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Judicial Independence and The Supreme Court--The Indictment

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The Supreme Court plays a crucial role in the delicate checks and balances system which forms the basis of American democracy. Although federal judges are appointed by the President and confirmed by the Senate, **judicial independence** is correctly thought to be a core requirement when judges decide cases based solely according to law and the Constitution. An independent Supreme Court has often served as a valuable check on the political process. Even when difficult cases involving controversial social issues bring them close to partisan interpretations, candor, respect for precedent, and clearly written opinions are required to sustain both the appearance and reality of judicial impartiality.

In other words, judges should not use their power for partisan purposes. Personal favoritism, family relationships, business connections, or financial dealings may also undermine independence if judges are perceived to be “playing ball” with one party or other favored associations.

Unfortunately, for Democrats and all Americans, the judicial process appears to have run amok. We have watched in dismay as an alliance between right-wing think tanks, large corporate interests, Donald Trump and three Supreme Court nominees, and Senate Republicans willing to play loose with judicial confirmation procedures have “captured” large parts of the American judiciary.

A step-by-step account of this story has been documented by Senator Sheldon Whitehouse in *The Scheme*. A Democrat from Rhode Island and member of the Senate Judiciary Committee,

Whitehouse recounts how right-wing businesses with unlimited “dark money” resources have now become major players in the judicial selection process. The conservative Federalist Society for Law and Public Policy Studies has become the de facto gatekeeper to government jobs and federal judgeship under Republican presidents. All six of the conservative leaning justices on the Supreme Court are current or former members of the Society.

More recently, the revelations that Justice Clarence Thomas did not disclose lavish gifts and financial arrangements with a wealthy Republican donor has called into question whether

judicial independence is undermined when existing disclosure requirements are weak or ignored. Thomas is not the only judge to engage in questionable behavior. Former Justice Antonin Scalia was reported to have accepted frequent hunting vacation outings. Many of the current justices are wined and dined with lecture invitations from favored groups accompanied by large honoraria.

Supreme Court’s code of ethics has not been a major public policy concern since 1969 when Justice Abe Fortas resigned after it was reported that he took outside income from a friend and Wall Street financier. The present Court seems to have lost sight of that precedent.



The new controversy demonstrates that the Supreme Court's ethics rules do not measure up to the standards applied to other elected federal officials and lower court federal judges. It is interesting that the first two requirements or canons of lower court judges state that (1) "A Judge Should Uphold the Integrity and Independence of the Judiciary" and (2) "A Judge Should Avoid Impropriety and Appearance of Impropriety in all Activities."

Demands that the Supreme Court rework and strengthen its ethical rules have been rebuffed. All nine Justices appear content to police themselves. Chief Justice John Roberts declined a request to testify before a Senate committee. It seems ironic that the Court is asserting its independence by not adopting clearer ethical standards, thus giving the impression that questionable personal relationships do not trump the need to respond to appearances of improper professional conduct.

Public approval of the Supreme Court stands near historic lows and is polarized along partisan lines. Faith in the institution seems rooted in a growing concern that decisions are based on partisan politics rather than the law. Overall support for the Court hovers around 40%. In one study Republican support for the Court's job performance was 73%; Democrat's support was 13%. So much for judicial independence.

Can anything be done to restore confidence in the Court? There are no easy solutions. Academics, law professors, and even a presidential commission have not been shy about expressing the pros and cons of several reform measures. Next month we will look at proposed changes that have been put forward and their chances for passage in an effort to save the Court and judicial independence.

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