

Suggested List of Issues to U.N. Country Report Task Force on U.S. Compliance with the
International Covenant on Civil and Political Rights (ICCPR):
JUDICIAL MISCONDUCT THWARTS ARTICLE 14 RIGHTS

Submitted by:



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I. Reporting Organization

LYRA is an association concerned with the erosion of the rule of law and fundamental human rights.

II. Lack of judicial candor is a decades-long problem that denies U.S. citizens of their rights under ICCPR 14.

ICCPR 14 protects the right to a fair trial. When a judge omits, cherry-picks, fabricates, or misstates the facts of a case there exists a violation of ICCPR 14.

Distinguished human rights law professor and the first American lawyer to win a case before the European Court of Human Rights, Prof. Anthony D'Amato observed "one federal judge after another, using reasons wholly inconsistent *inter se*, managed to affirm the conviction of a provably innocent man."¹ Among other examples, Prof. D'Amato observed a three-judge panel of the U.S. Court of Appeals omitting from its opinion exonerating evidence that would otherwise have set an innocent man free.² In another law review article, Prof. D'Amato stated that he was not a lone victim of such practices.³ The New York Times reported Prof. D'Amato saying "judges routinely fudge facts but get away with it, either because no one is watching, can fathom their reasoning, or can look beyond "the beautifully bound tomes of court reports, our secular society's equivalent of sacred texts."⁴ Practicing lawyers, he writes, "feel that their work is subject to the whim of judges who will play God with the facts of a case, inventing them to make the case come out the way the judges desire."⁵

Hofstra Law School's Monroe H. Freedman, in a speech to the Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, condemned the practice of entering "judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges." Prof. Freedman accused federal judges of "falsify[ing] the facts of the cases that have been argued [and entering] judicial opinions that make disingenuous use or omission of material authorities."⁶

Columbia Law School's Karl Llewellyn wrote of judges "manhandling of the facts of the pending case, or of the precedent, so as to make it falsely appear that the case in hand falls under a rule which in fact it does not fit, or especially that it falls outside of a rule which would lead in the instant case to a conclusion the court cannot stomach. To this one can add what commonly takes less research to document: the distortion of the case in point beyond all recognition, so as to slip its whole force. And one can include the unvarnished citation of a few alleged authorities which have little or nothing to do with the proposition for which they are cited."⁷

U.S. Court of Appeals Judge Richard A. Posner wrote, "Appellate judges in our system can often conceal the role of personal preferences in their decisions by stating the facts selectively, so that the outcome seems to follow from them inevitably [.]"⁸

In violation of ICCPR 14, judges in the United States are depriving citizens of the right to a fair trial.

- 1 Anthony D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 Cardozo L. Rev. 1313 at 1316 (1990)
- 2 Anthony D'Amato, *Self-Regulation of Judicial Misconduct Could Be Mis-Regulation*, 89 Mich. L. Rev. 609 at 620 (1990)
- 3 Id. at 621
- 4 www.nytimes.com/1989/10/13/us/law-law-professor-with-beef-takes-judge-task-case-public.html
- 5 Id.
- 6 D'Amato, 89 Mich. L. Rev. at *619; see also 128 F.R.D. 409, 439 (1989)
- 7 Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* at 133 (1960)
- 8 Hon. Richard A. Posner, *How Judges Think* at 144 (Harv. Press 2008)

III. Current U.S. Government Policy or Practice

A. Post-judgment motions

The Federal Rules of Civil Procedure Rules 59 and 60 allow litigants to request the court to set aside a previously-entered order. Unless recused, the same judge that entered the erroneous order also rules on the post-judgment motion.

B. Petitions for writs of mandamus and prohibition

The Federal Rules of Appellate Procedure Rule 21 allows litigants to petition the U.S. Court of Appeals for an extraordinary writ ordering the lower court to take a specific action (mandamus) or ordering the lower court to desist from taking a specific action (prohibition).

C. Appeals

Litigants in the United States are provided with the right to appeal a final decision of a lower court. Interlocutory appeal of non-final decisions of a lower court may be sought by permission. U.S. citizens have no right to an appeal before the U.S. Supreme Court. Instead, such review may be prayed for through a petition for writ of certiorari.

D. Judicial Council

The federal judiciary accepts complaints against federal judges.⁹

E. Congressional action

A federal judge may be impeached and removed only for "treason, bribery, or other high crimes and misdemeanors."¹⁰ The House of Representatives must first pass, by a simple majority of those present and voting, articles of impeachment, which constitute the formal allegation or allegations. The Senate then tries the accused. To remove the judge a two-thirds majority of the senators must find the judge guilty of the charged crime.¹¹

IV. Concluding Observations and ICCPR Legal Framework

The current smorgasbord of remedies offered by the U.S. Government to counteract judicial error is insufficient to safeguard the ICCPR 14 right to a fair trial. When a judge omits, cherry-picks, fabricates, or misstates the facts of a case all of the provided remedies are insufficient.

The Supreme Court said in *Berger v. United States*, 255 U.S. 22 (1921) and elsewhere, a lower court ruling arrives at the appellate court "fortified by presumptions" "of truth due to the judgments of a tribunal appointed by law and informed by experience." "The remedy by appeal is inadequate," Justice McKenna noted in his opinion in *Berger*. "It comes after the trial, and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious." Appellate courts typically do not

⁹ 28 U.S.C. §§ 351-364

¹⁰ U.S. Constitution, Article II, Section 4

¹¹ U.S. Constitution, Article I, § 3, clause 6

revisit facts found by trial courts, but only the application of the existing law to those facts.¹² Because an appellate court relies upon the lower court's finding of facts, when the judge omits, cherry-picks, fabricates, or misstates the facts of a case, that case is dead on arrival at the appellate court. Such **de facto denial of the right to appeal** further triggers a violation of ICCPR 14.

Post-judgment motions, petitions for extraordinary writs, and appeals are all insufficient to safeguard ICCPR 14 rights. They each share a common flaw. When a judge omits, cherry-picks, fabricates, or misstates the facts of a case, a reviewing judge is at risk of becoming biased against the losing party by reason of the *Berger* phenomenon.

Judicial complaints alleging the subject judge omitted, cherry-picked, fabricated, or misstated the facts or gravamen of a case would most likely be dismissed on the grounds that the judicial complaint challenges the correctness of a judge's decision¹³. Regardless, the *Berger* phenomenon would jeopardize such an inquiry even if the rules were amended to allow complaints on these grounds.

Congressional action is a solution that is simply out of reach for the vast majority of U.S. Citizens.

V. Recommended Questions

A. Given that a lower court ruling arrives at the appellate court fortified by presumptions of truth due to the judgments of a tribunal appointed by law and informed by experience, what actions will the U.S. Government take to counteract judges who omit, cherry-pick, fabricate, or misstate the facts of a case?

B. Given that the U.S. Supreme Court has said the remedy by appeal is inadequate for reviewing the rulings of biased judges, what actions will the U.S. Government take to counteract judges who have hidden biases?

C. In light of the Freedom of Information Act, why does the federal judiciary redact judicial complaints and the dispositions of those complaints?

VI. Suggested Recommendations

A. Have the President of the United States propose to Congress new legislation creating federal civil grand juries:

1. each jury panel is to be comprised of 12 citizens¹⁴, each domiciled in a different appellate circuit¹⁵, and selected at random by computer

and empowered to:

2. receive verified¹⁶ complaints against federal judges accused of omitting, cherry-picking, fabricating, or misstating the facts or gravamen of a case

12 Gennaioli & Shleifer, *Judicial Fact Discretion* (October 2006) at 3
escholarship.org/content/qt72p0d687/qt72p0d687.pdf

13 www.uscourts.gov/judges-judgeships/judicial-conduct-disability/faqs-filing-judicial-conduct-or-disability-complaint#faq-What-can-I-complain-about?

14 Jury pools shall **not** be obtained from voter registration records but rather from driver's license or national ID card databases.

15 To overcome regional biases against minorities (oral testimony and deliberations can be through video conference)

16 i.e., sworn under oath

3. enter a preliminary finding of facts binding upon the courts unless set aside by a petit jury

B. Require the federal judiciary to un-redact Judicial Complaints, Chief Judge and Judicial Council Orders, Committee on Judicial Conduct & Disability Orders.

C. Require the Judicial Council to not dismiss complaints directly related to the merits of decisions or procedural rulings when the complainant alleges the subject judge omitted, cherry-picked, fabricated, or misstated the facts or gravamen of a case.