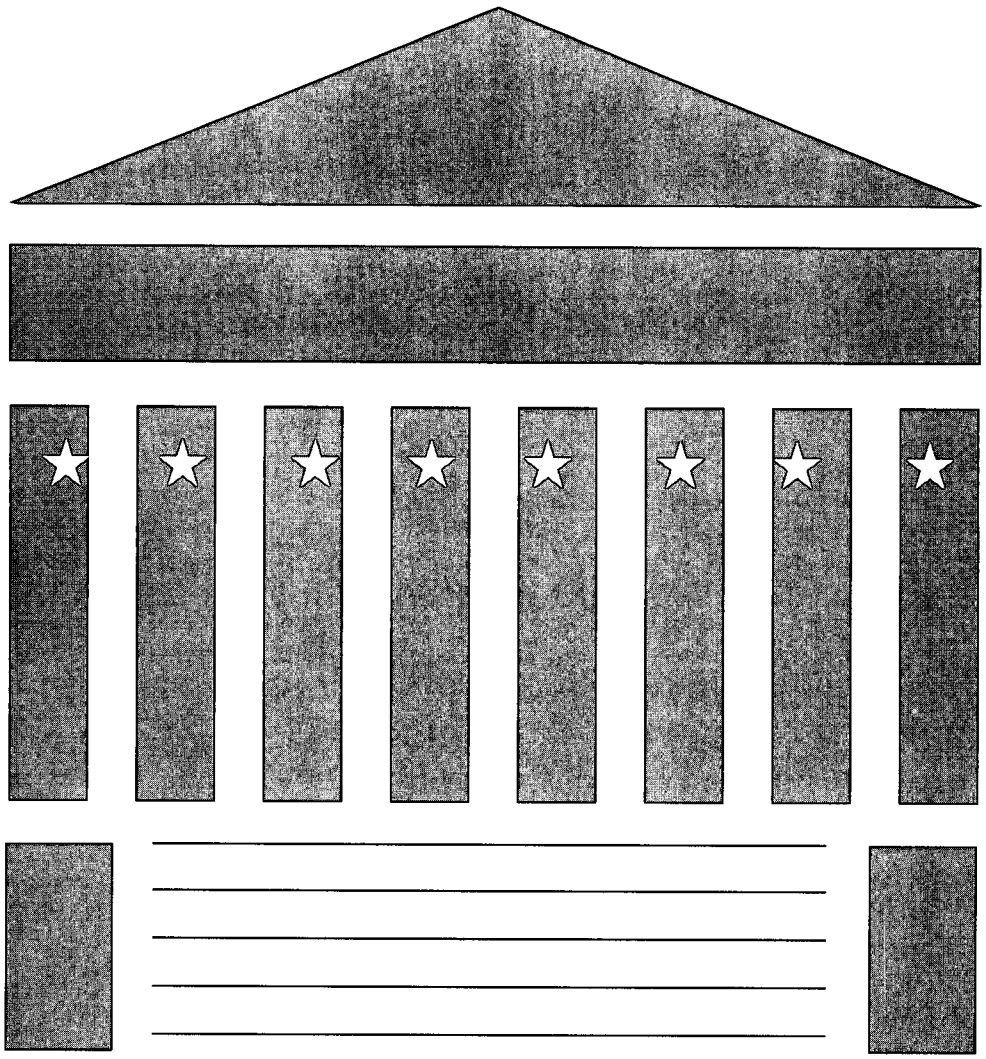
2-1997

An America without Judicial Independence

Penny White



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Judges must be able to make courageous decisions without fear of reprisal for resisting the popular will.

by Penny J. White

Just how essential is judicial independence to justice in America? Is it worth the struggle to maintain the judiciary as a 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 to the preservation of our system of government as well.

Having made such an unconditional pronouncement, I must be prepared to answer the obvious question: Why? Judicial independence has been described as the "best expedient to secure a steady, upright, and impartial administration of the law." Chief Justice John Marshall declared at the Virginia State Convention of 1829-30: "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."

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

It is, simply put, the principle that judges must be free to decide indi-

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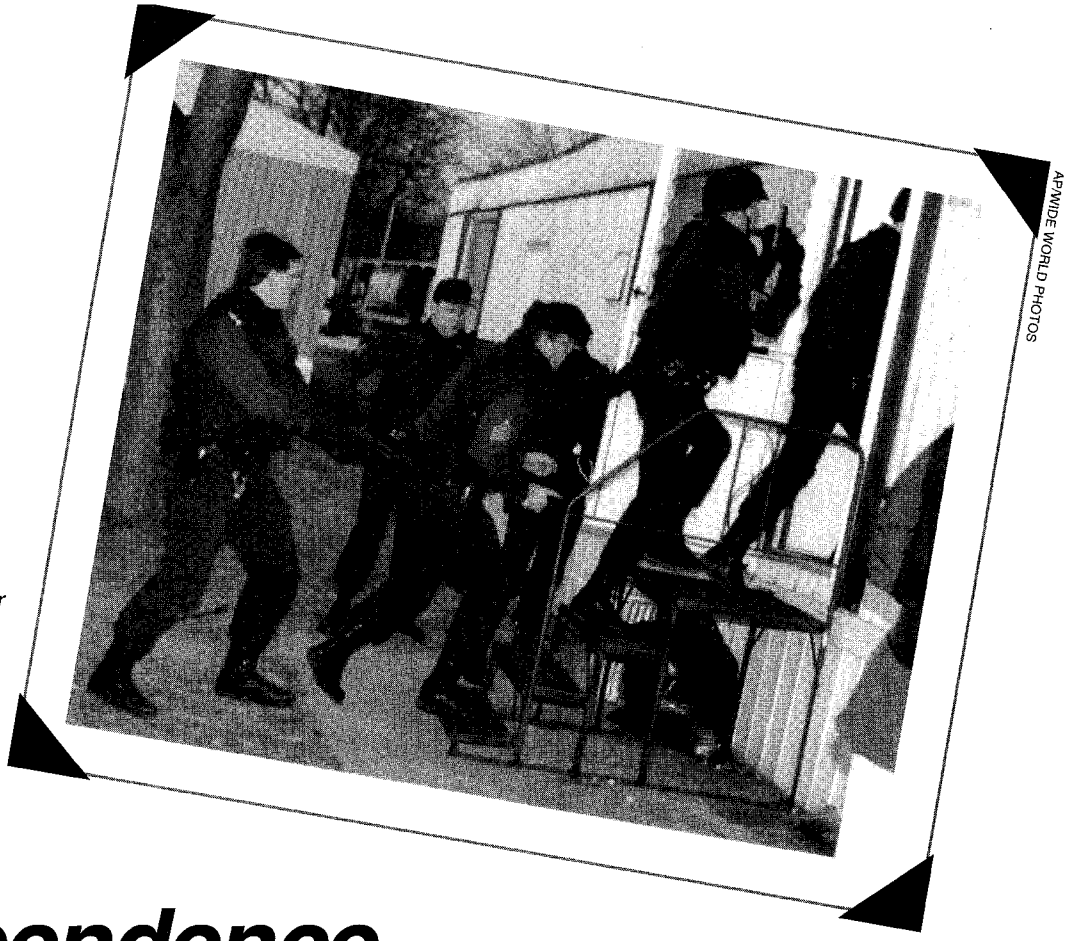
This article is adapted from the author's address to the University of Tennessee College of Law at its First Monday program on October 8, 1996, and from an essay published in the *University of Memphis Law Review.*



AP/WIDE WORLD PHOTOS

Without the decisions of courageous judges, the author argues, law enforcement officers would be allowed to search and seize evidence regardless of whether they violated cherished principles of liberty.

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vidual cases according to the judge's view of the law, not public opinion about it. In a more eloquent description, rising from the Supreme Court's opinion in *Bradley v. Fisher* (1871), it is described as

> a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising authority..., shall be free to act upon his own convictions, without apprehension of personal consequences to himself.

In order to have judicial independence, the legal system must protect judges from outside pressures that would force them to deviate from their interpretation of the law and the facts.

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. And so it was with Lord Coke, the distinguished jurist, the chief justice of the King's Bench, who was dismissed by James I for not ruling as James thought he ought to. Three subsequent kings dismissed dozens of judges whose rulings did not please them. It was indeed a common practice, understood by the judges, and the expedient ones governed themselves accordingly.

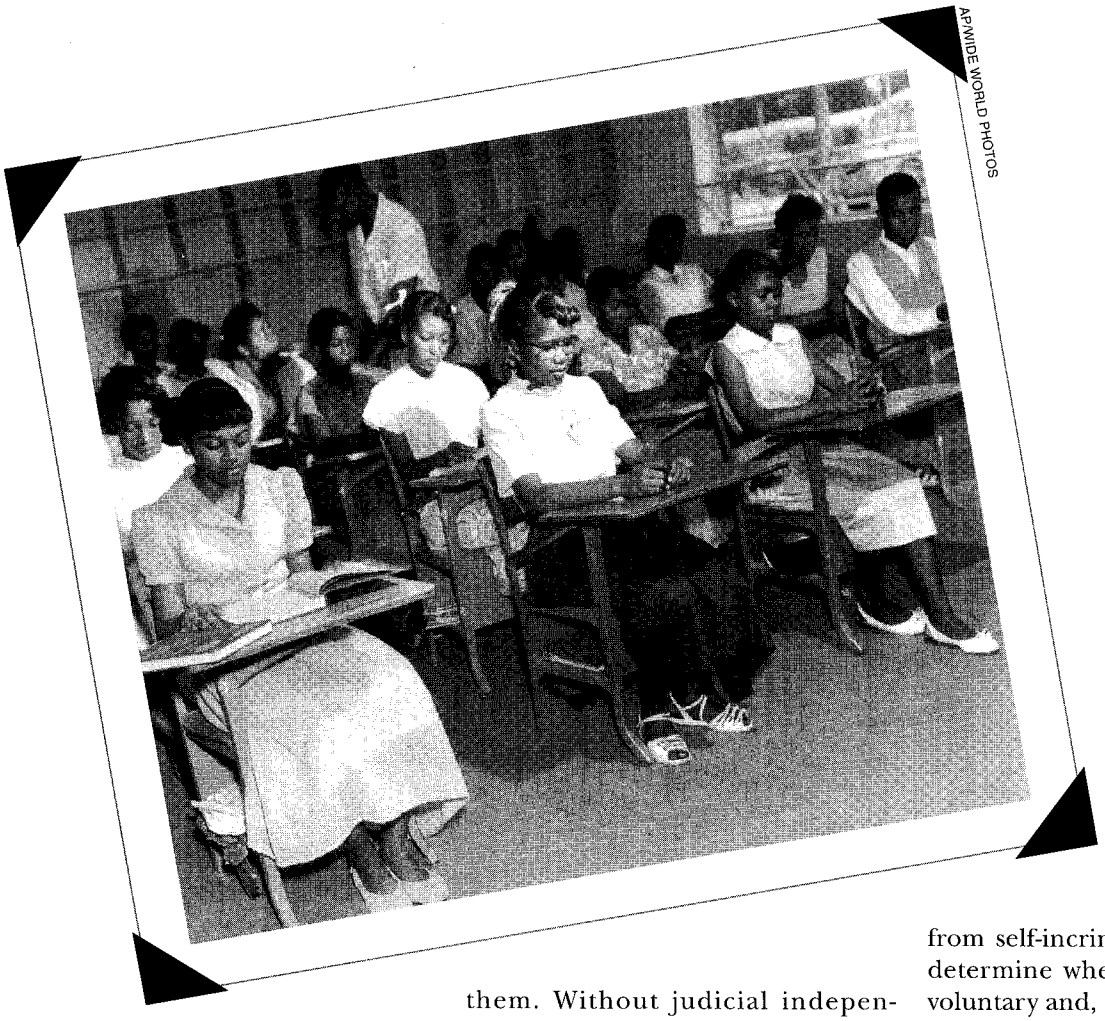
Finally, in 1688, the Glorious Revolution led to the deposing of King James II, the coronation of King William and Queen Mary, and the appointment of judges to serve "during good behavior." As a corollary to this necessary element of judicial independence, the Crown endorsed a fixed salary for judges so that neither Parliament nor the Crown could directly or indirectly influence judges' decisions.

These historical, academic statements about judicial independence may be helpful in assessing its significance to our system of justice, but they are not nearly as helpful as the practical ones. Thus, in thinking about what judicial independence is and how essential it may be, it is helpful to think about where we would be without it.

Practical significance

Our courts would be quite different had judicial independence not been a foundation of our legal system. 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 by the judiciary to meddle unlawfully in the business of the executive. 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; without judicial independence *Mapp v. Ohio* would never have been decided. Federal agents who violated



The U.S. Supreme Court's unpopular decision in Brown v. Board of Education *paved the way to abolishing "separate but equal" schools.*

the Constitution in their searches and seizures historically turned the evidence over to state courts, or helped state agents do the deed themselves, since the Bill of Rights only applied to federal government action. It certainly was unpopular, not the will of the people, for the 1961 Supreme Court to deem those rights, or at least those in the Fourth Amendment, equally applicable to the states.

Indigents would not have to be given counsel except as provided by state law, because the 1963 decision of *Gideon v. Wainwright* would not have occurred. Nor would 1967's *In re Gault,* giving juveniles certain procedural due process protections. It did not please the public to rule that hard-earned tax dollars had to be used to give free lawyers to poor adults and juveniles accused of breaking into the homes of taxpayers, assaulting them, and sometimes killing them. 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.

Additionally, 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 prompted confessions by depriving suspects of food and water and forcing them to run shackled alongside police cars. We would not wonder whether officers gave *Miranda* warnings, because there would be no such thing as a *Miranda* warning. Without the Court's ruling in *Escobedo v. Illinois,* there would be no need to determine whether a confession was voluntary or was extracted through physical violence or intimidation. Had the Supreme Court in 1965 ruled based on a popular vote, based on public opinion, based on the whim of the American citizenry, there would be no need to advise defendants of their right to be free from self-incrimination, no need to determine whether confessions are voluntary and, therefore, admissible.

Now before this America without judicial independence sounds enticing, or at least a lot less complicated, recall a few other omissions from our courtrooms. Many civil cases would be nonexistent, since legislatures 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* would have been great enough to deter the Supreme Court from enforcing the contract clause against state government. In fact, many historians suggest that in the absence of the *Dartmouth College* case from the Supreme Court waterfront, courts would barely have civil dockets because private business would have feared the encroachment of government and would not have dared to invest their capital to build and stimulate our economy. Likewise, had the Court not stymied the state's taxation attempts in *McCullough v. Maryland,* our economy would certainly have

evolved differently, if it had evolved at all.

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

Without judicial independence, circuit judges would not have to worry about *Batson* and its progeny, which disallow the use of peremptory challenges to strike women and minorities from juries. There would be no *Batson* challenges because there would be no minority jurors. *Taylor v. Louisiana* and numerous other decisions would never have been reached because the public pressure to keep juries all white, all male would have defeated the notion that judges ought to apply the law equally and fairly.

Upholding the promise

We could go on and on with national examples of what America would look like without judicial independence. Courts from the highest to the lowest in this land have made decisions throughout history that were unpopular, unaccepted, and unenforced. That is important to remember. Moreover, it is important that we support courageous independent judges so that they do not fall victim to the clamor of an excited people, the tyranny of public opinion. It is important that we undergird them with the strength to uphold the promise.

As important as the recognition of courageous judges is the recognition of courageous advocates. In almost every case that demonstrates the principle of judicial independence and judicial courage, the courageous judicial decision is preceded and prompted by courageous advocacy. Who argued the case of *Dartmouth College v. Woodward* in the U.S. Supreme Court? Daniel Webster. And *Gideon*? Abe Fortas, who went on to serve as an associate justice from 1965 until 1969. *Brown*? Thurgood Marshall, who served 23 distinguished years on the Supreme Court.

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 of Boston Massacre infamy despite criticisms that they were British sympathizers, 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.

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 and the outcry of the public against the two wealthy, spoiled geniuses, Clarence Darrow convinced the judge that justice required a life 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."

If courageous advocates make courageous judges, the absence of courageous advocates encourages timidity on the bench. And so we remember some of our country's darkest hours, in Salem, when 200 people, mostly women, were hanged, after verdicts by white male judges and white male juries deemed them guilty of witchcraft. Almost none of the condemned were represented by counsel.

Those who want judges to rule based on majority public opinion have never been in the minority.

Courageous advocates make courageous judges. And courage infiltrates the proceedings, breeds fairness, and strengthens the judge who wants to do the right thing.

All judges face the likelihood of being publicly criticized, ostracized, and attacked for decisions they must make. Let us remind the public that a judge who looks to another branch of government to be told how to rule on important legal and social issues is not doing his or her job and is risking the freedom of us all. Let us explain why a judge who publicly promises in advance to rule a certain way on a certain issue is not judging, is not worthy of judging, but is simply politicking. Let us remind the public that those who want judges to rule based on majority public opinion have never been in the minority. And 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."