

The Evolution of Judicial Independence in America – Part 3

Monday, May 15, 2023

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[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the Center in person and online. I'm Tanaya Tauber, the senior director of Town Hall Programs. This is the final episode in a three-part series exploring the evolution of judicial independence in America and its critical role in our democracy from the founding to present day. Part three features two federal judges discussing their experiences upholding judicial independence in the face of contemporary challenges. Clara Altman, deputy director of the Federal Judicial Center, moderates the conversation with Judge Guy Cole Jr. of the US Court of Appeals for the Sixth Circuit, and Judge Sara Lee Ellis of the US District Court for the Northern District of Illinois. This series is presented in partnership with the Federal Judicial Center and was hosted live at the National Constitution Center on May 15th, 2023. Here's Clara to get the conversation started.

[00:01:11] Clara Altman: Welcome back, everyone. Thank you for joining us for our program on the evolution of judicial independence. I'm Clara Altman. I'm the deputy director at the Federal Judicial Center. The Federal Judicial Center's the research and education agency for the federal courts. And we are really pleased to partner with the National Constitution Center on this program. We're really thankful to Jeff Rosen, to the staff at the NCC, and to all of you in the audience for joining us.

[00:01:39] Clara Altman: We just finished two panels this morning with historians and legal scholars talking about the history of judicial independence and its evolution, bringing us up to today. So it's fitting, we think, to round out that discussion with our two panelists, two federal judges, to talk about their perspectives on judicial independence. And I think where I wanna start is with some definitions. To start with, how you understand judicial independence and what it means to you. And I'll start with you, Judge Ellis.

[00:02:13] Judge Sara Lee Ellis: Well, I think judicial independence is... What it means to me is that we are able to make the decisions that we believe are correct, in line with the law, and that we don't worry about our jobs, we don't worry about our safety or our security, we don't worry about what Congress or the president thinks, but that we get to the right decision and that we are accountable to the people. And we are responsible to the people and we are protected and supported by the people.

[00:02:57] Clara Altman: Judge Cole.

[00:02:58] Judge Guy Cole Jr.: Well, I'd like to thank the Center for having us. My definition is pretty much the same. I see judicial independence as the freedom for courts, trial and appellate courts, Supreme Court as well, to be able to decide a matter based upon the merits without any concern for legislative or executive interference or involvement, or from any external source. So in my mind, we have a system in this country where we really don't have to worry about contact from outside sources. We don't worry, really, as much about threats from changes in government, changes that might impact the overall administration of our courts.

[00:03:57] Judge Guy Cole Jr.: You look at some countries where when there's a change in government the military comes in and political officials and judges are marched out of their offices. We don't have to worry about that. I mean, we have norms and conventions in this country where that's really not a concern. And, you know, we certainly are challenged in our history to try to protect those norms and those conventions. But at this point, we really are able to make decisions as judges based upon the merits of cases, based upon the record that is made by bankruptcy judges, magistrate judges, district judges. And in their cases, at the court of appeals, the record comes to us and based upon that record that is before us, then we can make a decision about how the case should be resolved.

[00:04:59] Clara Altman: So we've been talking this morning about a lotta the norms in the courts. We've been talking about some of the history of the politics and constitutional law. A lotta matters that those of us who are either steeped in thinking about this stuff or who are judges think about all the time. But I wonder about people who are not judges, people who are not steeped in thinking about this all the time in the way I think many in this room are. How would you explain judicial independence to them and what they might expect? Or how might you hope they understand it? And that may be some of what you've already said, it may be something else. Judge Ellis.

[00:05:37] Judge Sara Lee Ellis: Well, I think that the importance of civics goes a long way to making the public understand what we do and how important it is that we are independent and free to make the decisions that we think are correct on the merits. So every time that I see students come into the courthouse, I'm really excited to see them, or when judges go out into the community. But that it's important that people understand that the courthouse is their, that's their house, and that's where they should come in.

[00:06:18] Judge Sara Lee Ellis: We used to have court watchers when I was a young lawyer. And it was a group of people that were retired. They would come in, they would watch trials, and then, as I would be coming out, they would pull me aside and say, "Hey, kid, you know, that cross, I don't think that went over so well."

[00:06:42] Judge Guy Cole Jr.: [laughs].

[00:06:44] Judge Sara Lee Ellis: But they would come in and they would sit in the cafeteria and have coffee and talk about the cases and talk about the judges, but more importantly would go back out into the community and be our advocates and talk about how judges decided cases and that things ran smoothly and that things were fair. And that, I think, is so important. And I understand these days that it is harder and harder and harder to get into courthouses, and in some ways it should be because for judges to be independent and feel like we can make the decisions we need to make, we need to be safe and we need to feel safe. And we have to walk that line between security and safety and keeping the courthouses open so that people can see what we do.

[00:07:43] Judge Sara Lee Ellis: Because if they don't see what we do, they won't understand what we do and they won't understand how nonpartisan we are, that we are not trying to get to the right results because it will please the president or will please the senator that put our name forward, it's we wanna get to the right result because it's the right result. And the more that they can... the public can see that we do follow norms, that we don't decide cases solely on a particular whim but that there is a process and that the process is consistent no matter what judge, no matter whether it's a district court judge, a magistrate judge, a bankruptcy judge, a judge sitting on the court of appeals, there is a consistent process. And you can bank on that process. So the more that we have the public understand what we do, the more that they are invested in and understand how fragile judicial independence is and will stand up for us when it's threatened.

[00:09:02] Clara Altman: Judge Cole.

[00:09:03] Judge Guy Cole Jr.: Yeah, I think it's important to focus initially on just the three branches and how different they are. So if you look at the executive branch you're looking at millions of employees who are you know, federal government employees who work in different agencies, different sectors of the federal government. You got the cabinet, you got all of these various officials, and we expect for the executive to have policies that they're advancing. We expect the executive to run the government on a day-to-day basis. And we expect the executive to be visible in terms of advancing its agenda, its policies. You look at the legislative branch, of course their job is to enact laws. They also have policies that they're advancing. And we see these daily.

[00:10:05] Judge Guy Cole Jr.: So a good example, I think, just in front of us today is the debt ceiling crisis. So what we're seeing right in front of us right now is the executive and the legislative branches are negotiating trying to find some sort of agreement where this very important issue can be resolved. Reported in the news daily and we hear of movement one way or the other in terms of the policies and positions of these two branches.

[00:10:41] Judge Guy Cole Jr.: Notably absent, of course, is the judiciary. You know, we are—we're reactive. There's no role for us to play right now in terms of this debt ceiling crisis, and there won't be unless and until some sort of action is filed in one of our courts. What I would tell the public is that we are not designed to advance policies in that regard. We are really more of a silent partner, though critical partner, in the whole process. And we become more involved, obviously, once some sort of an action is brought to the courts.

[00:11:26] Judge Guy Cole Jr.: At that point, our role is to decide cases based upon a record that is made before us. We don't worry about what president appointed us, or we certainly should not, our decisions are not guided by the party of which we were before we became judges. We review matters based upon the constitution, based upon the law and based upon the record that gets made either at the trial court level or that's before the appellate court. So that's what I would tell the public. Our role is just very different from these other two branches, which are very visible in terms of advancing their policies and their perspectives.

[00:12:15] Judge Sara Lee Ellis: And I-

[00:12:16] Clara Altman: Go ahead.

[00:12:16] Judge Sara Lee Ellis: Just to follow up on that, I think that it's important for the public to understand that we play the long game and that we look at issues that come before us in the context of history and in the context of how issues have come before us before and how we may expect them to come before us in the future, whereas the executive branch or Congress or state legislators, are of the moment. And so they may not, as you're drafting a piece of legislation, be thinking about how does this interact with other pieces of legislation? How does this interact with other decisions that have come before? Sometimes it is in the legislator's mind about this interaction, and they will draft things very specifically. But a lotta times, they don't. And it's kinda like making sausage. You throw a buncha things in there and you see what comes out.

[00:13:32] Judge Sara Lee Ellis: As judges, it's our job to look at particular issues in the context of everything that has come before. And I think that it creates a lot of stability in government where people can rely on precedents. People understand what their rights are, that they believe that once it's established, they're not going to disappear. And that is our role in terms of judicial independence.

[00:14:05] Clara Altman: That was really a helpful foundation because I think you laid out a couple of aspects to independence. And I think we'll get into each of them. You talked about decisional independence, making decisions in cases free from improper influence. You talked about the independence of the judiciary as a branch within our government, what its role is. And on the last point, Judge Ellis, I hear you talking a little bit about the logic of the law and the way that that promotes independence, and the culture of the law. So I wanna start with this issue of your decisional independence. Mary Bilder referred to this as this thing called judging and the emergence of this thing called judging. And I was wondering if you could talk a little bit about when you are doing that as judges what are some of the constraints, the norms, the procedures, the practices that help you ensure your independence, that are part of you staying independent? And I'll start with you this time, Judge Cole.

[00:15:05] Judge Guy Cole Jr.: So I'll use an example that's in the news now, and so the asylum issue, the border crisis. So the public understandably thinks about the immigration issues in a very broad sense. What policies should our court... I mean, our country have in terms of people from outside this country entering and

obtaining some sort of review of their status? In the event they're seeking asylum or some other protection in this country.

[00:15:40] Judge Guy Cole Jr.: For the courts, we review those matters on a case by case basis. So yeah, there are all these overarching policies, but the courts make decisions based upon records that come before us. So in the immigration context, those records are made by an immigration judge and a board of immigration appeals, and they come, for example, to the court of appeals with that record before us. So to the extent a petitioner, as we call them, is making a claim that he or she should not have to return to their country of origin based upon some sort of status threat, persecution, or something of that nature, we as courts are not looking, really, as much at the overarching policy as we're looking at what record have the parties, the government and the petitioning parties, made before us. And we make our decision based upon that.

[00:16:43] Judge Guy Cole Jr.: Which leads me to the next point and that's that courts are governed by precedent. So we're not reaching decisions from whole cloth. We have a long body usually, not always, of law that gives us guidance in terms of how other courts have decided the matter, how district courts within our districts, how circuit courts within our circuits, and of course the Supreme Court. And so we have that precedent as a guidance. And we're bound, obviously, to follow precedent to a certain extent.

[00:17:20] Judge Guy Cole Jr.: The other thing that I think is a guide, I'll just say for the appellate courts... And this has been referenced earlier. The appellate judges sit in panels of three ordinarily. And having two other judges who hear the matter along with you and then are in a conference following oral argument—if the matter's argued—to discuss the matter, is of great benefit because it gives, certainly me as a judge, a chance to hear how two other judges have reviewed the record, how they've assessed oral argument, and how they're looking at the case that is before us.

[00:18:05] Judge Guy Cole Jr.: We also have, to the extent the panel has decided a matter in a way that maybe is a little bit off the rails or somebody views it as being erroneous, there's a process for panel rehearing. There's also a process, been referred to earlier, for en banc review. And in larger circuits, you're looking at an en banc court of 14, 15, 16 judges. And that is a bit of a self-regulating aspect of being in the appellate courts, because I think any judge is at least somewhat mindful of is this a matter that might prompt the en banc court to review this. And

it's a good thing. I mean, it's good to have the full court there to deal with matters of great importance, of exceptional importance, to the extent the en banc court has a different take from the three judge panel. And then, of course, you've got the Supreme Court, which can decide to grant review of a matter that they're requested to take.

[00:19:16] Clara Altman: Judge Ellis, what about on the district court?

[00:19:19] Judge Sara Lee Ellis: Well, we have the court of appeals. And that is a very significant constraint on people going off the rails. And I think it has more to do with people's humanity and sense of self in that nobody wants to be told that you're wrong and nobody wants to be publicly shamed and said, "You're an idiot, and, you know, you can't read." So I think that that actually goes a long way, when we're talking about norms, that it does keep people in check, because for the most part, most people don't want that public shaming. And most people care. And I don't want, and I don't seek to be reversed by the Seventh Circuit when I issue the decisions that I issue. I'm okay with being reversed if I believe that there are... Not everything is black and white. And if there are ways that the Seventh Circuit could say, "This is how it should come out," and I could legitimately say, "No, I think it's this other way," if it's two equally valid outcomes, I choose one, they choose the other one, there's no shame in being reversed. But where you go completely off the rails, there's a lotta shame in that, and there should be. So I think that that is an institutional way of kind of keeping individual decision making in check.

[00:21:18] Clara Altman: So there's this culture of the law and remaining within the bounds of the law and following precedent and not getting overruled and not getting told you're an idiot by your colleagues [laughs]-

[00:21:28] Judge Sara Lee Ellis: [laughs].

[00:21:29] Clara Altman: ... that helps to ensure judicial independence. There's this other aspect of it that came up on the earlier panels, I think Marin Levy referred to it as the family of in-laws. But the... You know, sorta coming into the court, the culture, the collegiality. And I was wondering if you could each talk a little bit about your experience with that, about how the community of the court and your colleagues shapes your sense of independence, reinforces or bolsters those norms. We'll start with you, Judge Ellis.

[00:21:57] Judge Sara Lee Ellis: And I think it's true, it is a family and that when you join the court that you are joining a family. And I know that across the country, levels of collegiality can vary from court to court and circuit to circuit, but I can say in Chicago in the Northern District, when somebody comes on, that it's almost a welcoming committee. And people go out of their way to share things as mundane as, "Here are the spreadsheets I use to keep everything on track so that we don't... cases don't fall through the cracks," to every Wednesday morning, we have coffee together.

[00:22:42] Judge Sara Lee Ellis: And when you do that over time, you get to see that it really doesn't matter who appointed you, that people have families and dogs and go on vacation and ask for restaurant recommendations. And you get to know people as other people. And what that does is creates, particularly on the district court when you are deciding things in isolation, that it's a space where it is open and safe to ask questions, that you are not meant to nor should you believe that you have all the answers and that things are difficult and hard. And so it might make sense to over coffee on Wednesday say, "I'm struggling with this. And what do you think?" And that you can then talk it through and get other perspectives.

[00:23:46] Judge Sara Lee Ellis: The nice thing about being on the appellate court is that you have to convince two other people to agree with you that what the result that you believe is the right result actually is the right result. And not only that it is the right result but the way you got there is the right way to get there. And as a district court judge, it's important to be able to have those kinds of conversations with your colleagues, but you will only do that if there's trust, if there's mutual respect. And so I think that these things of collegiality are so important to build that.

[00:24:32] Clara Altman: Judge Cole.

[00:24:33] Judge Guy Cole Jr.: Yeah I agree completely. The prior panel made several really good points on this. The DC Circuit certainly focused under Judge Edwards on improving collegiality. And I think across the circuits, there's been a renewed focus on doing that.

[00:24:55] Judge Guy Cole Jr.: With the DC Circuit, you have all of the judges in one location. The challenge for many of the other circuits is that judges are resident in multiple states. And there is usually a home court where most of the arguments are held, though some circuits do travel.

[00:25:19] Judge Guy Cole Jr.: But the challenge is that the judges don't see one another each and every day. You can go weeks or months, four, five, six months and not sit with another judge or maybe even see that judge. So it's important to do whatever can be done to enhance the opportunities for those judges to interact, as Judge Ellis said, get to know one another on both a professional level and a personal level.

[00:25:47] Judge Guy Cole Jr.: I mean, I agree with Judge Edwards in his article from a number of years ago. Yeah, it's great to be collegial because you wanna work well with people and hopefully enjoy their company, but collegiality also promotes an openness for discussion and, again, hopefully respect for one another's positions. So I'll just use the Sixth Circuit as an example, but we're not the only circuit who've done this. We have made collegiality a priority. And so to such end, we've tried to develop opportunities for when we're in our home location in Cincinnati to get together. So there's a summer boat ride with judges and law clerks. That gives us a chance to get together socially. We try to have lunch, most recently judges and their law clerks. And that way you have a chance for three judges to get together and law clerks from those chambers. We have a dinner during the holiday season. We try to sit together as a full court three or four times a year now so that we're all in Cincinnati at the same time.

[00:26:58] Judge Guy Cole Jr.: I think there's just a real benefit if the judges can really just spend time, get to know one another, maybe get to know one another's families to some extent. It just promotes more productive discussions, more open discussions, and I think at the end of the day better decision making.

[00:27:19] Clara Altman: That's, Judge Cole, such a good point about collegiality, that it's not just about all getting along, but it's actually about fostering an environment that's open to ideas, because one of the things that came up in some of the earlier panels is the reality of increasing polarization and the impact of that increasing polarization on the nomination and confirmation process for judges. And the public sees that, it's very aware of it, we all are. And that sort of structures the whole way that judges come to the bench. And so what do you say to people looking at that and saying, like, "Look at this. I mean, there's just such increasing polarization." What do you say about how the culture of the judiciary or the culture of your courts helps ensure a kind of robust independence?

[00:28:16] Judge Guy Cole Jr.: Well, I think that as others have said, we're living in a very polarized society. I mean, that's just the reality. And I can't estimate or

predict now when we will be less polarized. If anything, we seem to be going in the direction of becoming even more polarized, if that's possible. So I get that question from friends and family and just members of the public, you know, "What is it like to work on a court, especially an appellate court, multi-judge court where you have judges who are nominated by different presidents of various stripes who these days go through a very difficult and challenging nomination and confirmation process. How do you find a way to work together?" And you just... It's like anything; you have to work at it.

[00:29:20] Judge Guy Cole Jr.: In our court, when new judges come on, we do things to try to welcome them and to make their move to the courts smoother. We have a mentor judge who will help that judge make the transition from the prior work to work on the court. And I think we just do our best to follow the rule of law and to be faithful to the rule of law. Yeah, do we have different tools in our toolkit, so to speak, [I've heard that expression before] in terms of how we decide cases and where we end up in terms of the resolution? Yeah, that's definitely true.

[00:30:07] Judge Guy Cole Jr.: But I guess my view is that the judges are trying very hard to follow the precedent, whether it's from the Supreme Court or the Circuit Court, to abide by constitutional principles, and to make the best possible decision they can make. These are challenging times, though. And as a member of the public, if I step back and look at the courts, I would be concerned especially over the last three, four, five, six years. And I just think we have to keep working at it.

[00:30:48] Judge Guy Cole Jr.: Some of the things we do, again across the circuits, to try to help with this, is address the issues that are of real concern to the public. You know, workplace conduct; there has been a real focus the last several years thanks to the chief justice and others for the courts to focus on problems that arose within the courts that can get exacerbated because of differences that judges and others have about issues. And so we're addressing those kind of issues. And most courts have a director of workplace relations.

[00:31:32] Judge Guy Cole Jr.: We're also focusing on things like wellness. And to the extent there are issues that divide courts or cause problems that seem to be related to some sort of disagreement and misunderstanding. Sometimes those are issues that are based upon health reasons or reasons related to health. And so there are avenues which judges can access at this point to get assistance. And then, of course, there are provisions to deal with judges conduct and disability. And yeah, I

think the courts are being very mindful to ensure that those sort of issues are addressed.

[00:32:14] Judge Guy Cole Jr.: At the end of the day, we have to continue to earn the public's trust. And we can only do that by ensuring that we are governing ourselves in a manner that is appropriate and that we're, again, just doing the best we can to follow the law.

[00:32:39] Clara Altman: Judge Ellis?

[00:32:40] Judge Sara Lee Ellis: Yeah, I completely agree. I mean, it is incumbent on judges to keep our own houses in order, or our own house in order, and to be proactive about it and not wait for decision issues to come to us, but that—we're not waiting for the next Wall Street Journal article to be published, but that we are taking an active role in looking at ourselves, looking at issues that bubble up, and then dealing with them in a very timely and proactive basis.

[00:33:13] Judge Sara Lee Ellis: I think, though, that we can also look to the other branches of government for assistance too. How do we select judges? So that the more that we can rely on merit selection panels, that that will give the public trust, that people are not being chosen on a partisan or ideological basis, but instead that by the time a list of finalists gets to a particular senator or two senators, that they have been vetted through a nonpartisan committee who is looking at people's experience, who—that committee, when they are looking at particular applicants, that they focus on a diversity of applicants. Right? So that you are looking at people that aren't just coming from big firms, or aren't just coming from the US Attorney's Office but are coming from a variety of experiences, a variety of backgrounds. And then the senator commits, "Here's the slate." We'll put someone from this slate before the president for nomination. I think that will engender trust in the public that people are not being chosen on an ideological basis, but rather on the basis of their work, their career, their merit.

[00:34:55] Judge Sara Lee Ellis: Then when we look at how the courts administer themselves, that we really focus on random assignment of cases and that they are random so that the more that the judge... that the public believes that they cannot judge shop, so you cannot bring a case in a particular district and think that you are only going to get that particular judge and it's only going to go to that circuit. You know, you can't stop people from filing things in a circuit. But if there is truly random selection, people can't judge shop. And that, I think, will also go towards

creating this sense that there isn't necessarily this partisan, ideological nature of I'm gonna choose this judge because I know I'm gonna get this result. I think that that too is really important.

[00:35:56] Judge Sara Lee Ellis: And, you know, just a plug for diversity is... I know we've talked about precedents, and I don't want anybody to think that we are chained to precedent because the law does change over time, and should, because society evolves and changes over time. And I think one of the best examples of that is when you look at the evolution of sexual harassment cases in employment law that when the bench was mostly male or all male that it was very difficult to prove sexual harassment cases because the people that were deciding those cases would look at the facts and say, "You know, this is just part of the job." Seeing photographs of naked women plastered all over the inside of a locker and having comments as you walk through the break room, you know, that's... "You should expect that. That's not harassment. That doesn't... That's not... shouldn't bother you. That doesn't impact your ability to do your job." Then the more that you had women coming on the bench, those women were able to reflect on their own experiences and say, "You know what? Actually, that does impact how I do my job. And that does make it difficult every day to go to work." And the law changed, as it should.

[00:37:49] Judge Sara Lee Ellis: So I don't want anybody to think that just because something has been decided one way that it should always be that way. That is not judicial independence either. I think judicial independence comes down to seeing how society has evolved, how norms have changed, and being able to look and see should the law also then change to go along with how society views certain conduct or behavior or actions.

[00:38:28] Clara Altman: This really goes back to something one of the earlier panelists mentioned about, you know one of the things that lifetime tenure promotes is the ability to develop the expertise and the deep thought and understanding in the law to be able to make decisions about it. And that's an important part of judicial independence as well.

[00:38:48] Clara Altman: So we've talked about sort of the decisional independence, we've talked a bit about the logic of the law and then there's a third aspect that I wanted to ask you a little bit more about, which is about the branch as a whole. And we heard on the earlier panels about the build, the growth of the judiciary since the founding, but then of course the development and the buildup of

kind of administrative apparatus for the courts and for the branch as a whole, largely in the 20th century. And I wonder if you could both speak to your sense of your role within the branch and your sense of the relationship between the larger administrative apparatus, the branch as a whole, and your particular role as a judge. I'll start with you, Judge Cole.

[00:39:33] Judge Guy Cole Jr.: Yeah. I think we're very fortunate, actually, to have the expansion that has occurred over the last 40 or 50 years or so. We have the administrative office of the courts, which I think employs somewhere around 800,000 people with various degrees of expertise as to all kinds of issues that impact the courts. And that would include ethics. So to the extent a judge has a question about ethics, that judge can call the administrative office and talk with someone who has experience. We have the FJC, the Federal Judicial Center, and we have opportunities like this one to learn more about subject matters and issues that impact how we do our job.

[00:40:27] Judge Guy Cole Jr.: So I think that the expansion of the administrative apparatus overall has been a good thing. We get more information; look at the law clerk hiring process now. We have OSCAR, which allows us to have exposure to a wide range of law clerks. Gives us a chance to review, on a database essentially, that will set forth the application material for those candidates who are interested in clerking. And for me for example, I'm looking for a diversity of law clerks in every respect, including clerks who come to my chambers and give me perspective that I might not otherwise hear. I always ask for at least one clerk to take the position that's contrary, perhaps, to the position that I have. And to argue that zealously.

[00:41:23] Judge Guy Cole Jr.: So anyway, I think the administrative structure is a good one. Again, as I mentioned before, with that there is the opportunity for any member of the public who has a complaint about a judge or a judge's conduct or a judge's ability to serve, that person can file a complaint. And there is a very robust review process throughout the circuit, the circuit counsel, the judicial conference perhaps, to review whether that judge is suitable to continue serving. And of course there's always the process of impeachment if grounds exist.

[00:42:06] Clara Altman: Judge Ellis.

[00:42:07] Judge Sara Lee Ellis: Yeah, I think that the expansion of the administrative aspect of the judiciary has really helped in terms of judicial

independence in that we are then able to show the other branches of government that we can manage ourselves. And I think it's also helpful for judges to participate in the judicial conferences, different committees, and show that we're able to kinda manage how the courts run themselves, how also the different agencies that work with the courts are run. And it brings up different things for judges to think about. So for instance, I serve on the Defender Services Committee, and through that work, hear about different constitutional issues that bubble up across the country that we then, as a committee, need to deal with in terms of, you know, do defendants, are they being represented at all critical stages of the proceedings? You want the answer to be yes, but there may be different courts across the country that have different practices or different cultures or different understanding of how they do things. But as a judge myself, when I'm looking at my own cases, it helps bring some of those issues to the forefront so that I make sure that I am being careful with all of these issues.

[00:43:52] Judge Sara Lee Ellis: So I think that it also fosters this sense of ownership in the judiciary when we are working on committee work or with the FJC or working with the AO or other agencies that this is our branch, and we take care of it, and we have pride in it, and we understand how fragile judicial independence is and what we need to do to take care of it and make sure that it goes forward.

[00:44:29] Judge Sara Lee Ellis: As people have said before, you know, that this is a family, and sometimes a family of in-laws, that yes, we can criticize each other within the branch. I can talk about my sister and say horrible things about my sister, but God forbid anybody else say anything horrible about my sister.

[00:44:52] Judge Guy Cole Jr.: [laughs].

[00:44:52] Judge Sara Lee Ellis: So it does create that sense of ownership in the judiciary, that this is our career, this is our calling, this is our branch, and we need to take care of it. So I think that that also strengthens this concept of judicial independence is when you are vested and you care about it and you wanna maintain it.

[00:45:22] Clara Altman: So a lot of our conversation to this point has already touched on a number of sort of current issues, or touched on sort of our social and political climate at the moment in which you're operating. And I just wanna ask you about that more directly. Is just sort of what do you think... What are the big

issues? What's on your mind about judicial independence in this current social and political climate? How do you see the significant issues? And I'll start with you, Judge Cole.

[00:45:53] Judge Guy Cole Jr.: We live in difficult times [laughs]. I think it's a tough time in some respects to be a member of the bench. But I think it's tough for the public too. And that's why I think, as Judge Ellis said, focusing on civics and the education of the public generally is just very important. I mean, we've got a 24/7 news cycle and I encourage public discourse, political discourse, public discussion and disagreement with what this branch does, what I do as a judge. That's part of our constitutional framework and so I am not at all opposed to that. But you look at just the various threats that exist to independence of our branch, and we just have to find ways to address those in a productive way.

[00:46:55] Judge Guy Cole Jr.: All we can do is decide cases. We find facts, we interpret the law, we write opinions. And then that's really the final word from us until a reviewing court reviews it. At the same time, with social media, with all the cable shows, the talk shows and pundits who, in 30 second sound bites, are giving their thoughts on the correctness of our decisions, the wisdom of our decisions, the thoroughness of our decisions. We are powerless in many respects ourselves to address those. So it's important for us to be transparent, it's important for us to urge parties and people generally to come to our court proceedings. A lotta the circuits now are streaming oral argument, and you can stream right off of YouTube, I know in our circuit, and I think most of the circuits.

[00:47:57] Judge Guy Cole Jr.: Add to that just the increasing number of threats that judges are dealing with. And, of course, we've had several very unfortunate incidents where their threats have been taken to actual devastating action. All these threaten our independence as a branch. But hopefully there are groups that can help explain what we do, bar associations, educational arms like the FJC, and people who understand what we do as judges so the public can come to understand better what we're doing behind those walls of our chambers or in the courtrooms. It can... Ah, I would imagine it could seem quite mysterious to a member of the public, especially for a court of appeals where you've got a very brief oral argument and the public doesn't know how these three judges are coming to a decision and what goes into the process.

[00:49:00] Judge Guy Cole Jr.: As others have said, most decisions are unanimous, like, over 90%. And most discussions among three judges are very

productive. I will say, as someone said earlier, I think the en banc court is a bigger challenge 'cause you're dealing with a larger number of people. But again I think as long as we are very clear and I guess just proactive in informing the public that self-governance is a priority in our system of—in our branch, and that we are doing our best to address the issues that would be of concern to any member of the public or to us, that's a good thing.

[00:49:46] Clara Altman: Judge Ellis.

[00:49:47] Judge Sara Lee Ellis: I think what I worry most about is creep. So I don't know that we're gonna lose judicial independence in one fell swoop. I don't think it's going to be something that happens from one day to the next and it's over. I think it's more that it would erode. And without vigilance, that that is what would happen, that there would be enough issues that bubble to the surface where all of a sudden there's an inspector general that is appointed by Congress, or various legislation is passed by Congress that then kinda eats away at judicial independence. So I just worry about judges not being vigilant enough and looking at the threats to judicial independence that come across the board.

[00:50:47] Judge Sara Lee Ellis: And when we talk about security and safety, for example, that maybe we get too far on the side of security and safety, and then courts are no longer accessible the way that they need to be. So I think that it is always a balance, and we have to just always be thinking about these different things not in a vacuum but how they all fit together.

[00:51:15] Judge Sara Lee Ellis: But what we can do is we have a voice. That voice is in our opinions. And the more that we can write clearly and directly, that the public can read our opinions and understand how we got to the decision that we did and follow the line of our reasoning and it is something that's clear and doesn't come across as partisan, that we are measured in our writing, that we don't take pot shots at the parties or we don't take pot shots at the judge or judges on a panel, that the more that we can be measured in our writing and clear in our writing and transparent in our writing, that that too will help protect. And that's what we can do. That's our voice.

[00:52:13] Clara Altman: It makes me think of the point Allie Larsen made this morning about these norms didn't emerge in one fell swoop, they were built up over time. And if they're gonna be lost, it won't all be in one fell swoop but an erosion, an erosion of them.

[00:52:29] Clara Altman: Well, we've covered a lot of ground in a few short hours this morning, moving from Madison and the framers all the way through the 20th century up to our conversation with judges today. Very different contexts from Madison's time to talking about the judicial branch as it is today and you and your many colleagues, an entire institutional apparatus around you. What is clear, though, is over all that time, people have thought deeply about judicial independence and what it means, just as you all are and as our speakers have today. And certainly, that will continue.

[00:53:10] Clara Altman: I wanna thank you both so much for your generosity with your time this morning. Thank all of our panelists and the audience for being with us today. It's been really enriching. And thank you.

[00:53:22] Judge Sara Lee Ellis: Thank you.

[00:53:31] Tanaya Tauber: This episode was produced by John Guerra, Lana Ulrich, Bill Pollock, and me, Tanaya Tauber. It was engineered by the National Constitution Center's AV team. Research was provided by Lana Ulrich. Visit us online for a full lineup of exciting programs, and register to join us virtually at constitutioncenter.org.

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