

# ON BEING A JUDGE

Prepared by Judge Daniel A. Barker<sup>1</sup>

## **Scripture References:**

- Doctrine & Covenants 134
- Twelfth Article of Faith
- Mosiah 29
- D&C 58:21-22

## **Selected Reading Material:**

Alexander Hamilton, The Federalist, No. 78, June 14, 1788 [[www.constitution.org/fed/federa78.htm](http://www.constitution.org/fed/federa78.htm)]

Thomas Jefferson, Letter to Judge Spencer Roane, September 6, 1819 [[teachingamericanhistory.org/library/index.asp?document=2192](http://teachingamericanhistory.org/library/index.asp?document=2192)]

Stephen L. Carter, The Religiously Devout Judge, 64 Notre Dame L.Rev. 932 (1989)

Sanford Levinson, The Confrontation of Religious Faiths and Civil Religion: Catholics Becoming Justices, 39 DePaul L.Rev. 1047 (1990)

Kent Greenawalt, Religious Convictions and Political Choice (1988)

Sean V. Grindlay, MAY A JUDGE BE A SCOUTMASTER? DALE, WHITE, AND THE NEW MODEL CODE OF JUDICIAL CONDUCT, 5 Ave Maria L. Rev. 555 (2007)

*State of Idaho v. Freeman*, 507 F.Supp. 706 (D.Idaho 1981)

2007 ABA Model Code of Judicial Conduct

## **Notes and Commentary:**

### **Section A: A Judge is Required to Fairly and Impartially Apply the Law of the Land Without Bias or Prejudice Toward or Against any Person or Organization**

- *Why is an independent judiciary and the rule of law important?*
- *What do judges take an oath to do?*
- *Can the judiciary exceed its proper bounds (contrast the views of Hamilton and Jefferson)?*
- *What are some of the ethical requirements pertaining to impartiality?*
- *Why is adherence to the rule of law and an independent judiciary so important to people of faith?*
- *How should a judge treat those who appear before the judge in court?*
- *Why must a judge follow the law, even if it may differ from a precept of the judge's faith?*
- *If a judge cannot in good conscience follow the law what are the judge's options?*
- *What attributes make for an outstanding judge?*
- *Why is the rule of law and adherence to the law, through those who will administer it fairly and impartially, so important to our Heavenly Father?*
- *Seeing the obligations of the judge to know and follow the law impartially, what duties does this impose upon the lawyer who will be appearing before that judge?*

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**Reading Excerpts:**

Socrates, as quoted in The Judge's Handbook 2<sup>nd</sup> Ed. (1994) 304:

“Four things belong to a judge:  
To hear courteously,  
To answer wisely,  
To consider soberly,  
And to decide impartially.”

John Marshall, Virginia Constitutional Convention, Debates 619 (1829-30) in The Judge's Handbook 2<sup>nd</sup> Ed. (1994), 7:

I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt or a dependent Judiciary.

Declaration of Independence, July 4, 1976, listing the reasons for independence:

He sat upon us one-sided jurists.

\* \* \*

He has made Judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries.

\* \* \*

He has obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers.

J. Reuben Clark, Jr., to the Los Angeles County Bar Association, February 24, 1944 as quoted in Romney, Marion G. *Why the J. Reuben Clark Law School?* (September 5, 1975) 34 [[http://www.law2.byu.edu/law\\_school/foundingdocumentsnew/index.php](http://www.law2.byu.edu/law_school/foundingdocumentsnew/index.php)]:

I am . . . mindful that in speaking to you, I am speaking to a distinguished group of that great body of citizenry, who, because of their training and experience, must take an important place in the future of this country, whether we shall go left or go right. You who are elevated to the bench are the dispensers of justice and equity to the people, the guardians of the peace and order of our society. You who are of the bar man the watchtowers of the nation and give view far and near. Your eyes must be the first to see and you the first to make ready to meet the oncoming tyranny. Upon the bench and the bar of the country rests the great responsibility of seeing that our liberties and free institutions are preserved. Legislators may be incompetent, executives may be dishonest, but if the bench and the bar be honest and filled with integrity, then under the Constitution, the people are secure, and free institutions will still live with us. But security and liberty both take flight where the [bar and/or] the judiciary [are] corrupt.

Thomas Paine, COMMON SENSE in COMMON SENSE AND OTHER POLITICAL WRITINGS, 3, 32, (Nelson F. Atkins, ed. 1953):

[L]et the day be solemnly set apart for proclaiming the Charter; let it be brought forth . . . [so] the world may know, that so far we approve of monarchy, that in America the law is king. For in absolute governments the

king is law, so in free countries the law ought to be king; and there ought to be no other.

Doctrine and Covenants Section 101:80:

I established the Constitution of this land, by the hands of wise men whom I raised up unto this very purpose.

Ezra Taft Benson, "The Constitution -A Glorious Standard," Ensign, May 1976, 91:

I reference the Constitution of the United States as a sacred document. To me its words are akin to the revelations of God, for God has placed his stamp of approval on the Constitution of this land. I testify that the God of heaven selected and sent some of his choicest spirits to lay the foundation of this government as a prologue to the restoration of the gospel and the second coming of our Savior.

5 U.S.C. § 3331:

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

Arizona Constitution, article 6, section 26:

Each justice, judge and justice of the peace shall, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Arizona, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.

Alexander Hamilton, The Federalist No. 78:

[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.

\* \* \*

[T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter . . . liberty can have nothing to fear from the judiciary alone . . .

Thomas Jefferson, Letter to Judge Spencer Roane, September 6, 1819[teachingamericanhistory.org/library/index.asp?document print=2192]:

If this opinion be sound [that the judiciary is charged with "exclusively explaining the Constitution"] then indeed is our Constitution a complete *fe/o de se* [an act of suicide]. For intending to establish three departments coordinate and independent, that they might check and balance one another, it is given, according to this opinion, to one of them alone the right to prescribe rules for the government of the others . . . The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics that whatever power in any government is independent, is absolute also . . . Independence can be trusted nowhere but with the people in mass.

Thomas Jefferson, Letter to William Charles Jarvis, September 28, 1820 in XV Writings of Thomas Jefferson 277 (Albert Ellery Bergh, ed. 1904):

You seem . . . to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps.

\* \* \*

I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power.

King Benjamin, The Book of Mormon, Mosiah 29:26:

Now it is not common that the voice that the people desireth anything contrary to that which is right; but it is common for the lesser part of the people to desire that which is not right; therefore this shall you observe and make it your law to do your business by the voice of the people.

2007 ABA Model Code of Judicial Conduct, Canon 3, (A), (B) 1 & 2:

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE  
IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

[Note that a judge "shall" hear all matters assigned to the judge unless disqualification is "required."]

Sir Thomas More quoting from W. Roper, The Lyfe of Sir Thomas Moore, Knighte, J.M. Cline ed. 42 (1950) in The Judge's Handbook 2<sup>nd</sup> Ed. (1994), 7:

If the parties will at my hand call for justice, then were it my father stood on the one side, and the devil on the other, his cause being good, the devil should have the right.

Our Heritage: A Brief History of The Church of Jesus Christ of Latter-day Saints 51 (1996):

Joseph and Hyrum Smith, Sidney Rigdon, Lyman Wight, Caleb Baldwin, and Alexander McRae were imprisoned in Liberty Jail in Clay County on 1

December 1838. The Prophet described their situation: "We are kept under a strong guard, night and day, in a prison of double walls and doors, proscribed in our liberty of conscience, our food is scant. ... We have been compelled to sleep on the floor with straw, and not blankets sufficient to keep us warm. ... The Judges have gravely told us from time to time that they knew we were innocent, and ought to be liberated, but they dare not administer the law unto us, for fear of the mob.

Sir Francis Bacon, *Speech to the Star Chamber*, to judges before the summer circuit (1619) in *The Judge's Handbook* 2<sup>nd</sup> Ed. (1994), 7:

A popular judge is a deformed thing.

William Howard Taft, *Present Day Problems* (New York: Dodd Mead (1908) pp. 63-64 as quoted in Jeffery A. Segal, et al., *The Supreme Court in the American Legal System* (2005), 17:

It is well that judges should be clothed in robes, not only that they who witness the administration of justice should be properly advised that the function performed is one different from, and higher than, that which a man discharges as a citizen in the ordinary walks of life: but, also, in order to impress the judge himself with the constant consciousness *that he is a high priest in the temple of justice* and is surrounded with obligations of a sacred character that he cannot escape, and that requires his utmost care, attention and self-suppression.

President Joseph F. Smith, Conference Report, October 1912:

Joseph Smith, the prophet, was inspired to affirm and ratify the truth, and he further predicted that the time would come when the Constitution of our country would hang as it were by a thread, and that the Latter-day Saints above all other people in the world would come to the rescue of that great and glorious palladium of our liberty. We cannot brook the thought of it being torn into shreds or destroyed, or trampled under foot and ignored by men. We cannot tolerate the sentiment at one time expressed by a man high in authority in the nation. He said: The Constitution be damned; the popular sentiment of the people is the constitution. That is the sentiment of anarchism that has spread to a certain extent, and is spreading over the land of liberty and home of the brave. We do not tolerate it. Latter-day Saints cannot tolerate such a spirit as this. It is anarchy. It means destruction. It is the spirit of mobocracy, and the Lord knows we have suffered enough from mobocracy, and we do not want any more of it.—

Dallin H. Oakes, "Opening Remarks" at the Opening of the J. Reuben Clark Law School, Brigham Young University, at 13 August 27, 1973 [[http://www.law2.byu.edu/law\\_school/foundingdocumentsnew/pdf%20documents/oaksbecomingclarksschool.pdf](http://www.law2.byu.edu/law_school/foundingdocumentsnew/pdf%20documents/oaksbecomingclarksschool.pdf)]:

Another aspect of the rule of law, sometimes misunderstood, is the principle that the law stands for the protection of the man who is evil as well as the man who is good, just as the Lord "maketh his sun to rise on the evil and on the good, and sendeth rain on the just and on the unjust" (Matt. 5:45). The results of this impartial protection are not ideal, but history shows this principle to be the best available alternative until our legal processes are perfected by the great lawgiver and judge to whom one day we all will bow in allegiance. So long as our lawmakers and judges are fallible men, we need rules that will not bend one way for the man or the cause that someone deems to be good and yet another way for the man or cause that some men judge to be evil.

Judge Learned Hand, *Brown v. Walter*, 62 F. 2d 798, 800 (2<sup>nd</sup> Cir. 1933):

Justice does not depend upon legal dialectics so much as upon the atmosphere of the court room, and that in the end depends primarily upon the judge.

2007 ABA Model Code of Judicial Conduct, Canon 3(B) 4 & 5:

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require\* similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

The Savior, Matthew 25:40, 45:

Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me. . . . Inasmuch as ye did it not unto one of the least of these my brethren, ye did it not unto me.

## **Section B: Courts Have Held a Judge Is Not Disqualified from a Case or Types of Cases Simply Because of the Judge's Faith.**

- *What are the ethical requirements imposed on a judge?*
- *When should a judge disqualify himself or herself from a case?*
- *Are there ethical requirements that may specifically impact judges for whom their faith matters?*
- *What rights do the religious test clause of the United States constitution and, where applicable, state constitutions preserve?*
- *Does a leadership position in a church necessarily disqualify a judge, even when the church involved has taken a position publicly on the issue?*
- *Must a judge refrain from making public statements on issues that may come before him or her?*
- *What constitutional principles are implicated if judges are disqualified from serving on a particular case or types of cases based solely on their faith?*
- *Must judges restrict their public involvement and statements on issues that may come before them?*
- *Must those who wish to be considered at some point in time to be a judge, limit their involvement prior to becoming a judge?*

### **Reading Excerpts:**

The American Bar Association (ABA) promulgated in 2007 a revision to earlier versions of its model code for judicial conduct. The individual states and the United States have their own separate codes of conduct pertaining to judges within their jurisdiction which may or may not reflect the ABA's model code.

2007 ABA Model Code of Judicial Conduct, [http://www.abanet.org/judiciaethics/ABA\\_MCJC\\_approved.pdf](http://www.abanet.org/judiciaethics/ABA_MCJC_approved.pdf), (last checked December 23, 2008):

CANON 1

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

CANON 2

A judge shall perform the duties of judicial office impartially, competently, and diligently.

CANON 3

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

CANON 4

A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.

ARIZONA CODE OF JUDICIAL CONDUCT-1993,

[http://www.supreme.state.az.us/ethics/Code\\_of\\_Judicial\\_Conduct\\_June\\_2004.pdf](http://www.supreme.state.az.us/ethics/Code_of_Judicial_Conduct_June_2004.pdf) (last checked December 23, 2008):

CANON 1

A judge shall uphold the integrity and independence of the judiciary.

CANON 2

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

CANON 3

A judge shall perform the duties of judicial office impartially and diligently.

CANON 4

A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

CANON 5

A judge or judicial candidate shall refrain from inappropriate political activity.

Code of Conduct for United States Judges, <http://www.uscourts.gov/guide/vol2/ch1.html>, last checked December 23, 2008:

Canon 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

Canon 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

Canon 3

A Judge Should Perform the Duties of the Office Impartially and Diligently.

Canon 4

A Judge May Engage in Extra-Judicial Activities To Improve the Law, the Legal System, and the Administration of Justice

Canon 5

A Judge Should Regulate Extra-Judicial Activities To Minimize the Risk of Conflict with Judicial Duties.

Canon 6

A Judge Should Regularly File Reports of Compensation Received for Law-Related and Extra-Judicial Activities

Canon 7

A Judge Should Refrain from Political Activity

2007 ABA Model Code of Judicial Conduct, RULE 2.11 *Disqualification*:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

\* \* \*

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

2007 ABA Model Code of Judicial Conduct, RULE 3.6  
*Affiliation with Discriminatory Organizations*:

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

COMMENT

[1] A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired.

[2] An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural

values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

[4] *A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.*

[5] This Rule does not apply to national or state military service.

United States Constitution, art. VI, sec. 1, cl. 3:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but *no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.*

*Feminist Women's Health Center v. Codispoti*, 69 F.3d 399 (9<sup>th</sup> Cir. 1995):

[The following is the complete text of an order issued by the Honorable John T. Noonan, denying the motion of the Feminist Women's Health Center that sought his recusal. The Health Center alleged that his "fervently held religious beliefs would compromise his ability to apply the law."]

**ORDER**

NOONAN, Circuit Judge.

The Constitution of the United States, Article VI, provides: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The plaintiffs in this petition for rehearing renew their motion that I recuse myself because my "fervently-held religious beliefs would compromise [my] ability to apply the law." This contention stands in conflict with the principle embedded in Article VI.

It is a matter of public knowledge that the Catholic Church, of which I am a member, holds that the deliberate termination of a normal pregnancy is a sin, that is, an offense against God and against neighbor. Orthodox Judaism also holds that in most instances abortion is a grave offense against God. The Church of Jesus Christ of Latter-Day Saints proscribes abortion as normally sinful. These are only three of many religious bodies whose teaching on the usual incompatibility of abortion with the requirements of religious morality would imply that the plaintiffs' business is disfavored by their adherents. See Theresa V. Gorski, *Kendrick and Beyond: Re-establishing Establishment Clause Limits on Government Aid to Religious Social Welfare Organizations*, 23 Colum.J.L. & Soc.Probs. 171 (1990). If religious beliefs are the criterion of judicial capacity in abortion-related cases, many persons with religious convictions must be disqualified from hearing them. In particular, I should have disqualified myself from hearing or writing *Johnston v. Koppes*, 850 F.2d 594 (9th Cir.1988), upholding the constitutional rights of an advocate of abortion.

True, the plaintiffs qualify my beliefs as "fervently-held" as if to distinguish my beliefs from those that might be lukewarmly maintained. A moment's consideration shows that the distinction is not workable. The question is

whether incapacitating prejudice flows from religious belief. The question is to be judged objectively as a reasonable person with knowledge of all the facts would judge. *Moideen v. Gillespie*, 55 F.3d 1478, 1482 (9th Cir.1995). As long as a person holds the creed of one of the religious bodies condemning abortion as sinful he must be accounted unfit to judge a case involving abortion; the application of an objective, reasonable-person standard leads inexorably to this conclusion if the plaintiffs' contention is supportable. No thermometer exists for measuring the heatedness of a religious belief objectively. Either religious belief disqualifies or it does not. Under Article VI it does not.

The plaintiffs may object that the disqualification applies only to cases involving abortion; they are not disqualifying Catholics, Jews, Mormons and others from all judicial office. This distinction, too, is unworkable. The plaintiffs are contending that judges of these denominations cannot function in a broad class of cases that have arisen frequently in the last quarter of a century. The plaintiffs seek to qualify the office of federal judge with a proviso: no judge with religious beliefs condemning abortion may function in abortion cases. The sphere of action of these judges is limited and reduced. The proviso effectively imposes a religious test on the federal judiciary.

The plaintiffs' motion of recusal is denied.

Flamm, Richard E. Judicial Disqualification: Recusal and Disqualification of Judges. 2<sup>nd</sup> Ed. Banks and Jordan Law Publishing Co. (1997) (footnotes omitted):

#### §10.4 Religious or Political Affiliations

An argument has occasionally been made that a judge should be disqualified from presiding over a matter because of her religious or political affiliations. However, judicial disqualification will seldom be warranted on the basis of a judge's political background or party affiliation, or because of views he expressed while he was a political figure and before he was a judge.

There is a practical reason for this. Many judges have a history of activity in politics, strong political connections, or both. In fact, it appears to be an inescapable part of our judicial system that judges are drawn primarily from that pool of lawyers who have actively participated in public and political affairs.

As for religion, it is universally agreed that the fact that a judge happens to be of a particular faith is no basis for disqualification. The Tenth Circuit Court of Appeals, in particular has consistently held that a judge's religious beliefs do not require recusal. This is generally so without regard to the fervor with which the judge's religious beliefs are held. In fact, disqualification on this basis might well constitute an unlawful infringement of the free exercise of religion as well as a violation of the rule that precludes a religious test as a qualification for public office.

State of Idaho v. Freeman, 507 F.Supp. 706 (D.Idaho 1981):

[Judge Marion Callister, who was serving as a regional representative for the Church of Jesus Christ of Latter-day Saints when this matter was filed, refused to recuse himself in a case involving the Equal Rights Amendment, even though the Church had taken a strong public position opposing the ERA. The Church was neither a party to the lawsuit nor filed an amicus brief.]

The underlying action is a suit filed by the states of Idaho and Arizona, and legislators from both states, asking for injunctive and declaratory relief,

asserting the State's right to rescind a prior ratification, and challenging the constitutionality of Congress' action in extending the ratification period of the Equal Rights Amendment. The suit was filed on May 9, 1979.

In August of 1979, the defendant, through its counsel, the Department of Justice, filed a motion to disqualify Judge Callister under 28 U.S.C. s 455, contending that his impartiality might reasonably be questioned because he then held the position of a Regional Representative in the Church of Jesus Christ of Latter-day Saints. This association was objected to because the First Presidency of the Church of Jesus Christ of Latter-day Saints have publicly stated their opposition to the Equal Rights Amendment. The First Presidency of the Church has also opposed an extension of the ratification deadline.

*Id.* at 710.

NOW [National Organization for Women], in its final reply memorandum, clarified its position that the disqualification they seek is not based solely on the Court's membership in the Church. They concede that disqualification based only on membership would be highly improper . . . NOW, in its memoranda, argues that holding the position of Regional Representative creates an appearance that those who hold that position are responsible for Church policy in that area and are required to promote the Church's stand on the ERA . . . The Court made clear in its prior ruling on the question of disqualification, that the Court has never publicly, either in a secular or ecclesiastical setting, stated any opinion or made his feelings known regarding the Equal Rights Amendment; nor has the Court, in any way, inserted himself improperly in the political process. The calling of Regional Representative is one of limited jurisdiction and circumscribed responsibility. At no time during the time that the Court served as a Regional Representative was he ever required or requested to promote the Church's position on the ERA. While the Court attempted to faithfully carry out his duties as a Regional Representative, those duties did not relate to the ERA.

*Id.* at 731, 732, 733.

*Menora v. Illinois High School Ass'n* 527 F.Supp. 632, 633-34 (D. Ill. 1981):

[Plaintiffs were male members of the Jewish faith that were prohibited by the Illinois High School Association from wearing skull caps ("yarmulkes") in basketball games. They sued the association on free exercise grounds. The assigned trial judge was Jewish. The association moved to recuse the trial judge, who denied the motion. The following excerpt includes the basis asserted for the recusal and a portion of the judge's reasoning.]

(3) The fact and reasons for the belief that such personal bias and prejudice [on the part of the trial judge] exist are as follows:

(a) The Honorable Milton I. Shadur was a member of and was active in the American Jewish Congress prior to his appointment to the federal judiciary.

(b) The American Jewish Congress is the organization that is bringing this action before the court.

(c) The issues before the court center on the free exercise of Orthodox Jewish beliefs.

This opinion will treat with the last of Paragraph 3's factual assertions first, simply because it is so entirely frivolous in the legal sense and ignorant in the factual sense.

As a matter of law my religious beliefs, as well as those represented by American Jewish Congress, are irrelevant-a matter treated shortly in this opinion. But because IHSA has again sought to place them in issue, I will repeat the statement I made when IHSA first moved my recusal: I am Jewish, but I am not an Orthodox Jew. I do not share the beliefs of plaintiffs, nor do I practice them. But of course I respect them as I respect the beliefs and practices of every religion or, for that matter, every atheist and every agnostic.

\* \* \*

What is critical here, however, are not these facts as to religious beliefs, but rather the poverty of IHSA's legal position in seeking to place them in issue. Three terms back, when the Supreme Court heard *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1818, 59 L.Ed.2d 538 (1979), should Justice Brennan [who is catholic] have recused himself, instead of writing as he did the dissenting opinion? When a suit is brought challenging the erection of the Nativity scene in a city hall at Christmas, who shall hear it? Must a Jewish judge recuse himself or herself? If so, must not a Christian judge? When the question is whether the Lord's Prayer from the King James Bible is to be recited in public schools, must a Protestant judge recuse himself or herself? If it is the Douay Bible instead, can the Protestant judge sit but not the Catholic? Does the Jewish judge not hear either of those cases?

### **Section C: The Doctrines of the Church of Jesus Christ of Latter-day Saints Impose no Obligations on its Members who Serve as Judges that Keep Them from Fairly and Impartially Applying the Law.**

- *Must a member of the Church keep his or her oath as a judge to follow the law in order to be a member in good standing?*
- *How does the history and doctrine of the Church of Jesus Christ of Latter-day Saints show an adherence to and respect for the rule of law? Why does the Lord want us to learn, follow and apply the law fairly and impartially?*
- *Though the Church may take a public position on an issue, does the Church leadership expect a judge who is a member of the Church to do anything other than fairly and impartially apply the law?*
- *Can a judge pray about the matters before him or her? If so, for what should the judge pray?*
- *How does one prepare to become a judge?*
- *Do the practicalities of the judicial nomination and approval process have an impact on one who has ambitions to the bench?*
- *How can our membership in the Church assist in qualifying us, rather than disqualifying us, from being outstanding judges?*

#### **Reading Excerpts:**

As you read the following excerpts, consider how church doctrine and membership, particularly when ardent and faithful, act to qualify, rather than disqualify, members of the Church to serve as judges.

[Apostle Erastus Snow, in the General Conference of the Church on April 6, 1883, Journal of Discourses 24:64, www.journalofdiscourses.org/](http://www.journalofdiscourses.org/)

So far as relates to some the administration of government and the exercise of political power, or the exercise of any manner of influence-political, religious or social-every man and every woman will be held accountable to God for the manner in which they exercise it. Kings and emperors, presidents and statesmen, judges and all officers of the law, will be held responsible for the administration of the power reposed in them. *And if, while acting officially, they disregard their oath of office and violate the principles that should govern them, they become guilty of mal-administration, and will be held accountable unto God, and should be strictly accountable to the people who place them in power.*

Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints section 134:1

We believe that governments were instituted of God for the benefit of man; and that he holds men accountable for their acts in relation to them, both in making laws and administering them, for the good and safety of society.

THE ARTICLES OF FAITH OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS *History of the Church, Vol. 4, pp. 535—541, Twelfth Article*

We believe in being subject to kings, president, rulers, and magistrates, in obeying, honoring, and sustaining "the law.

Elder G.A. Smith, July 4, 1855, in the Bowery in Great Salt Lake City, in celebration of the Fourth of July. *Journal of Discourses 7:71* [[http://www.journalofdiscourses.org/Vol\\_07/refJDvol7-12.html](http://www.journalofdiscourses.org/Vol_07/refJDvol7-12.html)]:

The Honourable Leonidas Shaver, Associate Justice of the Supreme Court, and Judge of this judicial district, has been suddenly called from the busy scenes of this life into eternity,-a worthy man and profound jurist, who, by his straightforward and upright course, has honoured his profession. His studious attention to his duty, his fine intellect, polished education, and gentlemanly bearing have won for him the universal admiration and respect of this community. It was only necessary to be acquainted with him to love him. Our worthy instructor and expositor of the law has been called from our midst suddenly. He not only administered the law, but honoured it himself. Hear it, O ye judicators of the law, and pattern after him.

President Brigham Young, at the General conference of the Church, April 7, 1873, *Journal of Discourses 16:8*. [[http://www.journalofdiscourse.org/Vol\\_16/JD16-008.html](http://www.journalofdiscourse.org/Vol_16/JD16-008.html)]:

I have a few things to lay before the Conference, one of which is-and I think my brethren will agree with me that this is wise and practicable-for from one to five thousand of our young and middle-aged men [and women] to turn their attention to the study of law. I would not speak lightly in the least of law, we are sustained by it; but what is called the practice of law is not always the administration of justice, and would not be so considered in many courts. . . . I have been in courts and have heard lawyers quote laws that had been repealed for years, and the judge was so ignorant that he did not know it, and the lawyer would make him give a decision according to laws which no longer existed. Now, I request our brethren [and sisters] to go and study law . . . We want you to turn in and study the laws of the Territory of Utah, of this city and other cities, and then the statutes of the United States, and the Constitution of the United States. Then read the decisions of the Supreme Court. . . . We live by law, and I only condemn those among the lawyers who are eternally seeking to take advantage of their neighbors.

President J. Reuben Clark, "America—A Chosen Land of the Lord." YMMIA and YWMIA Annual Conference, Salt Lake City, June 9, 1940, printed in *Stand Fast by Our Constitution*, p. 189

God provided that in this land of liberty, our political allegiance shall run not to individuals, that is, to government officials, no matter how great or how small they may be. Under His plan our allegiance and the only allegiance we owe as citizens or denizens of the United States runs to our inspired Constitution which God Himself set up. So runs the oath of office of those who participate in government. A certain loyalty we do owe to the office which a man holds, but even here we owe, just by reason of our citizenship, no loyalty to the man himself. In other countries it is to the individual that allegiance runs. This principle of allegiance to the Constitution is basic to our freedom. It is one of the great principles that distinguishes this "land of liberty" from other countries.

President Boyd K. Packer, "The Test", General Conference of the Church, October 2008  
<http://lds.org/conference/talk/display/0,5232,23-1-947-27,00.html> (footnotes omitted):

[The following account summarizes the celebration held on July 24, 1849, in Salt Lake City, Utah, marking two years since their arrival following the Saints' forced exodus from Nauvoo, Illinois. It began by recounting the Saints' efforts to stop the mob action against them.]

The Prophet Joseph Smith had earlier sought direction, and the Lord told the Saints to seek redress from the judges, the governor, and then the president.

Their appeals to the judges failed. During his life, Joseph Smith was summoned to court over 200 times on all kinds of trumped-up charges. He was never convicted.

When they sought redress from Governor Boggs of Missouri, he issued a proclamation: "The Mormons must be treated as enemies and *must be exterminated* or driven from the state, if necessary for the public good." That unleashed untold brutality and wickedness.

They appealed to President Martin Van Buren of the United States, who told them, "Your cause is just, but I can do nothing for you.

\* \* \*

In 1844, while under the avowed protection of Governor Thomas Ford of Illinois, the Prophet Joseph Smith and his brother Hyrum were shot to death in Carthage Jail. Words cannot express the brutality and suffering the Saints had endured.

Now on this 24th of July in 1849, free at last from the mobbings, they planned to celebrate.

Everything the Saints owned would come across a thousand miles (1,600 km) of desert by handcart or covered wagon. It would be 20 more years before the railroad came as far as Salt Lake City. With almost nothing to work with, they determined that the celebration would be a grand expression of their feelings.

They built a bowery on Temple Square. They erected a flagpole 104 feet (32 m) tall. They made an enormous national flag 65 feet (20 m) in length and unfurled it at the top of this liberty pole.

It may seem puzzling, incredible almost beyond belief, that for the theme of this first celebration they chose patriotism and loyalty to that same government which had rejected and failed to assist them. What could they have been thinking of?

Their brass band played as President Brigham Young led a grand procession to Temple Square. He was followed by the Twelve Apostles and the Seventy.

Then followed 24 young men dressed in white pants; black coats; white scarves on their right shoulders; coronets, or crowns, on their heads; and a sheathed sword at their left sides. In their right hand, of all things, each carried a copy of the Declaration of Independence and the Constitution of the United States. The Declaration of Independence was read by one of those young men.

\* \* \*

The Saints knew that the Lord had told them to be “subject to kings, presidents, rulers, and magistrates, in obeying, honoring, and sustaining the law.” That commandment, revealed then, is true now of our members in every nation. We are to be law-abiding, worthy citizens.

The Lord told them, “I established the Constitution of this land, by the hands of wise men whom I raised up unto this very purpose.

\* \* \*

And so on that day of celebration in 1849, Elder Phineas Richards came forward in behalf of the twenty-four aged sires, and read their loyal and patriotic address.” He spoke of the need for them to teach patriotism to their children and to love and honor freedom. After he briefly recited the perils that they had come through, he said:

Brethren and friends, we who have lived to three-score years, have beheld the government of the United States in its glory, and know that the outrageous cruelties we have suffered proceeded from a corrupted and degenerate administration, while the pure principles of our boasted Constitution remain unchanged. . . .

. . . As we have inherited the spirit of liberty and the fire of patriotism from our fathers, so let them descend [unchanged] to our posterity.

Spencer W. Kimball, “Guidelines to Carry Forth the Work of God in Cleanliness,” *Ensign*, May 1974, pg 4:

Early in this dispensation the Lord made clear the position his restored church should take with respect to civil government. In the revelation he gave to the Prophet Joseph Smith, he said: “And now, verily I say unto you concerning the . . . law of the land which is constitutional, supporting that principle of freedom in maintaining rights and privileges, [that it] belongs to all mankind, and is justifiable before me.

Therefore, I, the Lord, justify you . . . in befriending that law which is the constitutional law of the land. ([D&C 98:4–6](#).)

In harmony with this statement, the Church later adopted as one of its Articles of Faith: “We believe in being subject to kings, presidents, rulers, and magistrates, in obeying, honoring, and sustaining the law. ([A of F 1:12](#).)

In 1835 at a general assembly the Church adopted by unanimous vote a “Declaration of Belief regarding Governments and Laws in general,” in which it said:

We believe that all governments necessarily require civil officers and magistrates to enforce the laws of the same; and that such as will administer the law in equity and justice should be sought for and upheld by the voice of the people if a republic, or the will of the sovereign. ([D&C 134:3](#).)

In 1903 President Joseph F. Smith said, "The Church [as such] does not engage in politics; its members belong to the political parties at their own pleasure. ..." ("The Probable Cause," *Improvement Era*, June 1903, p. 626.)

And in the October conference in 1951, the First Presidency said:

A threat to our unity derives from unseemly personal antagonisms developed in partisan political controversy. The Church, while reserving the right to advocate principles of good government underlying equity, justice, and liberty, the political integrity of officials, and the active participation of its members, and the fulfillment of their obligations in civic affairs, exercises no constraint on the freedom of individuals to make their own choices and affiliations ... any man who makes representation to the contrary does so without authority and justification in fact. (President Stephen L Richards, *Conference Report*, October 1951, pp. 114–15.)

Now these statements we reaffirm as setting forth the position of the Church today concerning civil government and politics.

State of Idaho v. Freeman, 507 F.Supp. 706, 710-11 (D.Idaho 1981)

The church [Church of Jesus Christ of Latter-day Saints] teaches that its members have a responsibility to seek the enactment of laws which are just and which protect the morality and freedom of the citizens of the land. However, the church has never taught either that it has any place influencing judges in their interpretation of the laws, or that a judge's religious beliefs take precedence over his sworn duty to uphold the Constitution and laws of the United States. There is a crucial distinction between legislative chambers, where everyone (including churches and religious groups) may express their opinions and lobby for the passage or defeat of a particular piece of legislation, and judicial chambers, where any attempt to bring pressure to bear on judges or to lobby for a particular decision would be totally improper. As a judge, I have no obligation to the church to interpret the law in any manner other than that which is required under the Constitution and the oath which I have taken. Under the facts as presented, a reasonable person would not conclude that impartiality of judgment in the instant case is foreclosed by virtue of the position that I hold in the Church of Jesus Christ of Latter-day Saints.

Judge Daniel A. Barker, Arizona Court of Appeals, personal account (2002):

On one occasion I asked a law professor associate of mine, who is agnostic, "Is it appropriate for a judge, who happens to be a person of faith, to pray about the matters entrusted to him?" His response surprised me: "Why would you want to do that?" I replied, "I pray over cases because I pray about everything that is important to me. I am asking God to help me so that I can understand the facts and the law and make a decision that represents a proper application of both." I saw a sense of relief come over him. He said, Well, that would seem fine.

Benjamin Franklin, "Notes of Debates in the Federal Convention of 1787 Reported by James Madison", James Madison, (New York: W.W. Norton & Company, Inc., Ohio University Press, 1966), pp. 209-210

[The following is an excerpt from the proceedings of the Constitutional Convention in 1787, when Benjamin Franklin addressed George Washington]:

Mr. President [George Washington, Constitutional Convention],

The small progress we have made after 4 or five weeks close attendance & continual reasonings with each other--our different sentiments on almost every question, several of the last producing as many noes as ayes, is methinks a melancholy proof of the imperfection of the Human Understanding.

We indeed seem to feel our own want of political wisdom, since we have been running about in search of it. We have gone back to ancient history for models of Government, and examined the different forms of those Republics which having been formed with the seeds of their own dissolution now no longer exist. And we have viewed Modern States all round Europe, but find none of their Constitutions suitable to our circumstances.

In this situation of this Assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings?

In the beginning of the Contest with G. Britain, when we were sensible of danger we had daily prayer in this room for the divine protection. - Our prayers, Sir, were heard, & they were graciously answered.

All of us who were engaged in the struggle must have observed frequent instances of a superintending providence in our favor. To that kind providence we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity.

And have we now forgotten that powerful friend? or do we imagine that we no longer need His assistance?

I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth - that God Governs in the affairs of men. And if a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid?

Amulek, Book of Mormon, Alma 34:24-27:

Cry unto him over the crops of your fields, that ye may prosper in them. Cry over the flocks of your fields, that they may increase. But this is not all; ye must pour out your souls in your closets, and your secret places, and in your wilderness. Yea, and when you do not cry unto the Lord, let your hearts be full, drawn out in prayer unto him continually for your welfare, and also for the welfare of those who are around you.

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