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Judicial Independence and Independent Judges

Steven Lubet

JUDICIAL INDEPENDENCE AND INDEPENDENT JUDGES

Steven Lubet[*]

It is easy to believe in judicial independence, but it seems much harder to appreciate independent judges.

As an abstract principal, judicial independence ranks high in our constellation of democratic values—right up there with freedom of speech, the sanctity of the home, and the right to counsel. And well it should, since all other rights would be diminished, perhaps even forfeited, in the absence of judges capable of resisting the will of government or the pressure of popular sentiment. It is the independent judge, loyal only to the rule of law, who protects our constitutional liberties, who ensures fairness, and who stands guard against the excesses of those in power.

As Justice Jackson observed at the height of the Cold War and the depth of the McCarthy era:

> Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices.[1]

In other words, freedom rests upon the *application* of the law at least as much as it does upon the precise content of the law. In turn, application of the law rests upon the existence of judges who are unconstrained by other forces—who are, as we say, independent.

So much for the high-minded civics lesson. The concrete story of judicial independence is acted out more in the trenches than in the pages of the law journals or political science texts. Real-life intrusions on judicial independence come in many forms and at every level. Although

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* Professor of Law, Northwestern University.

1. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

these intrusions occur most often when a judge does something notably unpopular or controversial, it would be a mistake to believe that judicial independence is threatened only by demagogues or neanderthals. Rather, the dangers may come from any number of directions, some more subtle than others.

For example, I once had the occasion to attend a judicial disciplinary proceeding[2] at which the respondent-judge was charged with having violated the due process rights of a criminal defendant. The judge, on his own motion, had ordered an *ex parte* "security hearing" in which he considered proposed precautions to be taken in the courtroom against the possibility that the defendant might attempt to escape.[3] Both the defendant and his lawyer were excluded from the security hearing. A complaint was made to the state judicial conduct commission, charging the judge with misconduct.

The case against the judge was set for trial before a panel of judges, lawyers, and lay representatives. The respondent-judge argued that regardless of whether he was right or wrong in holding the *ex parte* hearing, he could not be disciplined for his good faith efforts in applying the law as he understood it. Called as an expert witness, I agreed with the respondent-judge's assessment. I testified that the principle of judicial independence would be damaged if judges were subject to reprimand on the basis of errors made in the course of judging. In ordinary circumstances, judges should not have to fear punishment in the event that their rulings are later determined to be mistaken.

The panel chair was skeptical. "How could it possibly threaten judicial independence," the chair wanted to know, "if we merely insist that judges respect the Due Process Clause?" Such an oversimplified query typified the general sentiment of the entire panel. "No one wants to infringe on independence," they implied, "but why not discipline a judge who violates basic rights?"[4]

The answer is at once both elusive and apparent. Judges should not feel free to trample on defendants' rights. However, at least when the judge has manifestly acted in good faith, the constraint should come from the judge's understanding of the law itself, and not from fear of

2. This case was never reported. However, a squib description may be found in JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS § 5.01, at 150 n.11 (2d ed. 1995).

3. It seemed uncontroverted that the defendant was an escape risk.

4. In the event, the state judicial commission decided not to discipline the respondent-judge for that conduct. *See id.*

discipline. An independent judge is one whose sole concern is about the quality of his or her judging, not about the acceptability of his or her ultimate decision. A judge who has to worry about personal consequences is not truly independent. Just as the First Amendment works best when it protects ideas we condemn, so too does judicial independence require the protection of decisions that appear wrong, so long as they are honestly wrong.[5]

This last lesson seems to have been ignored by critics of Federal District Court Judge Harold Baer. In a well-reported, if not exactly celebrated, narcotics case, Judge Baer suppressed evidence of more than eighty pounds of cocaine seized by police officers in New York City's Washington Heights neighborhood.[6] The decision itself seems hard to justify, based as it was on Judge Baer's conclusion that it might be reasonable behavior (and therefore not suspicious or furtive) for people to run from the police.[7] But Judge Baer's real mistake came in issuing the opinion at the beginning of the 1996 presidential campaign. Thus, it was quickly seized upon by prominent Republicans as a club with which to flail President Clinton. In calling for Judge Baer's impeachment, eventual presidential nominee Robert Dole stated, "'We don't need judges who try to find excuses for more criminal behavior.'"[8] Echoed Republican Senator Orrin G. Hatch of Utah, "'The President talks about putting cops on the beat, yet he appoints judges who are putting criminals back on the street.'"[9]

Although President Clinton could not bring himself to support Judge Baer's independence, numerous commentators, including myself,[10] have pointed out the folly and danger of castigating judges on the basis of

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5. I do not mean to suggest that judges may never face reproval for actions taken on the bench. Discipline may be appropriate where the judge's decision was prompted by bad faith, bias, improper influence, intentional refusal to follow the law, or some other ill motive. Nor is judicial independence threatened when a judge is disciplined for a pattern of repeated legal errors, or when the judge commits an error so egregious as to indicate lack of competence. *See id.* § 2.02, at 32-37.

6. *See* United States v. Bayless, 913 F. Supp. 232 (S.D.N.Y. 1996). Within a few weeks, Judge Baer granted the government's motion for a rehearing and vacated his earlier decision. *See* United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y. 1996).

7. *See Bayless*, 913 F. Supp. at 241-42.

8. Katharine Q. Seelye, *A Get-Tough Message at California's Death Row*, N.Y. TIMES, Mar. 24, 1996, § 1, at 29.

9. Eric Schmitt, *Senator Renews Attack on Clinton's Judges*, N.Y. TIMES, Mar. 26, 1996, at B9.

10. *See* Steven Lubet, *The Presidential Campaign Is Off to a Dirty Start*, NAT'L L.J., Apr. 22, 1996, at A23.

their decisions. Every such sling and arrow has the potential to weaken or even crack our civic commitment to judicial independence.

I raise the case of Judge Baer, however, not to rehearse its facts or to renew the liberal defense of his discretion. Rather, I want to point out that intolerance of judicial diversity, and consequently of judicial independence, is not limited to the political right. Liberals have also been known to flog judges with whom they disagree.

Consider Justice Antonin Scalia's recent remarks at a prayer breakfast sponsored by the Christian Legal Society. At the breakfast, Justice Scalia spoke about his religious belief in miracles, and the scorn he believes that secular, "'worldly wise'" elites heap upon Christian believers.[11] The *Washington Post* reported the speech as follows:

> "The wise do not believe in the resurrection of the dead. It is really quite absurd" . . . . "[E]verything from the Easter morning to the Ascension had to be made up by the groveling enthusiasts as part of their plan to get themselves martyred."
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> . . . .
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> "To be honest about it, that is the view of Christians taken by modern society" . . . . "Surely those who adhere to all or most of these traditional Christian beliefs are to be regarded as simple-minded."[12]

While not rising to Baer-like levels or calls for impeachment, the criticism of Justice Scalia was stinging. One critic, identified only as a practicing attorney and ethics expert, said he was "shocked," complaining that a Supreme Court justice "'shouldn't be saying anything like that because it's going to come up before the court.'"[13] The legal director of People for the American Way referred to Scalia's words as "'troubling'" and "'disturbing,'" since they appeared to parallel the views of religious conservative leaders Pat Robertson and Patrick Buchanan.[14] A spokesman for Americans United for Separation of Church and State accused Justice Scalia of "'undermin[ing] public confidence in his objectivity,'"[15] and the director of the Baptist Joint Committee labeled the Justice's views "'a right-wing litmus test.'"[16]

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11. Clay Chandler, *Scalia's Religion Remarks: Just a Matter of Free Speech?*, WASH. POST, Apr. 15, 1996, at F7.

12. *Id.*

13. *Id.*

14. *Id.*

15. Ray Archer, *Religion in America: Media Scorn Is Showing, Telling*, ARIZ. REPUBLIC, May 6, 1996, at B4.

16. Edd Doerr, *Scalia's Chutzpah, Clinton's Veto*, HUMANIST, July-Aug. 1996, at 33.

For our present purpose, the most interesting response came from a professor of constitutional law who stated that Scalia "'stepped over the line of what is proper,'" going on to say that "'[w]e expect Supreme Court justices to be the most secular of our public servants. That is not to say they can't have religious beliefs. But for good reasons, we are uncomfortable about them flaunting those beliefs.'"[17] In little more than a sentence, then, it was posited that Justice Scalia was guilty of impropriety, that Justices must be "secular," and that Justice Scalia in particular should keep his religious opinions to himself.

What does this say about the principle of judicial independence? After all, Justice Scalia was neither subjected to discipline nor threatened with removal. And certainly someone possessing his famous wit and combativeness can easily withstand a few adverse quotes in the popular press.

All true. Still, it is disquieting to think that a judge's expression of religious belief might result in calls for a certain orthodoxy among the judiciary, even if it is presented as a tolerant orthodoxy. Tolerance is as tolerance does, one might well suggest. The critics of Judge Harold Baer might also claim tolerance, arguing only that Judge Baer "stepped over the line."

A truly independent American judiciary must necessarily be comprised of Americans of all descriptions. That includes the secular and the faithful; the doubters and the believers. The suitablilty of a person for judicial office must not be measured by the depth or expression of his or her religious beliefs. It undermines the very premise of our system to suggest, as some did, that Justice Scalia could not preside fairly over religion cases. We expect judges to interpret the law as they discern it, to stand by their beliefs in the face of unpopularity or pressure, and to represent (in the broadest sense) the entire spectrum of the American people. How can this principle endure if there is no room on the Supreme Court for a Justice who expresses his belief in miracles?

Judicial independence is a fragile concept. It is popular at the highest level of abstraction, but it regularly loses support in the face of rulings or statements that clash with various notions of correctitude. There is a line that runs (though not always) from criticism of ideas to calls for impeachment to ruling-based discipline. If we truly adhere to the ideal of judicial independence, we must sustain it when we believe in the results, and even more when we do not.

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17. Chandler, *supra* note 11, at F7.