

# Superior Court of the State of Washington

## For King County



January 31, 2024

**DAVID S. KEENAN**  
JUDGE

**KING COUNTY COURTHOUSE**  
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Margaret Satterthwaite  
Special Rapporteur on the Independence of Judges and Lawyers  
United Nations

via email to [hrc-sr-independenceil@un.org](mailto:hrc-sr-independenceil@un.org)

Dear Special Rapporteur Satterthwaite,

I am writing in response to the Special Rapporteur's call for input on the independence of judges and lawyers for the next thematic report on safeguarding the independence of judicial systems in the face of contemporary challenges to democracy. Though I serve on the American Bar Association's ("ABA") Judges' Advisory Committee to the ABA Standing Committee on Ethics and Professional Responsibility and on the Washington State Superior Court Judges' Association Ethics Committee, I am writing in my individual capacity concerning important issues involving equal access to the justice system and the fair administration of justice.<sup>1</sup>

Judges in the United States do play an active role in safeguarding democracy, and that role is undermined at times by stifling important discussions on institutional racism in the courts under the guise of policing ethics.

In 2020, in the wake of George Floyd's murder, the Washington Supreme Court took the extraordinary step of writing to the judiciary and legal community, declaring in part that, "[a]s judges, we must recognize the role we have played in devaluing black lives."<sup>2</sup> While the statement was significant for its timing, in the midst of civil rights unrest, perhaps its greatest significance was that such a decidedly partial declaration came from an impartial body. The statement recognized that, with respect to racism, there is no neutrality, in the courts or anywhere else. The Washington Supreme Court's letter opened up many opportunities for

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<sup>1</sup> Wash. Code of Judicial Conduct R. 3.7, cmt. 8.

<sup>2</sup> Letter from the Washington Supreme Court to the Judiciary and the Legal Community 1 (2020), *available at* <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>.

judges to consider more broadly their role in addressing bias in the courts. I am grateful to have been a 2021 Racial Justice Institute Fellow at the Shriver Center on Poverty Law and to be a member of my state Administrative Office of the Courts' Antiracism Trainings Task Force, and many of my colleagues serve in various anti-bias roles throughout Washington's courts.

Despite the opportunities I and my Washington State colleagues have, judicial ethics rules can be used to prohibit such position-taking on issues like racism and bias against persons of color, members of the LGBTQ+ community, those living with disabilities, and many others hailing from marginalized communities who struggle to access the courts. For example, the American Bar Association Model Code of Judicial Conduct (the "ABA Model Code") provides that judges shall perform their duties "impartially," Rule 2.2, and "without bias," Rule 2.3, and relatedly that judges "shall not be swayed by public clamor or fear of criticism," Rule 2.4. What *can* emerge from these model rules—codified in judicial conduct codes through the United States—is an empty vessel of a judicial officer with no awareness and no preexisting opinions. As Professor Susan Bandes has observed, judges "may mistake their own perspective for the universal . . . , an occupational hazard for judges, who are encouraged by the trappings of their role to speak in a universal voice and to regard themselves as taking the view from nowhere."<sup>3</sup>

But judges do not speak for the universe and do not take their views from the ether. Encouraging judges to think otherwise lulls judicial officers into thinking that their ostensibly neutral role makes them simultaneously free from bias and ethically prohibited from even acknowledging bias. Thus, even in the ABA Model Code's allowance for "extrajudicial activities," Rule 3.1, the rule cautions judges not to "participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality." Depending on how these rules are applied, they can encourage important discussion like that raised by the Washington Supreme Court in its letter acknowledging racism in the courts, or they can silence critical discussion.

An example of the latter involves North Carolina Supreme Court Justice Anita Earls, a woman of color. Justice Earls gave an interview discussing, among other things, a lack of diversity on her state's appellate bench and among appellate advocates, and gave examples of bias she has experienced.<sup>4</sup> Later, the North Carolina Judicial Standards Commission advised Justice Earls that her remarks in the interview might "run contrary to a judge's duty to promote public confidence in the impartiality of the judiciary."<sup>5</sup> Though this dispute was later resolved, such ethical interpretations may chill judges who can and should call out bias in the courts.

United States Supreme Court Chief Justice John Roberts famously said during his confirmation hearing that he would "remember that it's my job to call balls and strikes, and not to pitch or bat."<sup>6</sup> The late Minnesota Supreme Court Justice M. Jeanne Coyne once said, "[a] wise old

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<sup>3</sup> Susan A. Bandes, *Empathetic Judges & The Rule of Law*, 2009 *Cardozo L. Rev. de novo* 133, 139 (2009) (internal quotation marks omitted).

<sup>4</sup> Hanna Albarazi, *North Carolina Justice Anita Earls Opens Up About Diversity*, *Law 360* (June 20, 2023), available at <https://www.law360.com/articles/1687516/north-carolina-justice-anita-earls-opens-up-about-diversity>.

<sup>5</sup> *Earls v. N.C. Judicial Standards Comm'n*, --- F. Supp. 3d ----, No. 1:23-cv-734, 2023 WL 8190395, \*3 (M.D. N.C. Nov. 22, 2023).

<sup>6</sup> Chief Justice John Roberts, Statement Before the Committee on the Judiciary, United States Senate, 109th Congress (Sept. 29, 2005), available at

man and a wise old woman reach the same conclusion.”<sup>7</sup> Years before her appointment to the Court, Associate Justice Sonia Sotomayor said, “there can never be a universal definition of wise, . . . [and] I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”<sup>8</sup> Yet, a judge’s background and their ability to marshal that background in decision making and to call out bias, matters.

The question of whether experience matters has come up again very recently in the context of nominations to the Supreme Court, as the Washington Post discussed the impact her uncle’s drug conviction had on Justice Ketanji Brown Jackson, noting that, “Jackson’s brush with her uncle and his prison sentence, which arose out of the nation’s war on drugs, adds to a set of life experiences that would distinguish her from previous justices.”<sup>9</sup>

If judges in the United States are to play a vital and active role in safeguarding democracy and upholding fundamental rights, they should be encouraged to be open about their life experiences, their concerns around institutional racism and bias in the courts, the limits of how their experiences can inform their decisions, and the benefits of a diverse, informed, and public-facing judiciary.

Sincerely,

A handwritten signature in black ink, appearing to read "David S. Keenan". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David S. Keenan  
Judge

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<https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process>.

<sup>7</sup> David Margolick, *A New Majority*, CHI. TRIB., Mar. 31, 1991, available at <https://www.chicagotribune.com/news/ct-xpm-1991-03-31-9101290014-story.html>.

<sup>8</sup> Sonia Sotomayor, *Lecture: A Latina Judge’s Voice*, N.Y. TIMES, May 14, 2009, available at <https://www.nytimes.com/2009/05/15/us/politics/15judge.text.html>.

<sup>9</sup> Aaron C. Davis & Ann E. Marimow, *Possible Supreme Court Nominee, Former Defender, Saw Impact of Harsh Drug Sentence Firsthand*, WASH. POST, Jan. 30, 2022, available at [https://www.washingtonpost.com/politics/courts\\_law/ketanji-brown-jackson-uncle-prison/2022/01/30/669c5f68-8116-11ec-bf02-f9e24ccef149\\_story.html](https://www.washingtonpost.com/politics/courts_law/ketanji-brown-jackson-uncle-prison/2022/01/30/669c5f68-8116-11ec-bf02-f9e24ccef149_story.html).