TRANSCRIPT OF COMMENTARY ON RESTORING THE PUBLIC'S TRUST IN THE JUDICIARY UPON RECEIPT OF *DOCTOR HONORIS CAUSA*

University of Puerto Rico *Doctor Honoris Causa* Award Ceremony

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INTRODUCTION

ME VAN A TENER QUE PERDONAR. SIENTO GANAS DE LLORAR. SUS PALABRAS me han conmovido. Cuando uno tiene tanta alegría en el corazón, es difícil dar un discurso formal. No obstante, esta es una ocasión seria. Ustedes van a tener que sufrir cuando esté hablando sobre un tema académico. Mis disculpas adelantadas; ahora comienzo.

Honorable Presidente, doctor Uroyoán Walker Ramos; Rectora, doctora Ethel Ríos Orlandi y Junta de Gobierno de la Universidad de Puerto Rico, es con un gran sentido de apreciación y humildad que acepto este prestigioso grado de *Doctor en Derecho Honoris Causa*. Utilizo esta oportunidad para extender mi gratitud a la Escuela de Derecho de la Universidad de Puerto Rico, tan hábilmente representada por la decana Vivian Neptune Rivera, quien nominó a esta servi-

* Associate Justice, Supreme Court of the United States.

dora para tan prestigioso grado doctoral. A todos los que están conmigo aquí hoy, les doy las gracias por venir y por conferirme este gran honor.

I have had many important moments in my life; today will count among the highest. I am particularly grateful that my mother, Celina Báez Sotomayor, and her husband, Omar López, y mi hermano, Juan Luis Sotomayor, and other members of my family and friends are here to celebrate this day with me. It is humbling to become a part of this great University, whose 110 years of providing higher education to the people of Puerto Rico have made it a leader in the pursuit of learning and academic thinking.

As most of you may know, I visit Puerto Rico with great frequency and my ties to the Island run very deep. In thinking about my remarks today, I thought about what I might be able to contribute to the intellectual exchange of this impressive institution and to the continuing dialogue of Puerto Ricans about their government institutions. For the last almost twenty-two years, I have been a judge and then a Justice. I am, therefore, most familiar with the Judiciary as a public institution and about how it functions. So I thought it best for my conversation with you today to be about how the Judiciary and institutions of higher education can foster greater respect and trust by the public in our role as institutions of government.

Mucho ha cambiado desde mi primera visita a Puerto Rico hace casi sesenta años. Cumplo los sesenta en junio próximo. No sé adónde se fueron los años. Puerto Rico ha sido testigo de cambios extraordinarios. He mencionado anteriormente, pequeños, pero significativos cambios que han ocurrido, como, por ejemplo, la evolución del uso de los mosquiteros y abanicos, los cuales permitían que la gente pudiera dormir de manera más cómoda, hasta el día de hoy, donde podemos encontrar un acondicionador de aire en casi todos los hogares. Además, he notado cómo las casas de madera con los techos de cinc se han convertido en casas de cemento.

También, he notado el cambio drástico en el volumen de tráfico; antes, solo encontrabas unos cuantos carros en la carretera y ahora siempre hay un tapón inmenso todos los días, sin importar la hora. El desarrollo en la Isla no ha sido uniforme y estoy segura que algunos cuestionarán si en realidad todos los avances han sido beneficiosos, como la pérdida del sonido calmante de la lluvia sobre los techos de cinc. Sin embargo, a pesar de todo, Puerto Rico continúa avanzando gracias a las personas trabajadoras y emprendedoras de esta Isla. Estoy segura de que habrá mayor progreso en su futuro.

And like Puerto Rico, much has changed in my life. Most notably, of course, I was fortunate enough to be appointed to the Supreme Court, where I have encountered professional challenges and rewards unlike any I've ever experienced before. The most significant realization I have had is how burdensome it is to be a Justice. In every case, so many people are affected. Not just the lives of the parties before you, but also the future of thousands or even millions of similarly situated persons, as well as any similar organization or institution.

My time on the Court has reinforced the unavoidable fact that in the cases that come before the Supreme Court, there is always at least one party that loses,

and their loss is one often shared by a great many others. It is only natural as a result that people feel aggrieved when the Court declines to take their side or recognize the injustice they feel has been done to them. These realizations have led me to reflect on the role of courts in our society and how we can best maintain the public's trust.

You see, we cannot promise anyone a win in court. We can only promise that we will provide a fair hearing. There is nothing more critical to the effective operation of a judicial system than public trust, by which I mean the shared confidence within a community that judges are resolving the disputes before them as correctly as possible based on the merits of each case, and not based on some illegitimate or hidden motivation. For when people do not believe that a judiciary is worthy of their trust, the entire fabric of civil society is destroyed. A judiciary that is suspected of deciding cases based on personal preferences, political favoritism, or perhaps outright bribery, will quickly lose its ability to command respect and compliance from the public. A public that has lost confidence in its judges may choose to take justice into its own hands.

One need look no further than the founding of the United States itself as an example. In describing the grievances that motivated the Framers to declare American Independence, the Declaration of Independence lists as one of the foremost grievances the fact that King George III "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of salaries."[1] The colonists feared, in other words, that no matter how meritorious their cases might be, judges would rule against them and for the British, perhaps confiscating their personal property, taking away their jobs, or finding them guilty of crimes they did not commit.

Regrettably, this fear is not a thing of the past. Recent studies have confirmed that in many developing countries, the public continues to lack trust in their judges. In Bangladesh, for example, a survey revealed that 63% of persons involved in litigation had paid bribes either to court officials or to an opponent's lawyer, and 89% thought that judges were corrupt; sad statistics.[2] Similarly, concerning numbers have been reported from countries closer to home, like the Philippines, Latvia, Nicaragua, and Bolivia.[3]

A lack of public trust in the Judiciary is, unfortunately, not only a problem in developing nations. Even in the United States there are growing concerns that the Judiciary may not be worthy of the public's confidence. Now, fortunately, there may not be the same concerns about outright bribery and judges putting their decisions up for sale to the highest bidder. And even when instances of that kind of unacceptable behavior occur, it appears that they are detected and punished by the authorities.

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1 THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

2 PETER LANGSETH & OLIVER STOLPE, STRENGTHENING JUDICIAL INTEGRITY AGAINST CORRUPTION 5 (2001), https://www.unodc.org/pdf/crime/gpacpublications/cicp10.pdf.

3 *Id.*

A few years ago, for example, two Pennsylvania state court judges were convicted of accepting more than two million dollars in cash bribes from the builder of a private, for-profit juvenile detention facility, in exchange for imposing harsh sentences on juveniles in order to increase the number of inmates in, and thus demand for, the detention centers.[4]

Yet, even setting aside these more egregious examples —and we are very fortunate when they are caught and punished, because it sets a public tone of respect— there are signs that the public's trust in the federal judicial system may be waning. To use my own court as an example, a 2001 survey reported that half of Americans had "quite a lot" of confidence in the Supreme Court; by 2013, that number had fallen to 34%.[5]

Our task as judges, lawyers, and law schools then, is to do everything in our power to rebuild and protect the public's trust in our judicial systems. My goal today is to explore more closely what I think may be the root causes of the public confidence problem, and then to talk about some critical ways in which all of us —judges, lawyers and educators— can make a positive impact.

I. THE ROOT CAUSES OF THE PUBLIC TRUST PROBLEM

A. The Inherent Uncertainty in the Enterprise of Judging

Let us start with what I believe may be the root causes of the public trust problem. I want to suggest today that there are two very different potential sources of public distrust in the judicial system. One type of source is inevitable, as it is founded in the inherent uncertainty in the enterprise of judging. That is to say, judges are often confronted with difficult cases in which they are called upon to resolve close disputes between competing parties who both fervently believe that they have the correct view of the law and facts. Yet judges are humans and therefore susceptible to mistakes. For example, it may be impossible to know with one-hundred percent confidence whether a doctor in a malpractice suit really performed negligently in a particular medical operation, or whether a defendant is actually guilty of a charged crime. While some of the pressure of resolving difficult factual disputes is relieved because juries are often tasked with providing ultimate answers, that does not fix the problem altogether because judges still frequently have to consider factual disputes during bench trials or during appeals.

More importantly, the uncertainty that judges are asked to resolve is not limited to uncertainty about historical facts. A major part of judging involves deciding the meaning of complicated and sometimes ambiguous statutory terms and constitutional provisions. For instance, when trying to decide if a particular

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4 Ian Urbina, *Despite Red Flags, Judges Ran Kickback Scheme for Years*, N.Y. TIMES, March 27, 2009, http://www.nytimes.com/2009/03/28/us/28judges.html?pagewanted=all&_r=0.

5 *Job Approval–Supreme Court*, GALLUP, http://www.gallup.com/poll/4732/Supreme-Court.aspx (last visit Jan. 7, 2015).

law was intended to do one thing or another, it may be truly hard to answer the question given that there may be competing reasonable interpretations of the statutory text, purpose, history, and so on.

Sometimes legislatures inject uncertainty into statutes accidentally, perhaps because they are unable to predict ahead of time how laws will be understood in future contexts in light of technological or other developments. Other times, legislative ambiguity may be intentional, because if a law were written with greater specificity, it might not be able to win passage.

The same kind of uncertainties exist with respect to the Constitution, which provides the broad outlines of how our society is to be governed, but cannot possibly answer with perfect clarity every conceivable dispute. While the Fourth Amendment guards against unreasonable search and seizures,[6] I do not think our founding fathers ever imagined a smartphone, iPad or any of the technology that exists today, that is so capable of invading privacy. The challenge that arises for the Judiciary is that given these uncertainties, judges are often put in something of an impossible position: they are asked to decide questions to which there are no obvious correct answers. And the net result is that invariably courts will issue rulings that members of the public may perceive to be incorrect and thus unworthy of their confidence.

B. The Public's Concern about Judges Possible Illegitimate Interest

If what I have just described as the first source of judicial distrust involves the difficulty inherent in the task of deciding between two competing, yet plausible views of the facts and the law, the second source of judicial distrust is very different. Instead of being founded in legal and factual uncertainty, the second source of distrust involves the concern that judges may not be deciding cases based on the law and facts in the first place or not doing so in a collaborative or respectful way that creates confidence that all sides of an issue are being neutrally explored.

This is the point that we can control. In other words, the second source of public distrust is the public's concern that judges may be beholden to some illegitimate interest, such that there is a failure of judicial independence or the existence of judicial bias. By judicial independence, I mean a concept that a University of Miami Professor named Keith Rosenn has defined as the "degree to which judges actually decide cases in accordance with their own determinations of the evidence, the law and justice, free from coercion . . . interference, or threats of governmental authorities or private [persons]."[7]

When judicial independence is lacking, the problem that arises is that the people will no longer feel as though their cases are being decided based on what the law requires, but rather on some other impermissible consideration, whether

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6 U.S. CONST. amend. IV.

7 Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 7 (1987).

a bribe, a political favor, a judicial bias, a public opinion poll, or some special interest.

This is not a new concern. Alexander Hamilton identified it in 1787, when he wrote in the Federalist Papers that "a steady, upright and impartial administration of the laws"[8] is essential because:

> [N]o [person] can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today. And every [person] must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.[9]

John Marshall, perhaps the most prominent Chief Justice in the history of the United States Supreme Court, had the same view as Hamilton, observing that "the greatest scourge an angry Heaven ever inflicted upon [a] . . . people, was an ignorant, a corrupt, or a *dependent* Judiciary."[10] In other words, it is one thing to have judges who get difficult questions wrong; and it is quite another to have judges who are answering questions based on improper motives, bias, or factors outside of the law and facts before them.

Now that is what we control. And both Professor Rosenn and Chief Justice Marshall got to the core of it. What you permit today, if it is wrong today, you can suffer that wrong tomorrow. Because government changes, the thing that we want to be constant, and the thing we respect, is the law. Because it outlasts political parties, it rises above the moment and treats all equally, and to the extent we do not uphold that standard we are going to do permanent damage to our institutions.

II. CRITICAL WAYS IN WHICH JUDGES, LAWYERS AND EDUCATORS CAN MAKE A POSITIVE IMPACT

So what can we do to address these sources of public distrust? I suggest two categories of answers. The first involves the way in which judges work with one another as well as the way judges relate to the public through their court interactions, courtroom demeanor, public appearances, and most important of all, written opinions. I have learned in my many years on the bench that the style and substantive approach that one takes in answering a particularly tough question can go a long way towards proving to litigants and the broader public that our decisions, although debatable, are nonetheless worthy of trust. The second category of suggestions that I have involves some broader institutional reforms that I think can help foster and preserve the independence of our judiciaries.

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8 THE FEDERALIST NO. 78, at 450 (Alexander Hamilton) (A.B.A. Publishing, 2009).

9 *Id.* at 454.

10 Jefferson B. Fordham & Theodore H. Husted, Jr., *John Marshall and the Rule of Law*, 104 U. PA. L. REV. 57, 61 (1955) (emphasis added) (citing PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30, at 615-19 (1830)).

A. The Ways Judges Work and Relate with one Another and to the Public

With respect to the first category, I submit that in living up to the dignity and nobility of their profession, judges have an obligation to interact among themselves and with the public in a way that will mitigate the problems that could otherwise give rise to public distrust. Judges will disagree about outcomes. Those disagreements will manifest themselves among trial judges in the different conclusions they might reach in similar circumstances presented by different parties. At the appellate level, those disagreements are publicly aired in concurrences or dissents.

As discussed previously, that is inherent in the job of judging. Quite often I am asked how Supreme Court Justices remain cordial with one another despite such profound disagreements in our opinions. Every law professor in this room knows that we are not silent about our disagreements. Our friendliness and personal warmth despite our disagreements is incredibly important, because the public notices both when we are cordial to each other outside the courtroom, and when we are not. So when Justices of different judicial philosophies socialize with one another as individuals, regardless of philosophical background, it inspires the public to believe that there is a real conversation going on between us in an attempt to resolve our differences.

Although they disagree with one another often, Justices Scalia and Ginsburg go to the opera together and have socialized as families over some holidays. Justices Scalia and Kagan often disagree too, but they are frequent hunting partners. Justice Breyer, Justice Alito, and I have had dinner together at one of our homes. Some of these events are reported upon, and the public appreciates seeing them.

Everyone focuses on the Supreme Court's divided opinions. But the reality is, we have many unanimous or nearly unanimous opinions. Last Term [2012], for example, 49% of our cases were decided by a unanimous vote.[11] A total of 63% were decided with at least seven Justices in the majority.[12] Moreover, even when we have split opinions, it is more common than you would think that Justices of different judicial approaches will join together.

Just recently, Justices Kennedy and Alito joined a dissent I wrote. In trying to explain that unusual lineup, a blog remarked that the three of us fall into "no known ideological or jurisprudential category."[13] But unusual lineups happen often and it is a good thing for public trust because it reinforces that judges are acting as individuals with their own views and not for a particular group agenda.

Many have criticized the Court for its adherence to tradition. I do not think tradition is a bad thing. It ensures that all members of the Court and the public

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11 SCOTUSBLOG–SUPREME COURT OF THE UNITED STATES BLOG 5 (2013), http://sblog.s3.amazonaws.com/wp-content/uploads/2013/09/SCOTUSblog_StatPack_OT121.pdf.

12 *Id.*

13 Noah Feldman, *Three Justices and a Lack of Practicality*, BLOOMBERGVIEW (Mar. 4, 2014), http://www.bloombergview.com/articles/2014-03-04/three-justices-and-a-lack-of-practicality (last visit Jan. 7, 2014).

are comfortable knowing that routines exist to make certain that Justices are acting on their own views of the law and not for improper motives.

For example, my court's procedures for reviewing cases include waiting to discuss cases until after oral argument. We do not talk about a case amongst ourselves until after oral argument. It is at that first conference, at the end of an argument week and after the parties have had a chance to present their positions, that we then discuss cases according to a specific order. These kinds of procedures help not just to create the impression of structured, orderly decision-making, but also to strengthen the independence of Justices who are able to act according to what they perceive to be the best answer after hearing all the thoughts of all other Justices.

Obviously, we continue to talk in smaller groups sometimes, after a vote, and there are attempts to change one another's minds. But that independent vote held at the first conference ensures that any Justice who does change his or her mind can articulate a convincing reason for that change, and that convincing reason shows good faith.

What I mean by all of this is that how judges choose to communicate with one another and the public can make all the difference between the public realizing that our disagreements over outcomes are really just rooted in difficult legal and factual questions —the first source of public distrust I spoke about— and not rooted in impermissible motivations, the second source of public distrust. I submit to you that when judges do their jobs correctly, the public can understand disagreements based on legal uncertainty, such that public confidence in the Judiciary is not compromised at all.

Are there other ways for judges to do this? The key is that judges should make clear through their actions that, insofar as their rulings may be open to reasonable dispute, such dispute is about the merits of the case, and not about unrelated political issues or other concerns. Doing this can involve simple actions, such as treating litigants with dignity and respect whether in writing or in the courtroom, no matter how much a judge happens to disagree with a position that the litigant may espouse. It can involve being open to questions and criticism in the public sphere without responding harshly or defensively. We as judges are always going to be attacked. We must be above the attacks.

I ask my law clerks to bring me articles that discuss mistakes or things we have overlooked in our decisions or that we had not considered before. It does happen. We are humans. We make mistakes. I continue to listen, even after cases are decided, because a new case will come with a similar issue and you want to be sure you got it right the first time. As I've said, it is also important for judges and Justices to act in an inclusive way with one another, debating issues in good faith and with an open mind. We should never talk or socialize privately with a party or lawyer involved in a case before us in any way and we should also stay away from political events and events hosted by people or groups that are involved in cases before the Court. Now, that is easier in the District of Columbia or even easier in New York City, because both cities are so large with so many

different groups. It may be harder in Puerto Rico where the community is relatively smaller.

Yet there is little that can undermine a judge's credibility more quickly than the appearance of partiality to one side of an issue. That is why I try to make sure that when I am invited to a prosecutor's training session, I also go to a function held by defense attorneys. Similarly, I have attended events put on by opposing organizations like the Federalist Society, which advocates an original construction of our Constitution, and the American Constitution Society, which adheres to an understanding of the Constitution that develops over time. I go to both. If I accept one, I look for a second. If I am going to invite some person who may have a public position that might make me seem biased, I invite someone of the other side. I always want to be evenhanded in everything I do publicly and even privately. Evenhandedness in what we do, both publicly and privately, is so important to promoting public trust.

Most importantly, when it comes to the core of our work —the written process of providing the reasoning for our decisions— our opinions should take seriously the arguments raised by all parties and any judge who has taken a contrary position. Our opinions should explain why a losing litigant's position may be incorrect on the merits and incorrect according to precedent, in fair and evenhanded language, rather than through scathing personal attacks. And our opinions should acknowledge when questions truly are close and tough to decide.

Being candid about situations where legal issues are just not capable of an easy or obvious answer can go a long way toward showing the public that disagreement in the courts is about the merits, and not about anything improper. For example, the Supreme Court has had a number of very controversial cases in recent terms, where the final vote is five to four, such that critical issues are being decided by the slimmest of margins.

When jurists disagree so closely about such important issues, it is not hard to see why the public may worry that what have driven the outcome are the Justices' personal preferences, political favoritism, public opinion or some other consideration other than what the actual right answer ought to be. Having opinions that are written in conciliatory language, and that recognize the best points made by the opposing parties, can go a long way towards showing the public that we, as judges, are just trying our best to get the answer right, and not that we are acting as part of some nakedly political agenda or with some personal bias.

My overarching point in saying all of this is to emphasize that when it comes to the two different sources of public distrust that I have identified —uncertainty about law and fact on the one hand, and concern that a judge may be deciding a case based on an impermissible motivation on the other hand— is that the public can understand and even tolerate the first type of problem if we as judges do a good job of explaining ourselves and remain consistent in our jurisprudence. But the public cannot be asked to tolerate or understand the second source of distrust. That is why our interactions with the public and our rulings must make

clear how, in fact, our disagreements really are just disagreements over difficult legal issues.

Let me give an example to illustrate. Two years ago, the Supreme Court decided a landmark case holding that it violates the Fourth Amendment's prohibition against unreasonable searches to attach a GPS tracking device to a suspect's vehicle without a warrant.[14] All nine members of the Court agreed on the result, but we reached it for very different reasons. Four Justices agreed that a warrant is required solely on the ground that the government had engaged in a physical trespass on the suspect's property. Four of us would have analyzed the question based not on the physical trespass, but on the fact that tracking a person's long-term movements with a GPS device violates society's reasonable expectations of privacy.

I found wisdom in both approaches, but wrote an opinion noting that even short-term tracking of a person's movement by the government could infringe on our expectations of privacy. The division of the Justices was not something thought to be normal. Justice Scalia wrote the majority opinion, joined by Chief Justice Roberts and Justices Kennedy and Thomas, as well as myself. I concurred. The other side was Justice Alito, who generally goes the other way, and Justices Ginsburg, Breyer and Kagan. So you see, despite our different judicial approaches generally, it is important that in many cases we divide in ways that people do not expect. That also is a source of confidence, when we are not always voting as a bloc but when people can perceive we are trying to get the law right individually.

All that said, even if judges do everything they can to make clear through their opinions and demeanor that their disagreements are honest disputes over the law and the facts, that alone will not convince every member of the public that impermissible motivations did not factor into the process. And that brings me to the second category of suggestions for how we may foster greater public trust in the judiciary: ways in which we can shape our institutions to encourage judicial independence, so that the public will have structural reasons to trust that decision-making is based on the right considerations.

B. Broader Institutional Reforms to Foster and Preserve Judiciary Independence

When talking about the issue of judicial independence, one has to begin by distinguishing between a pair of very different kinds of threats. On the one hand, as I alluded to earlier in the context of an unfortunate number of developing countries, there is the problem of outright judicial bribery, fraud, and corruption. This is obviously the most severe kind of problem, because it undermines the very integrity of the judicial system if justice is meted out to the highest bidder.

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14 United States v. Jones, 132 S.Ct. 945 (2012).

I am afraid that there are no simple magic bullet solutions that can fix this problem, as the culture of bribery that pervades a regrettable number of judicial systems in the world is founded in a complex mixture of causes including social norms, economic inequality, and nascent legal and prosecutorial systems that may be as yet incapable of ferreting out and punishing such behavior. We must remember, if you pay judges too little or not enough, they may be more prone to bribery. We are fortunate enough that, for the most part, our legal systems do not suffer from this kind of outright corruption, or that when such corruption exists, it is detected and punished as in the scandal involving juvenile detentions that I mentioned earlier. So perhaps the best we can do in our own judicial systems is to model what it looks like for judges to be acting with dignity and honor, as independent and impartial arbiters of the law.

That is not to say that our judicial systems are a perfect example of independence, however. There are risks of judicial dependence in the mainland United States as well as in Puerto Rico; it is just that the source of such problems owes to a more subtle type of dilemma, which is that judges may face institutional pressures to base their decisions on less overt considerations other than the facts and law before them. I want to focus today on three specific types of these improper considerations: public opinion, political favoritism and special interests.

The first type of institutional pressure is that judges may decide cases based not on what the law and facts require, but rather on their estimation of what will be most popular. Now, in the abstract one might ask, what would be so wrong about a judge choosing to base his or her decision in a specific case on the result that a majority of the people would want? We live in a democracy, after all, and so maybe it would be a good thing to encourage judges to do what 51% of voters would prefer.

The problem with this view is that in our constitutional system, one of the paramount purposes of the Judicial Branch is to serve as a counter-majoritarian check, to stand up for what the law and Constitution actually require, rather than what happens to be the most popular thing at the time. One need only think about some of the most important cases in the history of the United States to see how important it is for the Judiciary to perform its job independent from public opinion.

If the Supreme Court had consulted public opinion polls before deciding *Brown v. Board of Education*,[15] it is possible that it would not have ended segregation. Indeed, it is arguably popular opinion that led to some of the most criticized cases in our history, such as the *Dred Scott* decision, which permitted slaves to be treated as property and not citizens, and which some scholars view as a precipitating cause of the Civil War.[16]

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15 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

16 Dred Scott v. Sandford, 60 U.S. 393 (1856).

Recognizing that reliance on public opinion would make judges incapable of protecting the core rights that preserve our civil society, the framers of both the Federal and Puerto Rican constitutions created systems in which judges would not need to look over their shoulders for fear that an unpopular ruling would cost them their job. Thus, Article III of the U.S. Constitution provides that federal judges shall be granted life tenure, and not be subject to periodic elections that might lead them to issue decisions based on popular opinion as opposed to the proper view of the law.[17] Article V of the Puerto Rico Constitution likewise creates an appointed judiciary, with the slight modification of mandatory retirement at age seventy.[18]

In my view, the decision to make the judiciary a non-elective branch has many virtues. To see why, one need only look to the experience in certain U.S. states where judges are not appointed for fixed tenures, but instead have to be elected and re-elected through periodic popular votes or reappointed at the whim exclusively of political entities.

In the State of Alabama, for example, judges are chosen through partisan elections held every six years. The result of this procedure is that Alabama judges face an innate pressure to tailor their rulings in individual cases not only to what the particular facts and law would require, but also to what they think is likely to earn them re-election. Again, although one might argue that this responsiveness to public will may be a good thing in some respects, there are certainly significant downsides as well.

To give an example, trial judges in Alabama are the only judges in the country that routinely override jury recommendations to sentence criminal defendants to life in prison and instead sentence them to death. This is in my view an extraordinary thing to do. Where a jury of Alabama residents has considered all of the evidence and made a considered judgment to recommend a sentence of life without parole, for one person to override that choice and impose her or his own judgment of death is, to say the least, a weighty choice.

Yet, because Alabama judges must face partisan re-election challenges every six years, there is substantial pressure on them to appear as *tough on crime* as possible, even if a jury disagrees. One Alabama judge, who has overridden jury verdicts to impose the death penalty on six occasions, ran several advertisements voicing his support for capital punishment as part of his re-election campaign. One of these ads boasted that the judge had presided over "some of the most heinous murder trials in our history," and expressly named some of the defendants whom he had sentenced to death over a jury's contrary judgment.

Another judge who had overridden a jury verdict of life in order to impose a death sentence admitted that voter reaction has "some impact, especially in

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17 U.S. CONST. art. III, § 2.

18 CONST. PR art. V, § 10.

high-profile cases."[19] "Let's face it," the judge said, "we're human beings. I'm sure it affects some more than others."[20] My colleague, retired Justice Sandra Day O'Connor has taken the lead in calling on states to reform their judicial selection procedures so as to ensure that judges can make decisions based on the law and not on political expediency.

However, political appointment has its own pluses and minuses. Political appointment can instill a sense of favoritism that can bias a judge, but there are ways in which various states and systems in the United States try to control or minimize political considerations. For example, in many places they have merit selection committees, comprised of representatives from all the major parties in that state and major groups that interact with the potential judges. That works for some institutions. There are a lot of other ways to minimize political favoritism and emphasize merit, but the point remains that one needs to think about depoliticizing the ways in which judges are appointed. Because if we do not, then it is innate in the system that the appearance of politics will take over.

A second kind of pressure that can threaten the independence of the judiciary is the flip-side to the pressures that can be brought upon by judicial elections. For if judges are not elected, then they are invariably appointed. In the federal system and in Puerto Rico, they are appointed by the Executive Branch. The risk with political appointments, however, is that rather than being beholden to public opinion polls and future election prospects, judges may subvert their independent decision-making to the preferences of the administration that selected them.

What would be wrong with a system in which judges conform their decisions to the views of the political official or party responsible for their appointment? The answer is that such a decision-making process would undermine the principle of separation of powers that is essential to our democratic system. In our system, it is the job of the political branches to create and enforce the law in accordance with public opinion. The job of judges is to interpret the law, and the fundamental rights afforded under the Constitution, and to apply those principles neutrally to the facts of each case.

If judges were instead to just do the bidding of the Executive, then that would place so much power in the hands of the Executive that it would endanger the rights of individuals. As Alexander Hamilton explained more than two centuries ago, "there is no liberty, if the power of judging be not separated from the legislative and executive powers . . . . The complete independence of the courts of justice is peculiarly essential in a limited Constitution."[21]

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19 Eric Velasco, *More Jefferson County Judges Issue Death Sentences Despite Jury*, THE BIRMINGHAM NEWS (July 17, 2011), http://blog.al.com/spotnews/2011/07/more_jefferson_county_judges_i.html (last visit December 21, 2014).

20 *Id.*

21 THE FEDERALIST NO. 78, at 450-51 (Alexander Hamilton) (A.B.A. Publishing, 2009) (citations omitted).

That is not to say that the Legislature and Executive are powerless to act if they disagree with certain decisions by the Judiciary, at least with respect to statutory questions. If, for example, they disagree with the Judiciary's answer on a question of statutory interpretation, they can pass new legislation to override that answer. What they must not do, however, is influence the Judiciary's decision in the first place, for the same reason that judges should not be beholden to public opinion.

For just as public pressure can lead courts to issue erroneous rulings with far-reaching repercussions for individual rights and the development of the law, the same can be said of political pressure. One example that comes to mind is *Korematsu v. United States*, the 1944 decision in which the Supreme Court agreed with the government's argument that it should be allowed to force Japanese American citizens to live in internment camps to prevent the possibility that they might conspire with Japan during World War II.[22]

In justifying its decision, the Court relied in large part on deference to Congress and military authorities, who argued that such drastic steps were necessary to protect the public. It is now widely understood that the case was wrongly decided, and the Department of Justice even confessed that error in 2011.[23] But if the Supreme Court had shown a greater skepticism for the views of the political branches when deciding the case, it is possible that they would have acted properly at the time to stop the fundamental violation of individual rights before it was too late.

A third kind of improper consideration that courts should protect against is influence from special interest groups. For just as it would be improper for a judge to make a ruling based on public opinion or political favoritism, so too would it be wrong for a judge to decide a case as a courtesy to some powerful interest group or organization. A lot of the problems with special interests can be addressed by reforming judicial elections, since one of the main ways that special interests can influence cases is by making large campaign contributions.

Without such contributions, the influence of special interests is severely curtailed. But even appointed judges may be tempted to side with special interests in the absence of robust rules of ethics and codes of conduct forbidding judges from participating in particular cases. In fact, one of the benefits of having clear ethical rules is not only that it prevents judges from ruling on cases in which they may have vested interests, but also that it prevents the appearance of impropriety as well.

For example, by requiring a judge to recuse herself or himself from any matter in which he or she may be acquainted with one of the parties, or owns stock in one of the interested companies, not only is the judge relieved of any potential

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22 Korematsu v. United States, 323 U.S. 214 (1944).

23 *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, THE UNITED STATES DEPARTMENT OF JUSTICE (May 20, 2011), http://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases (last visit Jan. 7, 2015).

conflict of interest, but so too can the public be confident that no improper considerations are coming into play.

It is important to recognize that these ethical rules are just floors, not ceilings. Judges themselves have to be cognizant of the appearance of impropriety. It is for this reason that, even though the Supreme Court's ethical rules allow Justices to participate in cases that involve people they have worked with as long as the work was more than two years ago, I continue to recuse myself in cases where I have any continuing personal contact with those organizations or employers. Thus, professional pride —a desire to be a judge who is admired and emulated in the community— is important not just to the respect one earns personally, but also to the legacy that one leaves behind. And above all else, it is critical to the public's confidence in us and our judicial institutions.

I should mention one more powerful means of protecting the actuality and appearance of judicial independence. It is a concept that applies across the board with respect to independence from public opinion, political favoritism, and special interests. That is the concept of transparency.

The more open and transparent a judicial system is to members of the public, the more likely the public is to have confidence that judges are deciding cases based on the proper considerations. With that in mind, the Supreme Court opens every oral argument to members of the public and the media, and releases transcripts and audio from each case as well. Now, there has been some debate recently about whether the Court should allow live cameras in as well, a debate on which I can see the arguments on both sides. But the key point is that even without public cameras we are making our proceedings open to the public through our recordings, and that allows others to judge what we are doing at oral argument. The more courts make themselves open to the public and open to scrutiny, the more likely the public will trust that it is engaging in a fair and evenhanded process.

C. Lawyers and Academic Institutions' Role in Rebuilding the Legal Profession's Trust

Up until this point, I have spoken about the efforts that judges can undertake to build public trust in the Judiciary, and ways in which institutions can be structured and reformed to do the same. However, I must pause now to emphasize the absolutely essential role that lawyers and academic institutions play in tackling this problem as well.

To start with lawyers, there are some simple ways in which they can assist in the maintenance of public trust that involve practices similar to much of what I have described for judges. For example, just as I emphasized the importance of judges disagreeing with each other in a respectful way that focuses on the merits of each case rather than on unsupported allegations of bias, lawyers should do the same when they are on the losing end of a dispute.

When a lawyer loses his or her case, there is an obvious temptation to blame the result on the judge and to accuse the judge of getting the case wrong for any

number of reasons. But there is a huge difference from the perspective of the public when a lawyer accuses a judge of getting the case wrong due to some honest misconception about the law, and accusing a judge of some bias or personal agenda. The latter type of attack should not be made recklessly. For although the public can understand that judges make mistakes because they are, in the end, only humans, the public cannot be expected to tolerate corruption or bias. A charge of bias made by a lawyer carries more weight.

However, building the public's trust in the judicial system requires lawyers and educators to do more than just serve as sources of honest information about the decisions that judges make. Lawyers and legal educators also represent the judicial system in their own right. When a lawyer provides lackluster legal assistance to a client, or even worse, steals from a client outright, such actions cannot help but to cast a pall over the entire judicial system. For as much as the public interacts with judges, they interact more on a daily basis with lawyers. That fact, in turn, creates an obligation on legal educators to serve as role models of ethical behavior and zealous advocacy.

I do not mean to suggest that law schools have a duty to teach lawyers every last detail about every possible legal subject. Regrettably, law schools spend a lot of time on the substance of legal issues, and often not enough time teaching students about what it means to be a lawyer. Law schools do have an absolute duty to train their students on how to be principled and moral professionals. There is no greater duty than that, and perhaps no greater way in which educational institutions can produce a positive impact on our legal system.

Finally, lawyers and law schools should make a concerted effort to educate the public directly about the key values that undergird our legal system, the reasons for the law's inevitable uncertainty, and the fact that these uncertainties should be cause for us, not to disengage from or doubt the wisdom of our justice system, but rather to join together in efforts to improve it. When local bar associations host events about various issues in the law, they can make an effort to encourage members of the public to attend. Many bar associations often take an active role in arranging for *pro bono* work by experienced lawyers on behalf of those less fortunate members of our society who are in need of legal assistance. By showing these members of society that the legal system can be an instrument of justice on their behalf, such volunteer initiatives can go a long way to building public trust in the judicial system.

Lo mismo va para las escuelas de Derecho. In terms of community education, law school events and speeches make for an ideal environment for professors and other lawyers to interact with members of the community and to talk about their experiences with, and developments in, the judicial system. Another way that law schools can play a positive role in educating the public is through clinical programs whereby students get out in the community and educate citizens about their rights and the operation of the judicial system, and assist with certain frequently recurring legal issues.

I know the Law School here has made great strides in offering clinical and other *pro bono* opportunities to the student body. Such programs serve a double

bottom line. Not only do they make the legal system accessible to members of the public, teaching them that their judicial institutions are worth believing in, but they also train and develop young lawyers into future leaders in the profession, who recognize the value of client-oriented service and the greater good that can be served by our profession.

I applaud the University of Puerto Rico Law School as it continues to expand these kinds of opportunities for students and members of the public, as they are truly on the front-lines of the battle to build public trust in the legal system.

Conclusion

En los veintidós años que llevo sirviendo a la Judicatura Federal, puedo decir con orgullo que siempre he tenido la misma meta en mente: evaluar imparcialmente los hechos y la ley presentados, para poder llegar a la conclusión correcta en cada caso. Igualmente, puedo decir con orgullo que mis colegas en cada nivel de la Judicatura se han enfocado en la misma meta básica. Esto no significa que hemos llegado siempre a la misma conclusión, ya que me he encontrado en firme desacuerdo con mis colegas en algunos casos. Sin embargo, me gustaría pensar que nuestro desacuerdo refleja diferentes puntos de vista legítimos en cuanto a preguntas legales y hechos complejos.

To the extent the public has not seen it that way and may be losing trust in the Judiciary as an institution, it poses a challenge to all of us to do a better job of explaining our reasoning and writing in a civil manner so as to eliminate any doubt that impermissible motivations may be playing into our decision-making processes. It is a challenge that applies equally to every judge in every courtroom in the world, which is why I have tried to offer a few ways that judicial systems may be structured to avoid the problems associated with judicial reliance on popular opinion, political favoritism, and special interests.

I hope that my fellow judges, both here in Puerto Rico and throughout the United States, will work together with this goal of judicial independence in mind, for it is one of the most important challenges facing our societies. And I hope everyone in this room, especially the lawyers and educators, will join this undertaking.

Gracias nuevamente por tenerme aquí hoy y por otorgarme tan importante honor. Gracias a todos.