After work, be ethical. At work, being corrupt is fine.

Justice Thomas and his wife Ginni

by Lev Tsitrin

The fight over Supreme Court's ethics rules is heating up. Punch is followed by a counter-punch. First, the Senate went on the attack: "The Senate Judiciary Committee voted, 11-10 along party lines, to approve Sheldon Whitehouse's (D-R.I.) bill that would overhaul ethics and transparency requirements for the Supreme Court," as *Politico* put it – "a crucial first step in restoring confidence in the Court, after a steady stream of reports of Justices' ethical failures has been released to the public." A month later, the great champion of the Court – Justice Alito – girded himself for a fight, delivering a monstrous knock-out: "*Congress can't regulate Supreme Court ethics.*" At this point, spectators to the fight chimed in with their howls of indignation and outrage. "*The Arrogance of Samuel Alito*" is how the *New York Times* titled a

recent op-ed by its regular Supreme Court critic Jamelle Bouie.

Since I know a whole lot more about how federal judiciary operates than the *Politico* and the *New York Times* (though I readily admit that they know more about what judges do in the after hours), let me chime in with this simple question: Why should We the People care about what judges do when they don't work? After all, it is only this – 5pm to 9am, plus vacations – part of their biological cycle that the proposed ethics rules for the Supreme Court are supposed to cover (or as Mr. Bouie elegantly put it, "Congress has no authority to micromanage the conduct of individual justices. The legislature can't force the justices to use one interpretive method over another or promulgate rules on how they reason through particular cases and decide them.") Justices' critics' answer to my question seems to be – "precisely for that reason!" According to that logic, because judiciary is "independent" (which is a politically correct euphemism for "arbitrary"), judges are free to do from the bench whatever they want – including deciding cases in favor of their friends, when the impartially-applied law would have turned the decision around. Hence, the solution: forbid judges to have friends, or to take anything from them – or at least obligate them to notify the public when they do take gifts. This way, fearing that their favoritism will be detected and exposed, judges will be prevented from favoring their friends. Ethics off the bench will assure the rule of law on the bench, the theory implies.

The problem is, it won't: the rules of judicial misconduct explicitly block those ethical complaints that are tied to judicial decisions, they being seen as a concealed attempt to get around the appeals process. There is simply no way to shame judge into properly doing their work. And there is no way to sue them into doing it (as I tried to do), either: federal judges defend themselves by a self-given in *Pierson v*

Ray right to act from the bench "maliciously and corruptly." Thus, ethical behavior after work in no wise prevents legally-protected malicious and corrupt behavior at work. The after-hours' and the in-office ethics are completely decoupled when it comes to federal judges. Being forced to be ethical at 8:59am seamlessly turns into being legally "malicious and corrupt" at 9:01.

So how about doing something different for a change – like treating judges exactly like we treat everyone else? Like everyone, judges should be able to have friends and take gifts. And like everyone – doctors, contractors, electricians, car mechanics – judges should work according to rules and be held accountable when they don't. One of those rules is called "due process of the law" – and according to it, a judge cannot be a party to the case argued before him or her – or in practical terms, judges cannot advance their own argument on behalf of the parties, but have to limit themselves to weighing on the scale of justice the argument advanced by parties themselves. (During nomination hearings, would-be Supreme Court justices assure the public that this is exactly what they do – remember Chief Justice Roberts' "judges don't pitch or bat, but call balls and strikes"? – but once confirmed, they promptly drop such scruples, and proceed with pitching and batting with all their might, making argument for parties. If they didn't, Court's split decisions would be impossible).

Judicial pitching and batting (in the form of wholesale replacement in decisions of parties' argument with the utterly bogus argument of judges' concoction) was, in fact, exactly what I sued a bunch of federal judges for – to learn that such procedure is perfectly legit, it being merely "corrupt and malicious" – and what's wrong with that? So how about making it wrong – by turning "judicial ethics" from its head, and standing it on its feet, by applying it to what judges do on the bench rather than what they do after work, by forbidding

them to deploy their own (or as they call it, "*sua sponte*") argument?

After all, you don't have to do anything extra for that – just enforce the existing rules (and, of course, nullify the crazy *Pierson v Ray*). Existing rules are very clear indeed, as I learned from a *New York Times* "guest essay," penned a while back on the very same subject of Supreme Court ethics by the Dean of UC Berkeley Law School Erwin Chemerinsky, "*Time Is Running Out for John Roberts and the Supreme Court*" – "a federal law, 28 U.S.C. § 455, requires federal judges, including justices, to disqualify themselves in any proceeding in which their "impartiality might reasonably be questioned." This, obviously, is the knife to the heart of judicial *sua spontism* – it is impossible for anyone to be impartial to one's own argument, judges included. Hence, decisions based on judges' own, *sua sponte* argument must be struck down on the grounds that those judges did not disqualify themselves when they obviously could not be impartial. (This won't work without first striking down judges' right to be "corrupt and malicious" though – not disqualifying themselves when they should have is most definitely a "corrupt and malicious" practice – who would argue with that! Which is why *Pierson v Ray* must go.)

Bottom line – the problem with federal judiciary is not that Supreme Court justices don't have a code of ethics (lower court judges do – but it did not prevent them from swindling me out of justice). The problem is that judging is arbitrary (or if you will, "malicious and corrupt"). To make judicial decision-making process follow "due process," to turn judges into mere human agents of the "rule of law" is what needs to be done to straighten out the judiciary, both the Supreme Court and the rest of the ethical-at-home, but corrupt-at-work bunch. What Senate and the mainstream press – the *New York Times*, the *Politico*, the *ProPublica* and all their ilk are doing with puffing up their "Supreme Court judicial ethics

reform” is just spinning the wheels, and throwing the public off-scent. Address what judges do on the bench and forget about what they do after-hours. Everything else is a waste of time.

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