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FAIR & IMPARTIAL  
JUDICIARY  
Symposium

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**“HOW DO JUDGES DECIDE CASES?”**

**Honorable Anthony J. Scirica, U.S. Court of Appeals for the Third Circuit  
Professor Stephen Burbank, University of Pennsylvania Law School**

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**Summary:** Judge Anthony Sirica and Professor Steven Burbank regularly team up to teach a law school course on the judicial process. Their discussion here focuses on how judges arrive at decisions.

1. Article III of the U.S. Constitution established “one supreme court, and ... such inferior courts as the Congress may ... ordain and establish.” Professor Burbank characterized the notion of judges deciding cases as a fallacy. Rather, he noted that “Courts” decide cases. What does he mean by this? Do you agree or disagree? Why?
2. Judge Sirica remarked that courts have an obligation to announce what is the standard of review applicable to a particular case? What does this mean?
3. Although the public pays a lot of attention to Supreme Court decisions, most judicial decisions that apply to them are decided by lower court judges. How do the decisions of the lower courts differ from that of the U.S. Supreme Court?
4. Professor Burbank noted that the law matters most in decisions, but he also stated that attitudinal factor and the identity of judges, *e.g.*, race and gender, play a part in their decision-making. Do you agree with his opinion? Do you think these other factors should figure into their decisions? Explain your answer.
5. Judge Sirica stated that he believes he benefits from having colleagues with different life experiences when deliberating cases before his court. Do you think

that U.S. courts should better reflect the diversity in American society? Do you think presidents should nominate individuals outside of their political party if those individuals better reflect the electorate (American society) as a whole?

6. Judge Sirica came to the bench with prior elected official experience, having served as a member of the Pennsylvania state legislature, and he has found that experience beneficial to him when interpreting statutes that come before his court. Currently, no member of the U.S. Supreme Court has elected official experience. Justice Sandra Day O'Connor was the last Supreme Court justice to have served as an elected public official, *e.g.*, Senator or Governor, prior to her tenure on the Court. Do you think her public official experience aided her decision-making as a Supreme Court justice? Explain your answer. What qualities and experiences do you think the President should seek in a nominee for the federal courts?

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## “IS THE SUPREME COURT DIFFERENT?”

Theodore W. Ruger, Dean of the University of Pennsylvania Law School  
Linda Greenhouse, the Knight Distinguished Journalist in Residence and  
Joseph M. Goldstein Lecturer in Law at Yale Law School

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**Summary:** Linda Greenhouse currently teaches at Yale Law School, but for many years she was a *New York Times* reporter covering the U.S. Supreme Court. Her widely read and respected newspaper columns provided the nation with its clearest view of the role the Court played in American society. Unlike many other courts, the public sessions of the Supreme Court are not televised, and not that long ago even the audio tapes of the oral arguments before the Court were not readily available.

1. Changes in the media – the decline of newspapers and the rise of social media – have altered the way in which we get information about public affairs. How have these changes affected the way in which we get information from the courts, particularly the U.S. Supreme Court?
2. Today, we can get access to Supreme Court arguments and judicial opinions via the Internet. Do you think the Court should allow the arguments before it to be televised, as many other federal and state courts allow?
3. Studies of the Supreme Court have found that in divided cases (in the period from the inception of the Court until 2010) there were only two instances in which the Court was specifically divided along party lines. However, since 2010, there have been eight cases in which the Court was specifically divided along political party lines. How do you think this division has impacted/is impacting the image of an independent, impartial Court? Explain the factors you believe support your position.

4. One explanation for the political party division in the Court’s recent decisions is the type of issue that the Court has examined in cases before it. For example, Ms. Greenhouse highlighted abortion as a “hot” topic for the Supreme Court to examine. She also noted that cases involving First Amendment free speech, as well as those pertaining to church and state issues have resulted in decisions along political party lines. Do you agree with her assessment? What other issues do you think could cause decisions of the Supreme Court to be divided along political party lines?
5. *Stare decisis*, which means to “stand by things decided”, is the doctrine of precedent and is important for the judiciary. Do you think this principle is important to judicial decision-making? How do you think *stare decisis* affects judicial decision-making at the various levels of the federal court system? Finally, do you think it is less important at the Supreme Court level? If so, why?

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## “DECIDING DIFFICULT CASES”

**Jeffrey Rosen, President and CEO, National Constitution Center (Interviewer)**  
**Honorable Emmet G. Sullivan, U.S. District Court for the District of Columbia**

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**Summary:** In this discussion, Professor Jeffrey Rosen, President of the National Constitution Center and a prolific author on the subject of the U.S. Supreme Court, and Judge Emmet Sullivan, a sitting judge on the U.S. District Court for the District of Columbia, converse about the public corruption trial of long-time Republican Senator Ted Stevens of Alaska. Mr. Stevens’s prosecution cost him re-election, and his defeat deprived the GOP of its narrow majority in the U.S. Senate at the time. Judge Sullivan presided over those proceedings, for which he chastised the prosecutors and the U.S. Justice Department, in general, for their mishandling of evidence and misconduct in the case. Judge Sullivan’s unique role in these developments are a testament to the importance of judicial independence.

1. In this discussion, Judge Emmet Sullivan talks about the *Brady* and *Jenks* rules that protect individuals charged with federal offenses. What are these rules and how do they protect individuals?
2. How does Judge Sullivan’s behavior attest to the importance of judicial independence? Do you think Judge Sullivan would have behaved in the same manner had he been elected to the court? Do you think his behavior would have differed if his position was not a life tenure? Be prepared to explain your reasoning.
3. Do you think the issues involved in the Stevens trial resemble any current issues?
4. Judge Sullivan noted that there was a possible conflict between the rights of the whistleblower in this case and the right of Senator Stevens to a fair and speedy trial, as protected by the Sixth Amendment. How do you think you resolve such a

conflict?

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## PANEL DISCUSSION: CIVICS 101 – “HOW TO IMPART THE IMPORTANCE OF JUDICIAL INDEPENDENCE TO THE AVERAGE CITIZEN”

**Chris Satullo, Principal at Keystone Civic Ventures LLC (Moderator)**

**Professor Kimberly Wehle, University of Baltimore School of Law**

**Thomas L. Jipping, Esquire**

**Michael Smerconish, Esquire**

**Chancellor Phoebe Haddon, Rutgers University–Camden**

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**Summary:** This diverse panel examines the question of what can be done to preserve the independence of the judiciary in an era of intense partisanship, particularly when both sides have made the judiciary an issue to be exploited for their own interests.

1. Surveys have found that although the judiciary is the most respected of the three branches of the U.S. government, it is the least understood. For example, 10% of respondents to a recent survey thought that Judge Judy Sheindlin (TV Show Judge Judy) is a member of the U.S. Supreme Court. Do you think the Judicial Branch would be more, or less respected if U.S. citizens knew how the courts operated? Explain your reasoning.
2. Although we frequently talk about “separation of powers”, the concept is not specifically referenced in the Constitution. It is, however, embodied in the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Articles of the document. Increasingly of late, distinctions between the three branches of the U.S. government have become more and more blurred, with both the executive and judicial branches acting more like the legislative branch. For example, presidents have usurped power through increased use of executive orders, while the Supreme Court has made decisions about rights that are explicitly stated in the Constitution. Do you think this a good or bad development?

3. The process by which federal judges are appointed has changed dramatically. For example, Justice Antonin Scalia was confirmed by a unanimous vote of the Senate, and only a few senators voted against the confirmation of Justice Ruth Bader Ginsburg. However, nominees today often receive significant opposition, even for lower court appointments, and often the opposition has no relationship to the quality of the nominee. What do you think is the reason for this change? Do you think this change is problematic? If so, explain your reasoning and offer suggestions on what can be done to change it.
  
4. Surveys have shown that more than half of U.S. citizens are concerned that the Supreme Court has become too political. These same surveys also find that respondents overwhelmingly believe the Constitution should evolve as the country evolves. Do you think there is a contradiction in these opinions?



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## “THE NATURE OF JUDICIAL INDEPENDENCE”

**Honorable Stephanos Bibas, U.S. Court of Appeals for the Third Circuit (Interviewer)**  
**Honorable Anthony M. Kennedy, retired Associate Justice of the U.S. Supreme Court**  
**David F. Levi, former Dean of Duke University School of Law**

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**Summary:** With Justice Anthony Kennedy’s retirement in 2018, President Donald Trump was given his second appointment to the U.S. Supreme Court. This opening was widely seen as giving the president the chance to dramatically shift the balance of the U.S. Supreme Court to a more solid, conservative majority, even more so than the vacancy created by the death of Justice Antonin Scalia. Unlike Scalia, who was generally a reliable conservative vote, Justice Kennedy had emerged as the ‘swing justice,’ assuming a role previously played by Justice Sandra Day O’Connor. Indeed, even more than O’Connor, Kennedy’s vote had played a key role in some of the Supreme Court’s most recent controversial decisions, particularly those involving, among other matters, abortion, homosexuality, and prayer in public schools.

1. During his remarks, Justice Kennedy noted several times that the Constitution must have relevance ‘in our own time’. What does he mean by this statement? Do you agree with the notion of a “living Constitution”? Justice Scalia used to champion a “dead Constitution,” believing that changes in a democratic society should come in the form of amendments. To which of these concepts do you subscribe? Why?
2. Justice Kennedy was praised for his willingness to engage with judges from other countries. His opinions sometimes cited the decisions of foreign courts. Do you think U.S. judges should be influenced by decisions from foreign nations? Why?
3. Justice Kennedy’s retirement attracted a great deal of attention because he was frequently the fifth vote in many of the Court’s controversial 5-4 decisions. As a result, he was regularly dubbed ‘the swing justice’. In reference to this, Kennedy

quipped, “The cases swing; I don’t.” What did he mean by this statement? Do you agree with him? Why?

4. In her earlier remarks, Supreme Court reporter Linda Greenhouse argued that Justice Kennedy’s opinion in a case involving late-term abortions represented an example of when the Court, without saying so, overturned a precedent. Do you agree with her? Do you think it is unusual for the Court to do this? Consider that most people when asked would answer that *Brown v. Board of Education* reversed *Plessy v. Ferguson*. It did not, only later was the *Plessy* precedent overturned.
5. One suggestion advanced to explain the highly charged debate that currently rages about the U.S. Supreme Court’s decisions is that some of the recent cases involve “social issues,” *e.g.*, abortion and homosexuality. Justice Kennedy disagreed. Do you? Why?
6. Referring to the controversial Supreme Court decision upholding the First Amendment right of an individual to burn the American flag, Justice Kennedy argued that over time the decision came to be accepted by most Americans. With this argument, Kennedy seemed to imply that although the Court is a counter majoritarian branch of government, its decisions come, over time, to be accepted by the people. Do you agree with his argument? Why? Do you think there are exceptions to this argument? If yes, what are they?
7. Current presidential candidate, Mayor Pete Buttigieg, has suggested that if elected, he would appoint persons to the Supreme Court with a similar perspective to Justice Kennedy? Do you agree or disagree with this position? Why?
8. Regardless of party affiliation, U.S. Supreme Court justices today generally agree on the application of the First Amendment’s guarantees of free speech and free press. Justice Kennedy suggested a new area in which they may soon be forced to determine how to apply First Amendment principles is regarding the Internet.

For example, should hate speech be protected? Is there a right to be forgotten? Should there be a right to purge material one has placed on the Web?