, the director of the Administrative Office, and seven judges chosen by the Judicial Conference. It provides research along with judicial training.

The judicial branch avoids misconduct and misuse of public resources through an intricate internal structure of these multiple administrative checks and overlapping authorities.<sup>20</sup>

#### **IV. Assignments**

In order to promote judicial independence, case assignment procedures are random and computerized. Excluding exceptional cases, Chief Judges do not assign specific cases to specific judges. Random assignment avoids favoritism and any retaliation against judges. Judges also regularly update their conflicts/recusal list. The recusal list is composed of potential conflicts, such as: a prior relationship with a law firm, financial conflicts, and any personal or organizational relationships that present actual or apparent conflicts.

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<sup>19</sup> United States Courts, *Administrative Oversight and Accountability*, UNITED STATES COURTS (Jun. 15, 2022), [Link](#).

<sup>20</sup> United States Courts, *Administrative Oversight and Accountability*, UNITED STATES COURTS (Jun. 15, 2022), [Link](#).



## V. Funding and Other Resources

Finally, the give and take between the courts and Congress on budget issues impacts judicial independence. As one of our founders, Alexander Hamilton, said, “The judiciary ... has no influence over either the sword or the purse ... It may truly be said to have neither force nor will, but merely judgment.”<sup>21</sup>

The Administrative Office of the United States Courts (AO) oversees the budget allocation and auditing of federal courts to ensure the responsible use of judiciary funds. The AO audits district courts, bankruptcy courts, and the courts of appeals every two to four years using independent certified public accounting firms. Audits of the Judiciary’s national appropriation accounts are also performed. The audit report recommendations are tracked and implemented.<sup>22</sup>

The AO is responsible for creating the annual judiciary budget submitted to the President and Congress for approval. To create this budget proposal, the AO “maintains an integrated management and financial planning system, with rigorous financial controls governing budget formulation and execution.”<sup>23</sup> In an effort to increase effectiveness and efficiency, the AO regularly surveys court operations, assesses judicial workload, and evaluates operational economy.

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<sup>21</sup> Alexander Hamilton, *The Federalist Papers: No. 78*, YALE LAW SCHOOL (May 28, 1788), [Link](#).

<sup>22</sup> United States Courts, *Administrative Oversight and Accountability*, UNITED STATES COURTS (Jun. 15, 2022), [Link](#).

<sup>23</sup> United States Courts, *Administrative Oversight and Accountability*, UNITED STATES COURTS (Jun. 15, 2022), [Link](#).

The three administrative governance agencies mentioned—the Judicial Conference, the Administrative Office (AO), and the Federal Judicial Center (FJC)—all work together to assist judges and to monitor judicial funds. The Judicial Conference has a Committee on Audits and Administrative Office Accountability. The AO every six months reports its financial audits, program reviews, special investigations, and prosecution referrals to this Committee. The FJC and the AO also collaborate to provide Chief Judges and unit executives with in-person and online training and resources to navigate their management and oversight responsibilities. The Director of the AO also holds a statutory responsibility to “supervise all administrative matters” in the courts.<sup>24</sup> Since financial regulation and oversight are done independently of judges and across different organizations, this allows for less opportunities for financial misconduct.

**Please provide examples in the judicial workplace that foster judicial independence and identify barriers and practices that impede or negatively impact judicial independence.**

To foster judicial independence in the workplace, judges must create and continually update a conflict/recusal list that they diligently cross-check when assigned to a case. In 2021, a *Wall Street Journal* article revealed that many federal judges failed to disqualify themselves in cases where the judge or the judge’s spouse held equity stock.<sup>25</sup> Each judge is required to file an annual Financial Disclosure Report. To promote transparency, the Judicial Conference announced in 2022 that the financial disclosures will be

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<sup>24</sup> 28 U.S.C. § 604(a)(1) (2018).

<sup>25</sup> James V. Grimaldi, Coulter Jones, and Joe Palazzolo, *Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WALL STREET JOURNAL (Sept. 28, 2021), [Link](#).

electronically reported.<sup>26</sup> In addition, federal courts across the U.S. use automated conflict-check systems, and judges sign “certification” statements “confirming that they have reviewed their financial holdings and updated recusal lists.”<sup>27</sup> These efforts emphasize that the standard is to avoid even the *appearance of impropriety* and the importance of transparency to meet that standard. By making the reports automatic, the disclosure is more efficient and accessible. The “certification” statement serves as a reminder for judges about ethics rules and obligations.

One means of promoting transparency is real-time publication of judicial opinions on the internet. While current rules preclude livestreaming of proceedings in district courts, which are the federal trial courts, many courts of appeals have their own YouTube channels and livestream appellate proceedings.<sup>28</sup>

Lastly, judges and courts can strive to interact with the public more through judicial outreach. These efforts can help the public understand the role and decision-making process of judges. The public often reacts to headlines attacking the judiciary. Judges can offer a professional narrative and become a “face of justice.”<sup>29</sup> Courts as institutions can also engage in outreach. A good example is when judges preside over naturalization ceremonies. The Federal Judges Association has a variety of programs that

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<sup>26</sup> Andrew Strickler, *Law Courts to Automate Judges Financial Disclosures*, LAW 360 (Mar. 15, 2022), [Link](#).

<sup>27</sup> Andrew Strickler, *Law Courts to Automate Judges Financial Disclosures*, LAW 360 (Mar. 15, 2022), [Link](#).

<sup>28</sup> United States Court of Appeals for the Ninth Circuit, *Pasadena Courtroom 1 11:00 AM Wednesday 7/13*, YOUTUBE (Jun. 13, 2022), [Link](#).

<sup>29</sup> Marla N. Greenstein, *Promoting the Independence, Integrity, and Impartiality of the Judiciary*, AMERICAN BAR ASSOCIATION (Dec. 19, 2019), [Link](#).

link the public and judges, including an essay contest for students. And the Federal Judicial Center sponsors many outreach programs.

Social media platforms provide many avenues for connections with friends and family, yet judges must acknowledge that these platforms also pose risks in terms of the public perception of judges. Judges must be perceived as impartial, even in their private lives. A federal guide to judicial use of social media provides judges with parameters to consider if using social media.<sup>30</sup> When a judge shares political positions, even on what seems to be a “private” account, that creates the appearance of bias and negatively affects judicial independence.

The “me too” movement and focus on sexual harassment also impacts the judiciary. In light of recent disclosures, the judicial workplace has become a focus for a revamping of workplace policies and judicial training. On a national level, the courts have created an Office of Judicial Integrity. The circuits have followed suit and the Ninth Circuit has an extensive program on the workplace. The workplace has become a target for Congress, which recently held hearings on the subject and introduced legislation to regulate internal procedures for the federal courts.<sup>31</sup> The

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<sup>30</sup> Committee on Codes of Conduct Judicial Conference of the United States, *Advisory Opinion, No. 112. (Vol. 2: Ethics and Judicial Conduct; Pt. B: Ethics Advisory Opinions)*, COMMITTEE ON CODES OF CONDUCT (Oct. 15, 2019), [Link](#). “In light of the reality that users of social media can control what they post but often lack control over what others post, judges and judicial employees should regularly screen the social media websites they participate in to ensure nothing is posted, whether by the employee him/herself or by others on the employee’s webpage, that may raise questions about the propriety of the employee’s conduct, suggest the presence of a conflict of interest, detract from the dignity of the court, or, depending upon the status of the judicial employee, suggest an improper political affiliation. We also note that the use of social media also raises significant security and privacy concerns for courts and court employees that must be considered by judges and judicial employees to ensure the safety and privacy of the court.”

<sup>31</sup> *Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 117th Cong. (2022), [Link](#); *Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory*

Judicial Conference has taken a position that the proposed regulation violates separation of powers and duplicates the already extensive undertakings by the federal courts.<sup>32</sup>

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*Change: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary, 117th Cong. (2022) (combined statement of the Honorable M. Margaret McKeown United States Circuit Judge for the Ninth Circuit and the Honorable Julie A. Robinson United States District Judge for the District of Kansas on Behalf of the Judicial Conference of the United States), [Link](#).*

<sup>32</sup> Federal Judiciary Workplace Conduct Working Group, *Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States*, JUDICIAL CONFERENCE OF THE UNITED STATES (Mar. 16, 2022), [Link](#); M. Margaret McKeown, *The Judiciary Steps Up to the Workplace Challenge*, 116 NW. U. L. REV. 275 (2021), [Link](#); United States Courts, *Judges Tell Congress That Workplace Conduct Strategy Should Continue*, UNITED STATES COURTS (Mar. 17, 2022), [Link](#).

## 4<sup>th</sup> Study Commission – United States

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