Judicial Independence
The new threat from within
by STEVE LEBEN and KEVIN BURKE

In election years, judges frequently come under attack for a specific decision. And since judges generally can’t comment publicly about pending cases beyond what was said in the decision itself, judges can be an easy target.

But something strange is happening as the 2012 presidential campaign comes into focus: In two high-profile court hearings, judges have struck what seems to be a partisan tone, unnecessarily inserting themselves into the campaign. Their actions from inside the judiciary threaten judicial independence just as much as attacks from the outside.

The first was Justice Antonin Scalia. During oral argument about whether the Affordable Care Act is unconstitutionally coercive on the states, he asked whether there was “any chance that all 26 states opposing it have Republican governors, and all of the states supporting it have Democratic governors?” When told there was “a correlation,” Justice Scalia triumphantly said, “Yes!” followed by laughter from the audience. Scalia got his laugh line—transcripts show he gets more laughs than any other justice. But here he did so by inserting a comment about purely partisan matters that had no legal relationship to the argument being made.

Justice Scalia later made reference to “the Cornhusker kickback” in asking a question about whether the entire healthcare law must be struck down if one part is found invalid. Using the term “kickback” in reference to a provision that purportedly gave federal benefits to a state (Nebraska) in exchange for its senator’s vote sounded more like a political attack ad than the sort of question a neutral judge would ask. This too was an unnecessary comment: the provision he referenced hadn’t ultimately taken effect and thus wasn’t part of the statute before the court.

The second was Judge Jerry Smith, a federal appeals court judge who was hearing another case involving the healthcare law. He interrupted the Justice Department attorney who was arguing the case to ask a question about what President Obama had said at a news conference—not something contained in the briefs or said by any attorney appearing in court to argue the case. Judge Smith made reference in his question to “Obamacare,” a name generally used by Republican opponents of the law, rather than the Affordable Care Act. Judge Smith then ordered the Justice Department to send the court a letter stating its position in regard to the recent statements by the president and that the “letter needs to be at least three pages single spaced, no less” and filed by noon two days later. This is not a typical court hearing at all, and certainly not one that promotes public confidence in the courts.

Our nation cannot afford to have the impression that judges made decisions based upon their personal or political views. What is at stake is the legitimacy of judicial decision making.

Decades of social-science research has shown what the public expects from its judges, and it comes down to several elements of procedural fairness. The public expects judges to allow the parties’ voice to be heard by listening carefully to the arguments and demonstrating that they have understood them, however they may rule. The public expects judges to decide cases in a neutral way, transparently relying upon established rules and precedents as much as possible. And the public expects judges to show respect for all parties and their rights, which are explicitly protected. Following these principles leads to greater trust in the court and leads to greater acceptance of and compliance with court orders.

We don’t suggest that these judges are not trying to be fair in actually deciding the cases—comments made from the bench don’t always indicate how a decision will come out. But the comments made from the bench can undermine public perceptions of fairness.

We have about 30,000 judges in this country, and a great many of them have been working to improve procedural fairness in the courts. But a few judges appearing partisan in high-profile cases can undercut the work of many others. Trust in public institutions is at an all-time low, and judges must be careful to maintain public support for the justice system. Without it, judges cannot maintain the independence necessary for the protection
of the constitutional rights we all treasure.

Hopefully, the self-inflicted damage to public perceptions of judicial fairness from these recent comments from the bench will be temporary. But every judge must respect the trust the people have placed with them. And as Yale law professor Akhil Reed Amar recently said, the country desperately needs a Supreme Court opinion in the healthcare cases that genuinely crosses party lines. A consensus decision attracting at least six votes in the healthcare cases would send the message that courts can still act based upon neutral principles, not political views. Making sure that the process seems fair along the way would help too. ★

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