

## ADDRESS

### THE CURRENT, SUBTLE—AND NOT SO SUBTLE— REJECTION OF AN INDEPENDENT JUDICIARY\*

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#### I.

An independent judiciary which applies rules of law, whether the laws are derived from old or relatively recent sources of values, is a pain in the neck to any government that wants to get things done. Whether the government is democratic or totalitarian, right-wing or left-wing, courts get in the way. Courts are a great source of political transaction costs—they create inertia when the government wants to change course.

This is not solely an American phenomenon. In Italy, for example, a newly elected government of the right is fighting with its magistrates, who persist in following their view of the law rather than carrying out the policies of the new administration. One of the most dramatic examples of this conflict in Italian history can be found in the time of fascism, when Italian judges were formalists to a degree unknown almost anywhere else in the world. In contrast to functionalists, who make the law respond to certain societal ends, these formalists carried out old law and thereby preserved its values. Those values, which were economically and politically libertarian values from the nineteenth century, got in the way of fascism.

When traveling in Italy in the 1920s, Roscoe Pound could not understand why there were almost no serious scholars of law, from his

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point of view. All the scholars who were legal sociologists, like Pound, who made the law do what the society wanted, were fascists. All the people who seemed like serious scholars were making the law consistent with what it had been a hundred years before, which to Pound was madness. After the war ended, several great Italian scholars said, "Now we can be functionalists, now that there's no longer a dictatorship. We can make the law come to do what the society wants." To which others said, "And what about the next dictatorship?"

While all courts do not seek to preserve an old order, they do get in the way. Therefore, courts and judicial institutions will constantly be under pressure to behave less like courts—to act less independently and be more responsive to the immediate needs of the majority. There will also be pressures to take issues away from courts and give them to bodies that will not be independent. When these pressures escalate, conflict arises. There is then much at stake, but whatever the outcome, at least it is an open and clean battle.

There have been many such struggles for control over the judiciary in the history of this country. Today, there are issues regarding (a) the use of military commissions to deal with terrorist prosecutions and (b) the removal of court jurisdiction over deportation cases. As to these issues, whatever is decided, we can be fairly confident that the polity has weighed the advantages and disadvantages of having decisions made in a politically dependent rather than in a judicial way. These debates raise questions analogous to those that my colleague Bruce Ackerman has said arise in "constitutional moments,"<sup>1</sup> those times when people act as "We the people" and can decide the issues in fundamental, semi-constitutional ways.

Rather than these constitutional moments, I want to discuss situations in which for *good practical reasons* we have rejected courts as decision-makers or have made courts less independent as judicial decision-makers. In each case, there may be very sound grounds for moving from an independent decision-maker to a dependent decision-maker. And, in isolation, each case may not amount to much. The question remains, however, whether, in a variety of different areas, intentionally or by chance, we are increasingly giving power to dependent decision-makers rather than independent ones and whether together these shifts amount to a very significant change in our system.

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<sup>1</sup> BRUCE ACKERMAN, *WE THE PEOPLE* (1991).

## II.

The first of the shifts that I want to discuss derives from the desire to have equality in sentencing, a perfectly sensible aim. Anyone who looked at how defendants were sentenced in federal court saw a degree of disparity that was not acceptable in a society that desires equality. One judge would throw the book at a defendant while another would give the lightest possible sentence. Now, we have a sentencing guideline system that greatly limits the degree to which judges can determine the appropriate sentence. The guidelines are not perfect and many judges, especially federal district judges accustomed to independence, resent them. It is hard to say, however, that there were not good reasons for the guidelines.

What has been the effect of the guidelines? Do we have equality in sentencing, or have we simply turned over discretion, formerly the province of judges, to prosecutors? Prosecutors have always had great power in deciding how to charge somebody, but before the guidelines, if judges figured that prosecutors had erred, the judges could use their enormous discretion in sentencing to remedy that error. Judges would ultimately decide—perhaps unequally, perhaps unfairly, but independently—what the result would be. With sentencing guidelines, judges no longer have that power, but we have done nothing—nor perhaps can we do anything—to curb the analogous discretion in people who instead are subject to political pressures. Is that bad? I don't know; judges naturally get in the way of what the polity wants. Regardless of whether it is or is not desirable, it is a change from decisions made by people who are independent to decisions made by people who are dependent.

Another example is the ascendancy of the expert in our increasingly complicated society. Judges are generalists who deal with a variety of matters and there are very good reasons why they should do so. But breadth inhibits depth, so the idea that judges should defer to experts is a perfectly sensible one. We judges are often told that we should yield to the experts. We had a case before the Second Circuit recently in which we were asked to defer to the judgment of the police commissioner and of the mayor in transferring a large group of black policemen, on the basis of their race, into the precinct where the Amadou Diallo incident had occurred.<sup>2</sup> We were told that we should not even consider whether this transfer met the requirements of equal protection, or whether the move amounted to racial targeting, because the *experts*, who do know a lot in these situations, believed that the transfer was necessary. An analogous argument was

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<sup>2</sup> See *Patrolmen's Benevolent Ass'n v. City of New York*, 74 F. Supp. 2d 321 (1999).

made for deferring to the military in *Korematsu*.<sup>3</sup> The “experts” there told judges that it was necessary to intern Japanese-Americans in California in order to defend the country, but the same military experts declined to urge anything similar in Hawaii.

We often are told that judges should not second-guess the people who run prisons, who are, after all, in the line of fire. In a case that I heard, the experts told me that allowing prisoners to receive pictures of their naked spouses would be dangerous to the security of the prison, but allowing them to have photographs from pornographic magazines would not.<sup>4</sup> The experts did not give any explanation. When I asked why, they just said “well, we know; we run prisons.” I can think of any number of reasons why the naked photos rule might be right, but it might also be wrong. As a result, my tendency—typical of independent judges—was to ask the experts to explain their reasons. I could then examine these reasons in the case before me, and in other situations, and then decide whether the rule made sense. Instead, the answer given to us was that judges cannot know the details of jail life and that we, therefore, should follow the experts without questioning them. In all these cases, whether that deference is right or not, it moves the decision from somebody who makes it independently to someone who may have reasons for pleasing the then-majority or the then-power structure in making the rule.

A more generalized problem arises with administrative agencies and the *Chevron* doctrine.<sup>5</sup> Do we defer to the interpretations of statutes by administrative agencies because such agencies are experts? *Chevron* says we must, for good reasons; yet, administrative agencies—whether they are dependent, like the Internal Revenue Service, or independent, like the Federal Reserve—are still not independent in the way that courts are independent. Agencies, in their statutory interpretation, respond much more to majoritarian pressure than courts do. Statutory interpretation under *Chevron*, like sentencing guidelines and deferral to expert witnesses, moves the decision-making from independent pains-in-the-neck to people who are more functionalist.

The next shift away from an independent judiciary that I will mention is explained in part by federalism, by the desire to let states be truly sovereign. As a judge I agree with this aim. I press for certifica-

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<sup>3</sup> *Korematsu v. United States*, 323 U.S. 214, 236-37 (1944) (Murphy, J., dissenting) (“Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence.”).

<sup>4</sup> *Giano v. Senkowski*, 54 F.3d 1050, 1057 (2d Cir. 1995) (Calabresi, J., dissenting).

<sup>5</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (holding that agencies may act within any permissible construction of the statutes they administer, unless congressional intent is unambiguous).

tion in diversity cases because I think federal courts generally are not very good at deciding what state law is; when we try to tell New York or Connecticut what their law is, we often get it wrong. As a result, certification seems to me to be eminently sensible. But there have been other, more troubling ways in which federalism has been used. One example is the routing through state courts of cases in which the issue ultimately is a federal one—whether, for example, a state rule complies with a federal statute or the Federal Constitution. Such a routing has the effect of getting district courts out of the business of being fact finders. By letting cases go through the state system, supposedly to be reviewed only by the Supreme Court of the United States, the role of independent judges, is, for reasons I will give shortly, substantially reduced. Of course, if genuine *de novo* review of these cases by the Supreme Court were possible, we would still have an independent tribunal reviewing state rules. But, given the limited capacity of the Supreme Court to take such cases, let alone review them fully if it were to take the cases, this is not, and cannot be, the way it works.

The problem is made worse by a current requirement of deference to state court decisions that goes well beyond deference to fact-finding. Under the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>6</sup> federal courts must uphold state court decisions in habeas cases on matters of federal law, even if the state decisions are erroneous, and even if they are unreasonable applications of a decision of the lower federal courts. We can only reverse even unreasonable applications of federal laws if the state court ruling represents an unreasonable application of a decision of the Supreme Court of the United States.<sup>7</sup> This means that for federal judges to reverse a decision made by a state court, on a matter of federal law, we have to say that the state courts read the United States Supreme Court unreasonably; not just that they got it wrong. Obviously, we are reluctant to insult state courts, and federalism, in this way. As a result, state courts frequently have the last word in such cases.

One might respond, however, “this doesn’t undercut judicial independence; it simply makes a different independent body decide—state courts rather than federal courts.” But this is incorrect because most states have elected courts. We tend to think of all courts as being mini-Article III courts, yet this is not true across the country, especially at the trial and first appellate level. It follows that decisions are being taken from relatively independent bodies, federal courts, and given to relatively dependent state tribunals which, because

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<sup>6</sup> Pub. L. 104-132, 110 Stat. 1214 (1996).

<sup>7</sup> See Pub. L. 104-132, § 104, 110 Stat. 1218 (1996) (codified at 28 U.S.C. § 2254(d)(1) (1997)).

elected, are much more likely to do what the then-majority wants. Once again, this may, or may not, be a good thing, but either way it is a move away from independence.

Another set of reasons for shifting issues away from federal courts is to protect these courts from being overwhelmed. Congress has told federal judges what things we should not do when dealing with prisoners in order to keep us from having too much to do.<sup>8</sup> For example, prisoners now must exhaust their claims in the state prison administrative system before they can bring a claim to court.<sup>9</sup> The Supreme Court unanimously decided this year that prisoners must exhaust these claims even when the claim is one for damages that cannot be awarded in the state system.<sup>10</sup> That again means that all of the fact-finding that is crucial to review is done by prison officials within the prison, rather than by judicial officials in independent courts. I am not saying that these prison tribunals are not doing their jobs well, only that they are not independent, and so subject to pressures to which courts are not.

Limits have also been put on writs of habeas corpus, so that petitions must be brought within a year except in extraordinary cases<sup>11</sup> and second habeas petitions are permitted only in very few circumstances.<sup>12</sup> Judge Pollak and I, in *Triestman*,<sup>13</sup> increased the circumstances slightly,<sup>14</sup> but most of the time such review is not available. Defenders of the new habeas corpus limitations argue that administrative pardons and similar measures will cure any injustices that might arise. That is, of course, true. But once again, these procedures are all in the hands of dependent and politically responsible bodies, rather than independent and politically insulated courts.

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<sup>8</sup> On the other hand, for political reasons, Congress is constantly giving us more jurisdiction over criminal acts that are already prohibited by existing state criminal laws. It is this peculiar, parallel state/federal jurisdiction, rather than prison litigation, that is actually overwhelming us.

<sup>9</sup> Pub. L. 104-132, 110 Stat. 1321-71 (1996) (codified as amended at 42 U.S.C. § 1997e(a)).

<sup>10</sup> *Porter v. Nussle*, No. 00-853, 2002 U.S. LEXIS 1373 (Feb. 26, 2002) ("Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit.").

<sup>11</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, §§ 101, 106, 110 Stat. 1217, 1220 (codified at 28 U.S.C. § 2244(d) (1997)).

<sup>12</sup> 28 U.S.C. § 2244(b)(3)(E) (2002).

<sup>13</sup> *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997).

<sup>14</sup> *Id.* at 376 (holding that "'inadequate or ineffective' does not refer solely to practical limitations on the petitioner's ability to obtain relief under § 2255," and that § 2241 review is available in those cases in which the absence of § 2241 consideration would result in serious constitutional doubts as to 28 U.S.C. § 2244(b), the statute limiting § 2255 review).

## III.

There are other ways in which the independence of the courts has been diminished that are even more subtle. The federal judiciary has become something of a career judiciary. Most of the Justices of the Supreme Court were court of appeals judges before their appointment to the High Court. In the Second Circuit Court of Appeals, a majority of the judges were promoted from positions as district judges. The effect of this professionalization has been to make our court less ideological and our discussions more technical than if we had federal judges coming primarily from the academy, politics, or practice.

My own assessment is that, on our court, there is more difference between judges, based on their previous jobs than on who nominated them. Thus, those who were formerly district judges, regardless of whether they were appointed by a Democrat or Republican, are very similar to each other. In contrast, Calabresi and Winter, whose politics before they went on the court were very different, but who were full-time academics, are much more like each other than those judges who formerly were in private practice. And both former academics and practitioners differ greatly from former trial judges.

It is highly beneficial to have this kind of diversity of experience among judges and, for this, as well as many other reasons, career judges are desirable. But there are also serious effects that flow from having a significant part of the judiciary be made up of career magistrates. Fear of getting fired is not one of these effects. I do not think that when federal judges make decisions that are unpopular, they really think that they might lose their job. Judges still have as their model, Oliver Wendell Holmes, who, when he got to the Supreme Court of the United States decided a case in a way that offended Theodore Roosevelt, the president who had appointed him. When Theodore Roosevelt berated the Justice at a Washington cocktail party, Holmes drew himself up to his full height, tweaked his mustache, and said, "Now, Mr. President, you can go straight to hell."<sup>15</sup> I do not think judges worry much about getting impeached. There was talk of impeaching Harold Baer, a district judge in our court,<sup>16</sup> because of an unpopular decision but nobody took it truly seriously.

The real danger, instead, is that if judges think about promotion, they are going to start being very careful not to make waves. If you are a district judge and you want to get on the court of appeals, it

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<sup>15</sup> Who knows if this oft repeated story is true. "Ma se non è vera è ben trovata."

<sup>16</sup> See Katharine Q. Seelye, *House G.O.P. Begins Listing a Few Judges To Impeach*, N.Y. TIMES, Mar. 14, 1997, at A24 (reporting that Representative Tom DeLay listed Judge Harold Baer as a possible candidate for impeachment).

does not help to have senators of the right or the left criticizing your opinions; yet we want politicians to criticize opinions. Judges may not like it, but opinions should be debated, criticized, and be part of the political discussion. On the other hand, if that means that judges are going to be afraid of making controversial decisions because they will not be promoted, then we have seriously diminished judicial independence.<sup>17</sup>

Another related issue is the fact that as overworked judges we need help. We have many clerks and we have help from the Administrative Office of the Courts. These may not seem to be dangerous things, but they are.

In 1957, a young lawyer named Rehnquist wrote an article saying that law clerks were dangerous left-wing influences on the Supreme Court and that the way to deal with this problem was to have such clerks be confirmed by the Senate.<sup>18</sup> I don't think the Chief Justice would believe that today. A year later, I asked Justice Black, for whom I was clerking, about this and he said, "No, I would never let a young man"—this was some 44 years ago—"go through that. I was a senator myself, I know what senators ask at confirmation hearings; they might even ask about a clerk's sex life. With a young man, you can't have something like that going on." With my usual self-importance, I blurted out, "But what would you do, Judge?" He said, "I wouldn't have any clerks. My opinions might be less learned and certainly shorter, but I could handle it."

Of course I felt very embarrassed because Justice Black could easily have handled the whole job alone; he obviously didn't need clerks at all. He, however, did not seem troubled by my gaffe, and instead turned very serious. He said, "There's something important in this. What makes courts independent isn't that we are here for life. Fourteen or twenty years would be plenty if we couldn't be reappointed and went on to other things. Instead, what makes us independent is that there is nothing that anybody can do to us. I don't need anything from anyone. My salary is fixed. If they take away my library, I can go to any law school in D.C. to get what I need. The building is nice, but I could decide cases almost anywhere. I want for very little. Beware of people who under the guise of helping judges make judges financially dependent. That's the difference between us and administrative agencies, even independent administrative agencies."

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<sup>17</sup> Regrettably, after a journalist says that a judge would be a good person to think about for the Supreme Court, many a judge, even on a court of appeals, start to dance. I once voiced this concern to Bob Drinan, a Jesuit who is a law professor and former congressman. He put on a fake Irish accent and said, "Sure, and we have the same thing in the church; we call it scarlet fever," scarlet being the color worn by cardinals.

<sup>18</sup> William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74-75.

As Justice Black reminded me, even independent administrative agencies are dependent because they cannot do the job they are assigned without important budgetary support from the Congress. And this means that such agencies have to make sure that key Congress people are not too unhappy.

There has been a major change from the day when Justice Black could do his work anywhere, with only two clerks whom he could do without, to the situation today. Judges are now much more dependent on our budget. The Chief Justice speaks about it and the circuit judges are very much aware of it. I do not think that any of us has ever decided a case differently because of budget pressures, but I do think that the way we have spoken—what we have said, and how rude we are willing to be to Congress—has been affected by the fact that nowadays judges need Congress to appropriate a not insignificant amount of money for the judiciary.

#### IV.

Again, each of these is by itself relatively unimportant. And, you might say, “this talk of dependence, what does it mean when we have a Supreme Court which is still totally independent and which is as aggressive a Supreme Court as has ever existed? *It* does not defer to *anybody* and whether it’s a right or a left Court doesn’t, from this point of view, matter. Why isn’t *that* enough to maintain judicial independence?” The reason is that the Supreme Court cannot handle most of the cases. It can only take a hundred, maybe if it worked harder, two hundred cases. It could not possibly deal with all of the issues that I have been talking about. That is why where one routes a case, whether it goes through the federal courts or through the state courts, is so important.

The same thing applies within a state court system. Certiorari jurisdiction explains why the Supreme Court takes very few cases. State certiorari rules also explain why the New York Court of Appeals, for instance, hears mighty few cases that involve a significant federal constitutional or statutory question. The decisions at the state level are made almost always by the intermediate appellate courts, which are subject to much more political pressure and have much less independence than the state’s highest courts. Just as in our system the Supreme Court ultimately cannot deal with a high volume of cases, so the same is true in the states. The result is that, with certiorari jurisdiction, we have the illusion, the myth of independence based on review by “Supreme Courts,” but that such review does not suffice to defend true independence.

Is all this really that serious? Each of the examples I have given—and I could give more—is a small thing. I come from New Haven, a town I love. It’s a beautiful city, but it is not as beautiful as it once

was. In 1900, New Haven had more eighteenth century houses than any city in the United States other than Charleston, South Carolina. Unlike Charleston, none of the houses were terribly important. They were scattered eighteenth century farmhouses, each of which was not worth saving when there was a good reason for taking it down. Today there are only two, maybe three such houses left in the city of New Haven. Similarly, each of these reasons, each of these instances of limitations on judicial independence, is well justified. Put them together, however, and you start to see a significant change.

How significant? I have tried to figure out how much of our docket is actually in these areas where deference or routing or some other mechanism of dependence has become important. It is hard to say, but if one subtracts those cases that have no particular political or ideological significance, the cases in which being a pain-in-the-neck does not matter, and one leaves only the others, these areas become an important part of our docket.

The changes I have described may be intentional, or they may not be. Once there is a good reason for a policy of deference or routing, some people will support that policy in part because they see the policy as an opportunity to improve their ability to influence results by getting rid of pain-in-the-neck judges. I do not mean "intentional" in the sense of a legislator or a member of the executive being primarily motivated by the desire to eliminate federal courts, as is the case with the creation of military commissions,<sup>19</sup> or with targeted deprivations of jurisdiction.<sup>20</sup> If they were that intentional, we would react in ways that would make of the proposed change a constitutional moment, a matter of discussion through which we could decide, "Do we want independence, or don't we?" They are not quite that way, and yet I don't think these changes are purely accidental. They are happening too often.

## V.

Independence isn't always good. It brings inertia and political transaction costs, which at some level outweigh the benefits of independence. This is the Owen Roberts Lecture. Whether it is true or not, Roberts is famous as the "switch in time that saved nine."<sup>21</sup> He is

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<sup>19</sup> See, e.g., Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (authorizing the creation of military tribunals to try suspected terrorists).

<sup>20</sup> See, e.g., S. 158, 97th Cong. (1981) (attempting to limit jurisdiction of federal courts in cases involving abortion); H.R. 3225, 97th Cong. (1981) (same).

<sup>21</sup> See generally Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 267, 291 (1988); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (indicating that Justice Roberts began to change his mind).

famous because he is said to have yielded—not at the beginning, but at a certain point—to political pressure. Independent judges are not totally independent. Dooley famously said that courts follow the election returns.<sup>22</sup> Perhaps judges do this, but if so we do it in a different way from politicians or bureaucrats. After the New Deal had both established itself and re-established itself, Roberts may have understood that even independent courts must at a certain point yield to some extent, that they probably *should* not be as independent as in our mythology we say that they are. And this is so, in part at least, to save the independence of the judiciary.

“The switch in time” is only half of why Justice Roberts is so important to the topic of this Lecture, however. Owen Roberts was also one of the few dissenters in *Korematsu*.<sup>23</sup> Owen Roberts was one of the Justices who said we need not, must not, and *cannot* simply defer. He stood up against what was one of the worst decisions in Supreme Court history, made because—as Justice Black said to me—*this was war* and who were we to stand in the way of the generals?

Thus, Owen Roberts symbolized in his life both the relative nature of the independence of an independent judiciary and the crucial importance of a judiciary that does not defer, that is independent, and therefore has the power to make decisions that run counter to outrageously popular demands. Justice Roberts represents why we must be on guard, lest by chopping down one unimportant eighteenth century house after another, we find ourselves with none left at all.

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<sup>22</sup> MR. DOOLEY'S OPINIONS 26 (1901) (“[N]o matter whether th’ constitution follows th’ flag or not, th’ supreme court follows th’ iliction returns.”).

<sup>23</sup> *Korematsu v. United States*, 323 U.S. 214, 225 (1944) (Roberts, J., dissenting).