Fall 1996

It's a Wonderful Life, or Is It - America without Judicial Independence

Penny White

It's a Wonderful Life, or is It? America Without Judicial Independence

PENNY J. WHITE*

In the movie *It's a Wonderful Life*, George Bailey is allowed to see what life in his hometown of Bedford Falls would have been like had he never been born. That experience, of viewing life without his existence, makes George keenly aware of his significance. Perhaps from a similar viewpoint we can envision an America without judicial independence and evaluate its importance to our system of justice.

My present transition, unwelcomed as it was, is one that has caused me to think a great deal about the privilege and the importance of judging. I realize that what we all need to think about and talk about as judges, lawyers, and citizens of the greatest democracy in the world is not what happened on August 1, or what might happen in 1998, but what must happen in every courtroom, in every classroom, and in our society generally if we are to preserve this country's foundation of three coequal and independent branches of government.

We hear talk of judicial independence. It is the post-election concern, the pre-election crisis, and the politically correct description of what we want our judges to be. Yet, we see

---

* J.D., University of Tennessee; LL.M., Georgetown University. This essay is based on an address given October 1996 by Penny J. White as part of the "First Monday in October" program at the University of Tennessee. Penny White has served as a trial and appellate judge in Tennessee and as a Tennessee Supreme Court associate justice.

efforts all around us to circumvent it. There are criticisms from one political candidate to another about judicial appointments,[1] calls from presidents to judges questioning their decisions,[2] and senators' characterizations of the philosophies of judges.[3] As judges and lawyers, we fret about that phrase—judicial independence—while those in the other two branches often give it mere lip service.

The willingness of one branch of government to attempt to harness the power of another is nothing new. Remember *Marbury v. Madison*,[4] in which the United States Supreme Court established its supremacy over Congress. In order to "advise" the Court of the appropriate ruling, Congress passed the Judicial Act of 1802 which abolished circuit judgeships created by the Judicial Act of 1801, and in so doing, restored circuit riding by the Supreme Court justices. More importantly, to hold the Court at bay, the Act abolished the 1802 term of Court.[5] Remember also the impeachment trial of Justice Samuel Chase for decisions he made as a circuit judge described at the time as the "entering wedge to the compleat [sic] annihilation of our wise and independent Judiciary;"[6] the plank of the Progressive Party in 1912, espoused by Theodore Roosevelt, which advocated the recall of judicial opinions and judges by popular vote;[7] the FDR court packing plan;[8] the 1958 legisla-

---

1. Anthony Lewis, *The Old Dole*, N.Y. TIMES, April 22, 1996, at A5; Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 774, 790 (1995).

2. Deborah Pines, *Under Fire, Judge Reverses Himself*, NAT'L L.J., Apr. 15, 1996.

3. *See* Neal A. Lewis, *GOP to Challenge Judicial Nominees Who Oppose Death Penalty*, N.Y. TIMES, Oct. 15, 1993, at A26, *cited in* Bright, *supra* note 1, at 790.

4. 5 U.S. (1 Cranch) 137 (1803).

5. Harold R. Burton, *Marbury v. Madison: The Cornerstone of Constitutional Law*, *in* THE SUPREME COURT AND ITS JUSTICES 15-18 (Jesse H. Choper ed., 1987).

6. *See* COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES, ITS BEGINNINGS AND ITS JUSTICES 1790-1991 19 (1991); *Trial of Samuel Chase, an American Justice of the Supreme Court Impeached by the House of Representatives for High Crimes and Misdemeanors Before the Senate of the United States*, 8th Cong., 2d Sess. (1805); *see also* Burton, *supra* note 5, at 36-39.

7. *See* Paul A. Freund, *Storms Over the Supreme Court*, *in* THE SUPREME COURT

tion proposed by an Indiana senator which proposed denying jurisdiction in a long list of cases including those involving loyalty oaths and subversive activities;[9] and more recently in 1986, the discussion of impeachment of three court of appeals judges who voted to overturn a murder conviction on what was termed a technicality.[10] Finally, there is the present debate over a constitutional amendment which would allow Congress to overrule decisions of the United States Supreme Court by legislative act.[11]

The branches will always struggle to become omnipotent. Thus, we must face this question: just how essential is judicial independence to justice in America? Is it worth the struggle to maintain the judiciary as the third, coequal, independent branch of government? My reflection leads me to a simple conclusion: judicial independence is the backbone of the American democracy. It is essential not only to the preservation of our system of justice, but also to the preservation of our system of government.

Having made such an unconditional pronouncement, that judicial independence is essential to preserving our nation, I must be prepared to answer the obvious question. Why? Judicial independence has been described as "an essential safeguard against the effects of the occasional ill humors in the society."[12] Chief Justice John Marshall declared in an argument at the Virginia Constitutional Convention: "I have always thought, from my earliest youth . . . that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary."[13] And

---

AND ITS JUSTICES 185 (Jesse H. Choper ed., 1987).

8. *See* JETHRO K. LIEBERMAN, MILESTONES! 200 YEARS OF AMERICAN LAW: MILESTONES IN OUR LEGAL HISTORY 209-13 (1976).

9. *See* Freund, *supra* note 7, at 186. (Senator Jenner's (Indiana) plan almost succeeded but was foiled by Lyndon Johnson, then-Senate majority leader.)

10. *See* Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763, 779 (1988). *See, e.g.*, *Petitions Circulate to Impeach Judges After Alday Ruling*, ATLANTA CONST., Jan. 3, 1986, at A15.

11. *See, e.g.*, Stanley Mailman, *Cutting Back on Hearings, Judicial Review*, N.Y.L.J., Oct. 28, 1996, at 3.

12. THE FEDERALIST No. 78, at 503 (A. Hamilton) (E. Earle, ed., 1937).

13. John J. Parker, *The Judicial Office in the United States*, 20 TENN. L. REV. 703,

so, we are told of judicial independence and of its signifigance to freedom and we utter the phrase frequently, but what is it? Why is it of utmost importance?

Judicial independence is, simply put, the principle that judges must be free to decide individual cases according to the judge's view of the law and not public opinion about it. In a more eloquent description rising from an 1871 opinion of the United States Supreme Court, it is described as "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising judicial authority, shall be free to act upon his [or her] own convictions, without apprehension of personal consequences to himself [or herself]."[14] In order to have judicial independence, the legal system must protect its judges from outside pressures that would force the judge to deviate from the judge's interpretation of the law and the facts.

Historically, the principle of judicial independence originated in the legal system of England. There, judges were originally appointed to serve at the King's pleasure. When their actions or decisions displeased the King, they were removed.[15] And so it was with Lord Coke, the distinguished jurist and Chief Justice of the King's Bench, who was dismissed by James I for not ruling as James thought he ought to rule.[16] Three kings following James I dismissed dozens of judges whose rulings displeased them. It was indeed a common practice, understood by the judges, and the expedient ones governed themselves accordingly.

Finally, in 1688, the Glorious Revolution led to the deposing of King James II. After the coronation of King William and Queen Mary, the Crown appointed judges to serve "during

---

706 (1949) (citing John Marshall's statement made during debate on the Virginia Constitutional Convention).

14. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).

15. *See* BERNARD SCHWARTZ, THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND 121-23, 150, 190-91 (1967).

16. *See id.*; *see also* 5 WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW, 440 (1st ed. 1932); COLIN RHYS LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY 333-35 (1962).

good behavior."[17] As a corollary to this necessary element of judicial independence, the Crown endorsed a fixed salary for judges so that neither Parliament nor the Crown could directly or indirectly influence judges' decisions.[18]

While these historical and academic statements about judicial independence may be somewhat helpful in our effort to assess its signifigance to our system of justice, these examples are not nearly as helpful as practical ones. When thinking about judicial independence, what it is and how essential it may be, it is perhaps more helpful to think about where we would be without it.

Our courts would be quite different had judicial independence not been a foundation of our legal system. As we have noted, no legislative acts would be subject to judicial review because Chief Justice Marshall would have minded the Jefferson administration, which characterized *Marbury v. Madison* as "a brazen attempt to induce the Supreme Court to interfere unlawfully with the conduct of the Executive Branch of the Government."[19] Poll taxes, literacy tests, loyalty oaths, political gerrymandering, segregated public accommodations, and lynchings would all have survived because the judiciary would have been powerless to question, let alone invalidate, the actions of the legislative or executive branches.

Judges, prosecutors, police officers, and defense attorneys would not have to worry about suppression motions because without judicial independence, *Mapp v. Ohio* would never have been decided.[20] The *Mapp* decision virtually eliminated the silver platter doctrine, where Federal agents who violated the Constitution in their searches and seizures turned the evidence over to the state prosecuting authorities "on a silver platter," or helped state agents do the deed themselves because the Bill of Rights only applied to federal government actions. *Mapp* was unpopular. The media described the decision as "imposing bur-

17. 1 WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 195 (7th ed. 1956).

18. Act of 1 George III, 1 Geo. 3, ch. 23 (1760) (Eng.); Act of Settlement, 12 & 13 Will. 3, ch. 2, § 3 (1701) (Eng.).

19. Burton, *supra* note 5, at 17.

20. Mapp v. Ohio, 367 U.S. 643 (1961).

densome and unfruitful handicaps on the police."[21] It was against the will of the people for the Supreme Court to deem those rights, or at least those in the fourth amendment, equally applicable to the states.[22]

Additionally, absent judicial independence, indigents would not be provided with counsel unless required by state law, because the 1963 decision of *Gideon v. Wainwright* would not have occurred.[23] Juveniles would not have certain procedural due process rights.[24] The *Gideon* and *Gault* decisions certainly did not please the public. The rulings that hard-earned tax dollars must be used to provide legal counsel to poor adults and juveniles accused of breaking into the homes of taxpayers, assaulting them, and sometimes killing them were certainly against the general public sentiment. Without judicial independence, our courts could avoid the backlog caused by a shortage of public defenders because there would be no right to and no need for lawyers for the poor.

Likewise, there would be no hearings to determine the admissibility of confessions. We could return to circumstances such as those in *Davis v. North Carolina* where officers coerced confessions by depriving suspects of food and water and by forcing them to run shackled alongside police cars.[25] We would not question whether officers issued *Miranda* warnings because, as you have guessed by now, there would be no such thing as a *Miranda*[26] warning—no need to determine whether a confession was voluntary or whether it was extracted through physical violence or intimidation.[27] Had the Supreme Court in 1965 ruled according to general public opinion, based on the whim of the American citizenry, there would be no *Miranda* case, no need to advise defendants of their right to be free from self-incrimination, and no need to determine whether the

21. *See* LIEBERMAN, *supra* note 8, at 292.
22. *See Mapp*, 367 U.S. at 655-59.
23. Gideon v. Wainwright, 372 U.S. 335 (1963).
24. *In re* Gault, 384 U.S. 997 (1966).
25. Davis v. North Carolina, 384 U.S. 737 (1966).
26. Miranda v. Arizona, 384 U.S. 436 (1966).
27. Escobedo v. Illinois, 378 U.S. 478 (1964).

confession given was voluntary and admissible.

Now, before this America without judicial independence sounds enticing, or at least a lot less complicated, let me remind you of a few other omissions from our courtrooms. Many civil cases would be nonexistent because the legislature would have subsumed many private and public corporations. Why? Because the public pressure against the decision reached in the 1819 case of *Dartmouth College v. Woodward*[28] would have been great enough to deter the court from enforcing the right to contract clause against state governments. In fact, historians suggest that courts would barely have civil dockets because the absence of the *Dartmouth College* opinion from American jurisprudence would have meant that the American economy would never have prospered; private business would have feared the encroachment of government and would have been reluctant to invest capital to build and stimulate the economy.[29] Likewise, had the Court not stymied the state's taxation attempts in *McCullough v. Maryland*,[30] our economy would certainly have evolved differently, if it evolved at all.

What about the few civil cases that remain? None would involve African American litigants. The public sentiment which led the Court to make the *Dred Scott*[31] decision, depriving African Americans of their standing as citizens, would have continued to sway the courts. The public outcry which followed *Brown v. Board of Education*[32] would have been anticipated, and as a result, the ruling would not have been made. The Civil War amendments would have remained hollow, and our country would remain as divided as it was in 1857 when the Court handed down the *Dred Scott* decision.[33]

Without judicial independence, circuit judges would not have to worry about *Batson*[34] challenges to juries, the line of

28. 17 U.S. 518 (1819).
29. *See* LIEBERMAN, *supra* note 8, at 111-15.
30. 17 U.S. (4 Wheat.) 316 (1819).
31. Dred Scott v. Sandford, 19 How. 393 (1857).
32. 349 U.S. 294 (1955); *see also* LIEBERMAN, *supra* note 8, at 276-81.
33. *See* LIEBERMAN, *supra* note 8, at 280-81.
34. Batson v. Kentucky, 476 U.S. 79, 98-100 (1986).

cases which prohibit the use of peremptory challenges to strike women and minorities from the jury.[35] There would be no *Batson* challenge because there would be no minority or female jurors. *Taylor v. Louisiana*[36] and numerous other decisions would never have been reached because the public pressure to keep juries all white and all male would have defeated the notion that judges ought to apply the law equally and fairly.

There are numerous other examples of what America would look like without judicial independence. Courts from the highest to the lowest in this land have made decisions throughout our history that were unpopular, unaccepted, and unenforced. That is important for us to remember. Moreover, it is important that we support courageous and independent judges so that they do not fall victim to the clamor of an excited people, the tyranny of public opinion. It is essential that we as citizens undergird them with the strength to uphold the promise of equal justice under law.

I have realized something only recently that is as important as our recognition of courageous judges. Equally as important as the recognition of courageous judges is the recognition of courageous advocates. It is, in most cases, the courageous advocate that empowers the judge to be courageous. I have discovered that in almost every case which illustrates the principles of judicial independence and judicial courage, the courageous judicial decision is preceded, and I would suggest prompted, by courageous advocacy. In almost every case that I have mentioned, in almost every case that comes to mind when you think about courageous, independent judges, there is a courageous advocate standing on the other side of the bench.

My claim is not hyperbole. Who argued the case of *Dartmouth College v. Woodward* in the United States Supreme Court? Daniel Webster.[37] Who argued *Gideon v. Wainwright*?

---

35. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Holland v. Illinois, 493 U.S. 474 (1990); Lockhart v. McCree, 476 U.S. 162 (1986).

36. 419 U.S. 522 (1975). *See* Duren v. Missouri, 439 U.S. 357 (1979).

37. *See* Dartmouth College v. Woodward, 17 U.S. 518 (1819); *see also* LIEBERMAN, *supra* note 8, at 95-115.

Abe Fortas, a Tennessean who went on to serve as an Associate Justice of the United States Supreme Court from 1965 until 1969, argued the case.[38] And, Thurgood Marshall argued *Brown v. The Board of Education* before serving twenty-three distinguished years on the United States Supreme Court.[39]

History is replete with other examples of courageous advocacy resulting in courageous verdicts and decisions in the face of tyrannous public opinion. John Adams and Josiah Quincy defended Captain Preston in Boston despite criticisms that they were British sympathizers and opponents of American independence. In a letter to his father who questioned his decision to become an "advocate for those criminals charged with murdering their fellow citizens," Josiah Quincy replied:

> Let such be told, Sir, that these criminals, charged with murder, are not yet legally proven guilty, and therefore, however criminal, are entitled by the laws of God and man to all legal counsel and aid; that my duty as a man obliged me to undertake; that my duty as a lawyer strengthened the obligation. I never harbored the expectation nor any great desire that all men should speak well of me. To inquire my duty, and do it, is my aim.[40]

We can only assume that Adams' and Quincy's in-court advocacy was as strong; the Boston jury acquitted.

In the case of Leopold and Loeb, despite the heinousness of the crime, the uselessness of the death of the two victims, the outcry of the public against the two wealthy, spoiled geniuses, Clarence Darrow convinced the judge that justice required a life sentence instead of a death sentence: "It is not for these boys for whom I argue, it is for the infinite number who are to follow, those who can't be as well defended, those who will go through the tempest without the aid of counsel."[41]

---

38. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 180-83 (1990).

39. RANDALL W. BLAND, PRIVATE PRESSURE ON PUBLIC LAW: THE LEGAL CAREER OF JUSTICE THURGOOD MARSHALL 82-87 (1973).

40. Letter from Josiah Quincy, Jr. to Josiah Quincy (March 26, 1770) (copy on file with the author).

41. JAMES J. BROSNAHAN, GREAT TRIALS AND GREAT TRIAL LAWYERS, (The Teaching Company 1994) (the superstar teachers audiotape series).

If courageous advocates make courageous judges, the absence of courageous advocates encourages timidity on the bench. This has led to some of our country's darkest hours. In Salem, when public hysteria attached to the idea of witchcraft, two hundred people, most of them women, were hanged after being found guilty of witchcraft by white male juries.[42] Almost none of those accused were represented by counsel.

Today, judges sling nooses over trees in the courthouse lawn in election years, set execution dates as birthday presents for their clerks, and sign death warrants with smiley faces.[43] One Florida judge, Richard Stanley, announced that he would go along with the system so long as he was allowed, "right after I pronounce the sentence to reach down by my left leg, come up with my pistol, and shoot 'em right between the eyes."[44] The most often used advocate in capital cases in a certain Texas county is an attorney credited with hurrying through capital trials and consequently earning the nickname "greased lightning." He is said to be a favorite among the judges because of the manner in which he expedites capital cases. Ten of his capital clients are on death row.[45]

Compare the above examples to Clarence Darrow, who lost one death penalty case out of the one hundred he tried.[46] I do not hold us all to the standard of trial advocacy of Clarence Darrow. I do, however, hold us all, each and every one of us, to a degree of courage which will inspire those men and women on the bench who want desperately to do the right thing to have the strength to do it. Advocates must provide the muscle, the strength, the stamina, and the courage which will enable judges, despite public clamor, to do the often difficult but

---

42. *Id.*

43. R. Dieter, *Killing for Votes: The Political Use of the Death Penalty*, Death Penalty Information Center, Washington, D.C. 9-12 (1996) (on file with the author).

44. *See* John McKinnon & John Pancake, *Shift in the Law Too Late to Benefit Killer*, MIAMI HERALD, Mar. 28, 1995, at A1; Porter v. Singletary, 49 F.3d 1483, 1487 n.6 (11th Cir. 1995).

45. R. Dieter, *With Justice for Few: The Growing Crisis in Death Penalty Representation*, Death Penalty Information Center, Washington, D.C. 9-10 (1995) (on file with the author).

46. *Id.*

nonetheless, right thing.

It is not just the Clarence Darrows and Thurgood Marshalls that inspire courageous judges. It is the lawyer that travels from Tennessee to Alabama to defend the Scottsboro boys when an Alabama judge had appointed the entire county bar knowing no one would dare come forward to defend minority youths charged with raping a young white girl;[47] it is the solo practitioner who dares to challenge the corporate defendant for the rights of consumers; it is the legal services' attorney who takes on the housing department for racial discrimination; and potentially, it is you.

Courageous advocates make courageous judges. This courage infiltrates the proceedings, breeds fairness, and strengthens the judge who is desirous of doing the right thing.

Let us adhere to the principle that the surest way for the law to lose its force in a democracy is for the people to have no understanding of it.[48] Let us each strive to educate our communities about judicial courage and independence. Let us remind the public that unlike the federal judges chosen as symbols of judicial courage for this First Monday program, our state court judges do not have the luxury of life-time appointments.[49] Nonetheless, they have identical obligations: to be courageous and to be independent.

All judges face the likelihood of being publicly criticized, ostracized, and attacked for decisions they must make. Let us remind the public that a judiciary who looks to another branch of government to be told how to rule on important legal and social issues is not doing its job and is risking the freedom of us all. Let us explain why a judge that publicly promises in advance to rule in a certain way on a particular issue is not judging, is not worthy of judging, but is simply politicking.[50]

---

47. *See* LIEBERMAN, *supra* note 8, at 314-17; Powell v. Alabama, 287 U.S. 587, 599 (1935).

48. LIEBERMAN, *supra* note 8, at viii-ix.

49. *See* Bright, *supra* note 1, at 776-80.

50. During his address to the American Bar Association in Florida in August 1996, Justice John Paul Stevens stated: "A campaign promise to be 'tough on crime,' or to 'enforce the death penalty' is evidence of bias that should disqualify a candidate from

Let us explain to our citizens that the only people who benefit from a judge who looks over his or her shoulder are those that are standing behind the correct shoulder at the moment that the judge chooses to look and then only if the judge is not blind or deaf to that individual's cause. Let us remind the public that those who wish for judges to rule based on majority public opinion have never been in the minority, have never been female, have never been Hispanic, have never been Jewish. Finally, let us remind the public of the words in *Absalom and Achitophel*: "Nor is the people's judgment always true; the most may err as grossly as the few."[51]

Let us be mindful of what our country would have been without judicial courage and independence and let us pledge to be the kind of advocates that make brave judges: courageous and creative advocates who lead judges desirous of doing the right thing to the sometimes difficult but always right result.

As Judge John Parker said: "It is of supreme importance not only that justice be done, but that the litigants before the court and the public generally understand that it is being done and that the judge is beholden to no one but God and his [or her] conscience."[52]

Let us strengthen the American judiciary through our courageous advocacy so that judges may each stand as symbols of judicial courage and independence, who go about doing justice beholden unto no one but their God and their conscience and upholding the promise of equal justice under the law for one and all.

---

sitting in criminal cases." *Justice Blasts State Election of Judges*, TAMPA TRIBUNE, August 4, 1996, at 16.

51. John Dryden, *Absalom and Achitophel, reprinted in* THE POEMS OF JOHN DRYDEN 59, lines 781-82 (John Sargeaunt, ed.) (1913).

52. Judge John Parker, *supra* note 13, at 705-06.