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Reforming Judicial Ethics to Promote Environmental Protection

by Tom Lininger

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I. Introduction

Does the duty of environmental protection belong in the ethical rules for our profession? A number of scholars have explored whether lawyers should bear such duties. But little attention has focused on the possibility that "green ethics" would also be appropriate for judges.

The time is ripe to discuss this topic. In 2019, the judiciary plays a more critical role than ever before in reviewing—and sometimes barring—public and private actions that could affect the environment. Dockets now include a vast number of environmental matters, and environmental advocates are offering novel, game-changing theories: some are invoking the public trust doctrine to sue the federal government for neglecting to address climate change, and some are raising the necessity defense to fend off prosecutions of civil disobedience in environmental protests. Sometimes, the courts salvage environmental protections that executive or legislative officials want to abandon. Indeed, some analysts believe that that the courts may present the best hope for environmental advocacy at the national level in 2019.

Rules of judicial ethics frame the manner in which judges take account of environmental concerns. At present, these rules provide very little guidance that is relevant to environmental matters. Many judges have a general inclination to favor private property rights or to defer to governmental approvals of development projects, but there is no countervailing authority that counsels judges to consider environmental priorities.

Why should we worry that codes of judicial ethics fail to address environmental considerations? When the ethical rules do not call for judicial cognizance of environmental harm, judges tend to undervalue such harm. On the other hand, if the rules of judicial ethics were to focus judges' attention on climate change and other environmental matters, judicial vigilance in these areas would likely increase. The result could be a more robust system of checks and balances, guided by consideration of environmental risks in every instance. In addition, judges can exert a steadying influence in overpoliticized areas of the law. In particular, federal judges are naturally suited to be guardians of the environment: with life tenure, federal judges have longer time horizons than do the executive and legislative officials who show little patience for the short-term sacrifices that environmental protection necessitates.

The following sections offer proposals for changes to the American Bar Association's Model Code of Judicial Conduct (ABA Code). Each section begins with the relevant language (current or proposed) in the ABA Code, all of which is in italics. Underlining of text indicates a proposed insertion in a current provision of the ABA Code. Striking of text (e.g., ~~*example of stricken text*~~) indicates a proposed deletion.

II. Duty of Accuracy in Fact-Finding

Canon 2 of the ABA Code should be amended to include the following new rule:

> *Rule 2.17: Accuracy in Fact-Finding*
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> *In hearings, bench trials, and other settings that necessitate judicial fact-finding, a judge shall carefully consider all available evidence and shall find facts as accurately as possible. A judge shall not knowingly issue any order that mischaracterizes the factual record.*

Why impose an ethical duty on judges to find facts accurately? One reason is that such an amendment would correct an asymmetry between the ethical codes for lawyers and judges. Both lawyers and judges bear an ethical duty of accuracy when they make statements about the law, but only lawyers bear the same duty when they refer to facts. No specific language in the ABA Code requires judges to find facts as carefully as they apply the law.

This contrast between lawyers' and judges' ethics is perplexing. While the client-centered paradigm distinguishes lawyers from judges and may heighten the likelihood that lawyers exaggerate, judges are not immune from distort-

ing facts. The possibility of judicial bias is evident in the large number of disqualification rules—a set of rules that is approximately equal in breadth to the conflicts rules for lawyers. The potential for judicial bias suggests a potential for judges to mischaracterize facts.

Though juries find the facts in most trials, judges also play a significant role in fact-finding. When parties stipulate to a bench trial, the judge serves as the sole trier of fact. Even in litigation that culminates with a jury trial, the judge usually has sole responsibility for finding facts in hearings on various matters including motions to exclude evidence, motions for summary judgment, and motions for temporary restraining orders.

The factual findings by the trial judge are rarely reversed. Appellate courts exhibit a great deal of deference to trial courts' factual findings and credibility determinations, assuming that trial judges are in a unique position to weigh evidence and assess the credibility of witnesses. The infrequent reversal of trial judges' factual findings, compared with the more rigorous appellate review of trial judges' interpretation of controlling legal authority counsels in favor of imposing an ethical duty on judges to find facts as carefully as they construe the law.

The danger of erroneous fact-finding by judges is particularly stark in environmental cases. Consider, for example, the possibility that a judge might refuse to acknowledge anthropogenic climate change. In one recent case, a state judge in Washington had to determine whether a climate protester could present the necessity defense to defeat a criminal prosecution arising from his involvement in briefly shutting down a pipeline carrying oil into the United States from Canada. The judge barred the defendant from presenting evidence on the harm caused by climate change. Incredibly, the judge asserted that "there's tremendous controversy over the fact whether [climate change] even exists." The prevalence of such views among judges is impossible to gauge, but the number of "climate deniers" in judicial office could be substantial. This number could increase in the future, because the executive authorities who appoint both federal and state judges—including President Donald Trump and governors in fifteen states—have expressed skepticism about whether climate change results from human activities, and the environmental views of an appointed judge tend to mirror the views of the appointing authority. A judge who dogmatically denies that humans affect the climate could reach incorrect results in cases with significant ramifications, and could end up handling a disproportionate number of climate-related cases due to forum shopping.

The extent of scientific consensus about anthropogenic climate change leaves little room for doubt. A recent survey by the National Aeronautics and Space Administration (NASA) involving several categories of scientists found nearly universal agreement on the deleterious effects of global warming and the role of human activities in causing it. NASA estimates the rate of concurrence at ninety-seven percent of the relevant scientific community. Michael Burger, executive director of the Sabin Center for Climate Change Law at Columbia University, wrote that, "no court could uphold a conclusion that climate change does not endanger public health and welfare." A judge who mischaracterizes this scientific consensus as a "tremendous controversy" is so brazenly misrepresenting facts as to erode public confidence in the judicial system—a problem that the ABA Code is usually careful to avoid.

To be sure, it would be a mistake to insist on unquestioning orthodoxy in fact-finding about climate change. Legitimate disagreements can and do arise about particular aspects of the climate problem. A rule that prevents judges from choosing a side in such disagreements would ill serve the judicial system. On the other hand, when the accuracy of a judge's fact-finding is readily verifiable or falsifiable—as in the case of a ruling reporting the state of research on climate change in 2017—a judge should be accountable for errors to the same extent that the judge is accountable for errors in the characterization of controlling legal authority. Justice cannot abide a knowing error as to law or fact.

Some judges might consider an ethical duty of accuracy in fact-finding to be daunting, especially with respect to the sort of scientific matters that arise in environmental cases, but judges have been finding facts on scientific matters relevant to expert testimony for decades. Judges have the ability to appoint experts sua sponte at public expense if guidance from these experts would be valuable, and the ethical rules already permit judges to consult with experts on their own initiative, so long as judges share all such communication with the parties. An increasing number of publications are available to guide judges in considering climate-related climate science. An ethical duty to find facts accurately would indeed increase the burden on judges, at least in the short term, but this burden is less onerous than the hardships that could result from unmitigated global warming.

III. Duty of Caution When Addressing Catastrophic Risk

Canon 2 of the ABA Code should be amended to include the following new rule:

Rule 2.18: Caution When Addressing Catastrophic Risk

(A) A judge shall exercise caution when addressing catastrophic risk, including risk as to which some degree of uncertainty exists.

(B) The judge shall thoroughly review all reasonably available information in order to ascertain whether the risk at issue is catastrophic.

(C) Upon determining that the risk at issue is catastrophic, the judge shall exercise caution in any procedural or substantive ruling relating to the risk. When other considerations are in or near equipoise, and more than one option is available for the judge's ruling, the judge will favor the option that minimize the risk.

> *(D) The existence of uncertainty does not relieve the judge of the duty to minimize catastrophic risk.*

An amendment to the "Terminology" section at the outset of the ABA Code is necessary to define the term "catastrophic risk":

> "*Catastrophic risk" means risk of large-scale harm to human health or to the environment. In assessing whether a risk is catastrophic, the court shall evaluate not only the gravity of the harm, but shall also the probability of the harm. This definition excludes a risk so remote that its occurrence is entirely speculative. For example, if a majority of the relevant scientific community has determined that there is no credible evidence of risk, then the risk should fall outside this definition. Uncertainty in the relevant scientific community does not defeat a finding that risk is catastrophic.*

The precautionary principle is a natural fit for judicial ethics. Indeed, the terms "judicious" and "prudent"—commonly used to describe the ideal judicial temperament—are virtually synonymous with "cautious." The judicial branch is generally the voice of caution within the tripartite framework of the U.S. federal government. Through judicial review, the courts rein in rash actions by the executive and legislative branches. A vast number of provisions in the current ABA Code prescribe caution with respect to various matters: to identify only a few, the disqualification rules apply when there exists any possibility of conflict (not just an actual conflict), and the mere possibility of future harm is sufficient to trigger other duties such as limiting public comments, reporting misconduct by others, and avoiding entanglements in extrajudicial activities that could give rise to potential conflicts. Given the courts' longstanding commitment to the notion of caution, it is but a small step to apply this principle to cases involving catastrophic risk.

As presently written, the ABA Code does not adequately articulate a duty to proceed cautiously in the face of catastrophic risk. The ABA Code does not explicitly mention either catastrophic risk or scientific uncertainty. In the absence of specific guidance, judges instinctively favor private property rights or defer to agency decisions, even if the private property owner or agency is advocating development that departs significantly from the status quo and portends ominously for the environment. One might argue that the current default position for the judiciary is not caution with respect to environmental devastation, but caution with respect to overriding the preferences of property owners or agencies.

In omitting the precautionary principle, the ethical rules for judges stand in contrast to their domestic and international counterparts. Various professions including nursing, engineering, homebuilding, landscape design, and several categories of business-related professions have promulgated ethical guidelines incorporating a version of the precautionary principle with specific language addressing environmental harm. Countries around the world are following the precautionary principle. International instruments have adopted it as well.

Courts and agencies in the United States have occasionally embraced the precautionary principle. An early example is *Ethyl Corp. v. Environmental Protection Agency*, in which the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit upheld the U.S. Environmental Protection Agency's (EPA's) decision to regulate lead as an additive to gasoline. While noting the case involved a high degree of uncertainty, the court rejected the argument that uncertainty necessitated inaction. The court concluded that the U.S. Congress had, in effect, endorsed the EPA's invocation of the precautionary principle with respect to the uncertainty about the potential harm of emissions attributable to leaded gasoline. Municipal governments have also adopted the precautionary principle, following it in a wide range of official decisions, from reviewing development proposals to contracting with outside vendors.

Some judges may find the precautionary principle to be unwieldy. In particular, the need to exercise caution in the face scientific uncertainty may cause frustration for judges accustomed to basing their decisions on a clear evidentiary record and defaulting to protection of private property rights or approval of agency decisions. The reality, however, is that scientific uncertainty remains ineluctable in environmental law, particularly in the area of climate change. Judges have frequently confronted scientific uncertainty since 1993, when the U.S. Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* changed the test for admission of scientific evidence: general acceptance by the relevant scientific community was no longer the crucial determinant of admissibility, so individual judges had no choice but to assess the reliability of novel scientific theories themselves. Even if scientific consensus were necessary, there is widespread agreement as to the validity of the science predicting grave harm from anthropogenic climate change.

Perhaps, judges might worry that the evaluation of catastrophic risk would consume undue time. But the language in proposed Rule 2.18(B) should allay these fears. Judges would have no ethical duty to consider expert testimony and other evidence on the subject of catastrophic risk unless the testimony were "reliable, credible and helpful to the court." This language is no more expansive than the current language in the Federal Rules of Evidence governing the admission of expert testimony about scientific matters, so there is no reason to believe that the new ethical rule will cause excessive delay (especially when one considers that catastrophic risk would very well be a material issue in the litigation even without the proposed ethical rule). In any event, the consumption of additional time and resources to address catastrophic risk seems to be worth the trouble.

IV. Duty of Transparency

Canon 2 of the ABA Code should be amended to include the following new rule:

> *Rule 2.19: Transparency*
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> *Unless limits are necessary for the protection of safety, privacy, or other legitimate interests in accordance with applicable law, a judge shall maximize public access to court proceedings and to court records. A judge shall not allow court personnel to charge fees for reproduction of court records except to the extent that such fees are necessary to defray the actual costs of reproducing the records in question. A judge shall instruct court personnel to comply promptly with requests for information.*

The United States judicial system has long recognized the value of transparency. Public access to court proceedings and court records improves the legitimacy of the legal system. Justice seems more accessible when the proceedings themselves are open to the public. Transparency promotes public understanding of court procedure and of the substantive matters handled by in the courts. The vigilance of the public provides an incentive for witnesses to testify truthfully, and publicity of trials might lead other witnesses to step forward. Ready access to court proceedings and court files can level the playing field between rich and poor citizens; when only the former can follow the courts' affairs, this disparity heightens political inequality. In addition, transparency is crucial for the accountability of the judiciary. Corruption and improper influence are more difficult when court proceedings are subject to close public scrutiny. The words of Justice Louis Brandeis still ring true: "Sunlight is said to be the best of disinfectants."

For these reasons and others, the U.S. Constitution provides for open proceedings in U.S. courts. The Sixth Amendment requires public trials in criminal cases, and the First Amendment also allows public access to various court proceedings. In determining whether the First Amendment right of access extends to a particular type of proceeding, the Supreme Court has considered two factors: first, "whether the place and process have historically been open to the press and general public"; and second, "whether public access plays a significant positive role in the functioning of the particular process in question." Lower courts have extended the right of access to both criminal and civil proceedings, and have found a right of access to hearings at various stages of litigation, as well as to court records. The case law has created a presumption of access, but opponents can overcome the presumption by demonstrating the potential for prejudice or other harm.

Why should the rules of judicial ethics promote transparency? While the benefits of open access may seem compelling on a theoretical level, judges who must deal with the reality of crowded galleries, intrusive reporters, and burdensome requests for documents might tend to favor a restrictive interpretation of the access rules. In other words, judges might instinctively believe that transparency is a nuisance. Significant media attention can transform a trial into something akin to a circus, causing difficulties for court personnel and prejudice to parties. Even outside the context of high-profile cases, requests for public records can divert court personnel from their other tasks. Some judges might fear public monitoring for other reasons relating to the judges' self-interest: transparency could subject them to social opprobrium, could threaten their chances for reelection, or could embroil them in disciplinary proceedings.

The proposed new ethical rule on transparency would require that judges maximize public accessibility until it conflicts with other legitimate concerns. Under the new rule, judges would have an obligation to prevent court personnel from charging fees for records in excess of the actual costs incurred in retrieval and reproduction. While charging such fees might seem tempting as a means of raising revenue or discouraging burdensome requests, the hindrance to public access is too great a price to pay. Indeed, a federal judge has recently certified a class action suit on behalf of plaintiffs who believe they paid excessive fees for records obtained through the Public Access to Court Electronic Records (PACER) system.

Greater transparency would be valuable in environmental litigation. When risks to human or environmental health are at issue, the public has a right to know about these risks; failure to alert the public might cause harm before the ultimate disposition of the case. Observers with a potential interest in pending environmental litigation need access to information so they can consider whether to file a motion for intervention or for leave to file an amicus brief. The manner in which the court reviews a private development proposal or an agency's decision could provide useful guidance to other similarly situated parties and could promote compliance with the law. Finally, greater transparency could promote the public's sense of judicial accountability, and accordingly, could enhance the legitimacy of the court system.

There are potential disadvantages to greater transparency in environmental litigation. As Professor Richard Stewart has noted, an increase in transparency might potentially delay proceedings, limit options available to litigants, and make settlement more difficult. In unusual cases, the secrecy is necessary to protect parties or witnesses from suffering financial harm or even physical injury. The proposed rule recognizes that exceptions to transparency are sometimes prudent, and the rule allows the judge to impose limits on transparency when "necessary for the protection of safety, privacy, or other legitimate interests." In other situations that do not present such circumstances, sunlight is just as salutary in the justice system just as it is in nature.

V. Duty of Inclusion

Rule 2.6 of the ABA Code should be amended to provide as follows:

Rule 2.6: Including Stakeholders and Ensuring the Right to Be Heard

> (A) When a judge adjudicates motions to intervene, motions to submit amicus briefs, and other requests for participation in pending proceedings, a judge shall strive to maximize the inclusion of stakeholders, subject to applicable law and considerations of efficiency, courtroom capacity, and fairness to current parties.
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> *(~~A~~B) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.*
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> *(C) In identifying potential legal interests that might deserve inclusion in pending litigation, the judge shall not deny an opportunity for participation based only on the lack of capacity to testify or direct legal counsel. In such circumstances, the judge shall explore the possibility of allowing an appearance by a guardian ad litem, conservator, or other representative.*
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> *(~~B~~D) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a matter that coerces any party into settlement.*

Inclusion of diverse stakeholders is generally advisable so that the courtroom does not become the exclusive province of well-heeled "insiders." Broad participation increases the likelihood that the court will consider the full range of interests. By allowing inclusion of stakeholders while the matter is pending, the court can reduce the time-consuming subsequent litigation that is necessary for excluded parties to have their day in court.

An inclusive approach is crucial in environmental cases. The involvement of many stakeholders is sometimes necessary to meet statutory requirements for environmental review, and in any event, is a prudent approach in identifying and addressing potential concerns about the environmental dimensions of the matter at issue. Commentators have generally expressed enthusiasm for allowing broad participation by stakeholders in pending environmental cases, either as intervenors or amici.

The proposed rule contemplates the possibility of involving nontraditional stakeholders. For example, young children suffering the long-term effects of environmental problems, or even nonhuman stakeholders, might have important interests that the courts should bear in mind when adjudicating environmental matters. The proposed rule would accommodate nontraditional stakeholders even if they are unable to testify or express their preferences to attorneys. Judges could appoint guardians ad litem, conservators, or other representatives to assist in this process, just as ABA Model Rule 1.14 has prescribed procedures for representing adults with diminished capacity.

Inclusion of more stakeholders could bring logistical challenges. For example, the necessity to hear many different viewpoints could prolong litigation and could diminish the influence of those parties who are central to the action. But the proposed rule does not require judges to maximize participation under all circumstances. Judges could limit participation when necessary due to such considerations as "efficiency, courtroom capacity, and fairness to current parties." Of course, the rules of standing and courtroom procedure will continue to impose constraints that are separate from the ethical rules for judges.

VI. Duty of Candor and Forthrightness for Judicial Candidates

Rule 4.1(A)(13) of the ABA Code should be amended to provide as follows:

> *Rule 4.1: Political and Campaign Activities of Judges and Judicial Candidates in General*
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> *(A) Except as permitted by law, or by Rules 4.2, 4.3 and 4.4, a judge or judicial candidate shall not:*
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> *****
>
> *(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office., but this limitation does not impair the ability of a judge or candidate for judicial office to share general viewpoints on matters relevant to judging, including substantive matters, in order to provide information to the electorate or to officials involved with the appointment or confirmation of judges.*

In the landmark case *Republican Party of Minnesota v. White*, the Supreme Court made clear that judges and judicial candidates have a First Amendment right to communicate their general views to the electorate. The Court struck down the "announce clause" in the earlier version of the ABA Code. That clause had barred judges from announcing their positions on legal issues. The Court did not disturb the "pledges and promises clause," which forbids judges from making commitments about particular matters that will come before them in the near future.

Judicial candidates do not always exploit the opportunities for candor that the Court has created. To the contrary, some candidates are wary of disclosing their general views about legal issues. These candidates worry that a forthright revelation of their true positions could cause division among voters (in the case of elected judges) or could alienate legislators involved with the confirmation process (in the case of appointed judges). When such a candidate would rather dodge a tough question, this candidate might invoke the pledges and promises clause and apply its preclusions too broadly: "I wish I could answer that question about [hot-button issue X], Senator, but the ethical rules prevent me from prejudging uses that could come before my court."

The Code of Judicial Ethics should make plain that the pledges and promises clause does not foreclose a forthright comment about the views of a judge concerning a general legal issue. Indeed, as Justice Antonin Scalia noted in *White*, the democratic process requires that the public must be able to learn the ideology of candidates, or judicial elections will be a hollow exercise. The proposed amendments set forth above would provide clearer guidance about the ability of judges to share their opinions about matters lying outside the scope of the pledges and promises clause.

The need for candid, forthright judicial candidates is particularly stark with respect to environmental law. Matters such as climate change are urgent, and judges play an important role in addressing those matters. Judicial candidates facing election might try to avoid discussing such issues if the boundaries of the pledges and promises clause remained unclear. The appointing authorities may not always be concerned with the importance of remediating carbon emissions, but the general public is highly alarmed about this issue. Rules that clarify the ability of judges to reveal their views should result in greater accountability of elected and appointed judges to the public, and accordingly might provide a greater incentive for judges to protect the environment.

VII. Duty of Continuing Education in Law and Science

Rule 2.5 of the ABA Code should be amended to provide as follows:

Rule 2.5: Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties competently and diligently.

(B) A judge shall obtain continuing education in law, legal ethics and science. The total time commitment devoted by the judge to continuing education shall be equivalent to the total time commitment required of a lawyer in the judge's jurisdiction. In choosing among providers of continuing education, the judge shall bear in mind the importance of neutrality, objectivity, and overall ideological balance.

(BC) A judge shall cooperate with other judges and court officials in the administration of court business.

Both judges and lawyers have an ethical duty of competence. State bars generally require that lawyers must receive continuing legal education for a minimum number of hours each year in order to maintain their competence. The 1972 version of the ABA Code included language requiring that judges should maintain judicial competence—implying on ongoing duty to receive instruction and training in relevant areas—but the current ABA Code does not include this language, nor does the commentary mention any duty of continuing education. The ABA Code should declare that judges have the same duty as lawyers to maintain their competence and to receive continuing education each year.

Environmental law is changing constantly. Judges need to stay abreast of fast-breaking developments in various areas including atmospheric trust litigation and the invocation of the necessity defense by climate protestors. Of course, education about such subjects would not obligate judges to take a particular position, but judges should learn how statutes and common law are evolving, and how other judges have addressed recent challenges.

The duty of education should extend to instruction on scientific subjects. For example, climate science is distinctive and presents unique issues with which judges may not have prior exposure. The ubiquity of climate-related impacts would make education about climate science relevant to judges at all levels.

In selecting among educational opportunities judges should be careful to avoid creating the appearance of bias. Judges should strive for balance and objectivity as they choose among presenters. Some putative "judicial education" may just be a junket designed to curry favor from the judge. Caution is necessary to maintain public confidence in the impartiality of the judiciary.

VIII. Duty to Avoid *Political Questions*, Not *Political Implications*

Rule 2.7 of the ABA Code should be amended to provide as follows:

Rule 2.7: Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by rule 2.11 or other law. A judge may properly decline to hear a matter or argument that would require the judge to usurp functions committed to the legislative or executive branches by explicit provisions of the Constitution or other law, but a judge shall not decline to hear a matter merely because it has political implications or might otherwise arouse political interest.

Opponents of litigation filed by environmental activists sometimes raise the defense that such litigation improperly calls on courts to address a "political question." These opponents are essentially contending that the courts would overstep their boundaries and violate the separation of powers if they took up questions of a political nature.

For example, the U.S. Department of Justice raised such a defense in a motion to dismiss the atmospheric trust litigation filed by youth in Eugene, Oregon, who claimed that the government had neglected its obligation to protect against degradation of the climate. U.S. District Judge Ann Aiken rejected the defense, citing the multi-factor test that the Supreme Court set forth in *Baker v. Carr*. This result was noteworthy because it stood in contrast to many other cases in which the political question doctrine had defeated climate-related suits.

While the political question doctrine might conceivably require dismissal of certain cases, it would be unduly facile for defendants to argue that this defense can overcome any suit with political implications. Most environmental litigation is politically controversial, at least in some circles, but that fact does not deprive the courts of jurisdiction. When a suit has a permissible basis in statute or the Constitution, the fact that it incidentally raises politically charged issues is not fatal.

A judge has an obligation to decide all matters properly presented to the judge, including matters fraught with political consequences. The proposed revision to Rule 2.7 simply presents a logical corollary to that rule, which is that political implications are not tantamount to a political question requiring dismissal. Although critics of environmental litigation may insist that "there's no place for politics in the courtroom," they cannot contrive the political controversy themselves and then complain about it in a motion to dismiss.

IX. Duty of Disqualification Due to Board Memberships

Rule 2.11(A)(6)(e) of the ABA Code should be amended to provide as follows:

> *Rule 2.11: Disqualification*
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> *(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:*
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> *****
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> *(6) The judge:*
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> *****
>
> *(e) served on the board of directors of a law reform organization that has been directly involved in the matter, or that has taken an advocacy position with respect to a category of issues that include an issue arising in the present matter, such that the judge's participation in the matter would raise reasonable questions about the judge's impartiality.*

Professor Charles Geyh, one of the country's leading experts on judicial ethics, recently stressed the importance of disqualification to maintain the public's confidence in the impartiality of the judiciary:

> For centuries, impartiality has been a defining feature of the Anglo-American judge's role in the administration of justice. The reason is clear: in a constitutional order grounded in the rule of law, it is imperative that judges make decisions according to law, unclouded by personal bias or conflicts of interest. When the impartiality of a judge is in doubt, the appropriate remedy is to disqualify that judge from hearing further proceedings in the matter.[1]

As is the case in many areas of judicial ethics, general standards concerning impartiality are not as valuable as specific rules identifying what is off limits. The broad exhortations provide little notice to the judge or to litigants about what misconduct could expose the judge to discipline, and they provide scant basis for enforcement.

Presently Rule 2.11(A) offers a hybrid of general and specific guidance to judges concerning possible bases for disqualification. Some grounds—such as a judge's prior work on a matter as a lawyer, or a family member's substantial investment in a business with a stake in the matter—are subject to clear provisions that guide the judge in determining whether recusal would be appropriate. Other possible grounds not covered by specific rules are subject to general language at the outset of Rule 2.11(A): "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."

A judge's board memberships do not seem to fit within any of the specific provisions of Rule 2.11(A). The proposed amendment to Rule 2.11 would add language at the end of Rule 2.11(A) clarifying that a judge's membership on the board of a law reform organization could prevent the judge from hearing a matter in which the organization is a party. The new language would also necessitate disqualification if the organization for which the judge served as a board member has taken an advocacy position with respect to a category of issues that include an issue arising in the present matter, subject to the caveat that this coincidence would only foreclose the judge's participation where a reasonable person would reasonably raise questions about the impartiality of the judge.

How might the new version of Rule 2.11 operate? Judges serving on the boards of advocacy groups would not be able to hear cases directly involving those groups, or cases involving a category of issues as to which those groups had expressed such a clear position that the judges' impartiality might be questioned. For example, the federal judges who served on the board of the Foundation for Research on Economics and the Environment (FREE), a group urging rollback of certain environmental regulations, would not be able to hear cases in which litigants challenged the very regulations that FREE opposed. But a judge who was merely a member of the Audubon Society would later be able to hear a case in which intervenors other than the Audubon Society advocated environmental interests. The main difference between the two scenarios is the degree of the judge's immersion in the advocacy group. While

1. *Judicial Transparency and Ethics: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 115th Cong. 18 (2017), at 34 (testimony of Charles Geyh, Professor of Law, Indiana Law School), https://judiciary.house.gov/wp-content/uploads/2017/02/115-1_24270.pdf (urging new procedures for judicial disqualification so that the system does not rely so heavily on the judge's own assessment of his or her ability to be impartial).

board service is not quite as preclusive as representing a client, board service does signal a deeper commitment to the group's goals than does mere membership.

The proposed amendment to Rule 2.11 would not limit judges' freedom of association or freedom of speech. A judge's ability to join an advocacy group or speak their mind would be no different than under current rules. However, such a judge who served on the board of an advocacy group would not thereafter be able to hear a case implicating an issue as to which the group had advocated while the judge was a member of the group's board. The proposed rule is arguably less restrictive than current rules forbidding a judge form becoming a member of certain discriminatory groups or espousing discriminatory views. In any event, disqualification rules do not police association or speech; they just limit the categories of official business that the judge can handle based on the judge's voluntary choices outside of work.

A critic might point out that if the ABA adopted the amendment proposed here, the ABA would treat "positional conflicts" more strictly for judges than for lawyers. That is indeed true. Under the proposed rule, judges' past board service for advocacy groups addressing particular issues could necessitate that judges avoid adjudicating cases involving those issues, while lawyers would have more leeway to take a position at variance with their advocacy for past clients or their past board service. But this disparity makes sense. The role of a lawyer is to be a partisan advocate—a hired gun, more or less—while the role of a judge is to be neutral. Past board service for an organization advocating reform of the law in particular areas would make it hard for a judge to maintain neutrality in a case presenting the exact same issues, so disqualification of the judge would be appropriate.

X. Conclusion

This Article has proposed a series of reforms to the ABA Code of Judicial Ethics. While such reforms will not, in themselves, be sufficient to protect the environment, they will help to create conditions in which the legal system can play a more efficacious, inclusive and transparent role in environmental protection.