

## **Do Americans Still Want an Independent Judiciary?**

Fifty years ago, when my classmates and I came to this place every morning, the world was a more sedate and reliable place. The nation was built of solid institutions. We knew what some of them were -- we knew that there were eight teams in the American League and eight in the National; we knew that IBM and US Steel were the bluest of blue chips -- and what we didn't know we were being taught. Dwight Eisenhower was in the White House. What was good for General Motors was good for America. There were three separate but equal branches of government that kept each other honest with something called checks and balances. There was also a Fourth Estate. Our graduation speaker was Louis B. Seltzer, publisher of a Scripps Howard newspaper called the Cleveland Press. We had never heard of the media.

Things were starting to come apart in 1955, though. The center was not going to hold. The long walks and green aisles of Old Reserve might long be preserved by time, but even here the seeds of something much more confusing were being planted, and right under Scotch McGill's nose. My classmates will remember the day that Tim Kahrl spoke truth to power and refused to bow his head in Chapel. They may also recall that we boycotted the barber who refused to cut Eddie Lander's hair. Eddie had a beautiful voice and could run like the wind. He was our only black student. Prefects were allowed to have record players, and so Jack Tidyman introduced us to "Work With Me Annie," by the Midnighters. I'm not sure that we understood the lyrics of that song until the sequel arrived. It was called "Annie Had a Baby," and it was actually a lecture. It ended with the words "that's what happens when the gettin' gets good." But it was too late for lectures. We didn't know anything about drugs, and we could only hope for sex, but rock 'n roll was already here. The abyss lay just ahead.

Now, what does all of this have to do with judicial independence? Well, let me remind you of what happened in the decade after 1955. It was in the spring of 1955 that the Supreme Court began to follow up on its 1954 school decision with orders to desegregate with all deliberate speed. Then the Supreme Court started handing down decisions that gave new rights to criminal defendants -- excluding evidence in criminal cases (*Mapp v. Ohio* 1961), guaranteeing the right to counsel (*Gideon v. Wainwright* 1963), and requiring that suspects be informed of the right to remain silent (*Miranda v. Arizona* 1964). Not only was the Supreme Court going soft on crime, some people thought, but it wasn't particularly hard on pornography, it was downright permissive on flag burning, and it stepped over a big line when it ruled against prayer in the public schools (*Engel v. Vitale* 1962) and invented a right to privacy that even the Court conceded was not actually found in the Constitution (*Griswold v. Connecticut* 1965). Between the time I left WRA and the time I graduated from law school in 1965 the legal landscape of the nation had been transformed by the Warren Court -- if, that is, you could see the landscape behind the "Impeach Earl Warren" billboards that had popped up all over the place.

And now, the Supreme Court having sown the wind (so the argument goes), a nation obsessed with newly discovered rights and newly conferred entitlements began to reap the whirlwind: civil rights marches and demonstrations, a revolution of rising expectations in the urban riots of the late 1960's, protests against the Vietnam War, a black power movement, a women's rights movement, a gay rights movement, an environmental movement, and, a little later, after the Supreme Court's abortion decision (Roe v. Wade 1973), an inflexible requirement that every politician declare him or herself pro-life or pro-choice. It was pandemonium. And whose fault was it? Why, it was the fault of activist judges, of course!

Judges occupy an odd place in the American consciousness. Almost by definition, half of the people who come before us leave happy and the other half leave unhappy. I love doing naturalization ceremonies, because they are the only thing I do that doesn't produce a winner and a loser. I remember one particular case when I was a practicing lawyer. I had a complex argument to make before a judge who, according to his reputation among the Bar, was a few bricks shy of a load. He saw the case my way, however, and I immediately decided that he was a jurist of rare and discerning intelligence. It has always been thus.

- Thomas Jefferson hated John Marshall, the great Chief Justice who gave shape to the constitutional idea of separation of powers. It was Marshall who wrote in the seminal case of Marbury v. Madison that "it is emphatically the province and duty of the judicial department to say that the law is." To Jefferson, though, "The Constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they may please."
- Chief Justice Roger Taney was the judge we still love to hate. He was the author of the Dred Scott decision, that Congress could not regulate slavery in the territories and that blacks were not citizens. Senator Sumner said Taney's name was to be "hooted down the halls of history," and so it has been, although it was a little over the top to say that "he was, next to Pontius Pilate, perhaps the worst thing that ever occupied the seat of government among men."
- Theodore Roosevelt appointed Oliver Wendell Holmes, but Holmes disappointed Roosevelt by his vote in some trust busting case. Roosevelt vowed that Holmes would never again darken the door of the White House and said that he could carve a judge with more backbone out of a banana.
- When Judge Frank Johnson issued orders to enforce the Supreme Court's school desegregation orders, Governor George Wallace called him a "low down, carpetbaggin', scalawagin', race-mixin' liar."

It was precisely to enable us to withstand that kind of criticism, and worse, that the Constitution established an independent judiciary. You will recall that the Declaration of Independence recites a long list of grievances against King George III to justify the American Revolution. You may not recall that one of them -- higher on the list than "quartering large bodies of armed troops among us," higher even than "imposing taxes on

us without our consent” -- was that the King made judges “dependent on his will alone, for the tenure of their offices and the amount and payment of their salaries.” Article III of the Constitution fixed that. It provided that federal judges “shall hold their offices during good behavior” and that their compensation “shall not be diminished during their continuance in office.” Lifetime appointments, in other words, at guaranteed salaries. Alexander Hamilton explained this in *The Federalist* (No. 78). He wrote that judicial independence in a republic is “an excellent barrier to the encroachments and the oppressions of the legislative body.” He was talking about checks and balances. He said that an independent judiciary “is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.”

Now fast forward some 220 years. A woman lies in a coma in a Florida hospice. She has been comatose for fifteen years after cardiac arrest. Six doctors say she is in a persistent vegetative state. She has left no living will. Her husband and her parents cannot agree whether to continue keeping her alive with a feeding tube. The courts have to decide. The Florida courts say no. The Florida legislature orders the tube reinserted. The Florida courts reject the direction of the Florida legislature. Now the United States Congress passes and the President signs a special bill to give jurisdiction to the federal courts. The federal courts say no. The feeding tube is removed. The woman dies. The Terry Schiavo case is a tragic one. It pushes many hot buttons about bioethics, legal guardianship, federalism, and civil rights. But the politicians -- the ones whose “encroachments and oppressions” Hamilton was concerned about -- turned it into a three-ring, judge-bashing circus. Congressman DeLay went to the press and said, “The time will come for the men responsible for this,” and he surely meant the federal judges, “to answer for their behavior.” Senator Cornyn permitted himself to wonder out loud on the floor of the Senate whether there is a cause and effect relationship between unaccountable political decisions of judges -- his words -- and violence against judges. Judge Greer did not ask for this case. It was assigned to him at random, and he just did his job a judge. Now he has to have protection from the U.S. Marshals because of threats against his life, and he has been asked to leave the Calvary Baptist Church.

It’s not just the Schiavo case that has uncorked all this venom. Justice Anthony Kennedy, a devout Catholic appointed to the Supreme Court by Ronald Reagan, was the special target of a recent Washington conference organized by the religious right called “Confronting the Judicial War on Faith.” Phyllis Schlafly called for Justice Kennedy’s impeachment because of his opinion in a recent case holding that capital punishment may not be imposed on juveniles. Another speaker at the same conference, not to be outdone, said that Kennedy’s philosophy “upholds Marxist, Leninist, satanic principles drawn from foreign law” and said his bottom line for dealing with the Supreme Court is Josef Stalin’s bottom line -- no man, no problem. The full Stalin quote is, “Death solves all problems: no man, no problem.”

Well, I suppose those people would say they just used a little hyperbole to make a point. After the murder of Judge Lefkow’s mother and husband in Chicago earlier this year by a disappointed litigant, we judges are not amused by hyperbole. The real question, though, is, what point? That we should only put judges on the bench who will reliably do what we want them to do? That’s what King George did, and there are modern examples for

us to follow, if that's what we really want. We could emulate Russia, where judges who mete out sentences thought to be too lenient are fired. Maybe we could elect federal judges for six-year terms as do you here in Ohio, although if you are concerned about money in politics you might not be drawn to that idea: remember that the Chamber of Commerce spent \$6 million in 2002 in an attempt to defeat a single Ohio Supreme Court justice. Or we could go the way of Iran, where the mullahs have the last word on what the law is.

Some of the most outspoken critics of the judiciary sound like they wouldn't mind the mullah model. Senator Sam Brownback of Kansas, preaching from Old Testament texts (Psalm 89, "righteousness and justice are the foundations of thy throne"; Isaiah 28:17, "I will make justice the measuring line and righteousness the plumbline"), says that judges are long on justice but short on righteousness, and that we need to get right with the people on what he calls life issues, meaning, of course, abortion and Terry Schiavo; on church and state issues, meaning presumably prayer in school and the Ten Commandments in the village square; and on marriage, meaning – well, we all know what that means.

To lawyers -- and of course to judges – the calls for impeaching judges because of their decisions and for the appointment of judges by litmus test are outrageous attacks on the Founders' design for an independent judiciary. It is possible, however, that we are the ones with the tin ears. Maybe the people don't want an independent judiciary any more. Jefferson himself thought that the tree of liberty would have to be refreshed every generation or so with the blood of tyrants and despots. If the people think judges are tyrants and despots, maybe it's time for a serious discussion of whether judicial independence is a core value worth preserving. People tend to learn from one another when they have serious discussions. Maybe we should try it.

Those who believe that the judiciary really is to blame for all that ails us, however, should not expect too much from that discussion unless we can all control ourselves and moderate the shouting and name calling that passes for debate today. Judge Learned Hand thought an independent judiciary important to civilization, but he did not think it a panacea. He wrote ("The Contribution of an Independent Judiciary to Civilization"):

This much I think I do know: that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

It has been a high privilege for me to stand before you today and deliver these remarks. I am grateful beyond measure for this wonderful school and for the masters who tried to instill in us a sense of community and moderation -- as well as righteousness and justice. I salute you who are about to be honored for your own achievements and contributions.

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for the District of Columbia