Communicating the Value of an Independent Judiciary

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We must never forget that the only real source of power we as judges can tap is the respect of the people. -Justice Thurgood Marshall

To communicate the value of something, we must understand it ourselves. A definition and a review of our history lesson s will help us start. The definition I like the best may be the least helpful, but it has a good sound bite. The Hon. Michael Kirby, a fellow Justice from the downunder, in a speech like this one said: "A judge without independence is a charade wrapped inside a farce inside an oppression." Justice Kirby went on: "The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law or the factual merits of the dispute. Without the rule of law and the assurance that comes from independent decision makers, it is obvious that equality before the law will not exist."

Our forefathers believed that we all stand equal and have natural rights even before the existence of government. People establish Constitutions to express their rights and create a government subject to them.. From the political philosopher Montesquieu then came the concept that separating the powers of government into branches protected these rights of the people. What role did the judiciary play in this plan?

The Declaration of Independence listed as one of our grievances that King George III had made judges dependent on his will for the tenure of their offices and their salaries. The drafters of the Constitution well knew that if the legislative or executive determined the meaning of the laws or Constitution, there would be no independence, only a new form of tyranny. James Madison, drafter of the Bill of Rights, expected the judiciary to resist every encroachment by the legislature or the executive on the rights expressed in the Constitution. He felt only permanent tenure gave the judiciary the necessary independence to complete such an arduous duty. Permanent tenure was so important because courts have no power to do anything on their own. You may have experienced that at one time or another and Rep. John Hostettler felt the need to point it out again recently when he said, "Federal courts have no army or navy."

So the judiciary standing alone, with no power or purse, no army or navy, received the charge to defend the liberty of the people through protecting the law, the Constitution. In his decision in Marbury v. Madison, Chief Justice Marshall added the final twist to the equation. It held the judiciary had the power of judicial review, the power to judge the constitutionality of the actions of the other branches. It thus placed the judiciary in the center of ongoing political controversies, and often at the focal point of the failures of our society.

The judiciary face all kinds of threats in their task: a hostile majority upset with protection granted a minority, poor communication between branches of government, demands for impeachment for unpopular decisions, unfilled judicial vacancies impacting workload, elections overpowered by the wealth, appointment of weak, unqualified or corrupt candidates who can't or won't exercise independent judgment, non-payment of salaries, non-payment of the

expenses of the court, and political limitations on jurisdiction or the substance of what the courts can consider.

Our Australian friend Kirby finished his definition: "The real test comes when judges are led by their understanding of the law, the findings on the facts and the pull of conscience to a decision which is contrary to what the other branches of government or other powerful interests in society want. Something different from what the home crowd wants." Then you determine what independence of the judiciary means. By the way, by citing foreign authority I've just joined Supreme Court Justice Kennedy on Congress's list of suspect judges.

How has this played out? Historically, we have seen the successes. At the height of World War II, the Court excused Jehovah's Witnesses from the responsibility of the Pledge of Allegiance. After Brown v. the Board of Education, efforts to abolish life tenure on the Supreme Court and strip it of jurisdiction over public-education cases failed, and Earl Warren finished his service without impeachment. During the Watergate scandal, a United States Supreme court with four Nixon appointees required the President to honor a subpoena directing him to produce tape recordings of his conversations with advisors in the White House. President Nixon provided the documents, and then promptly resigned. Sued while in office by Paula Jones, President Clinton asked the Court to stay the court proceedings until the expiration of his term asserting immunity. The Supreme Court dismissed his petition, and finally, in the cliff hanger presidential election of 2000, the Supreme Court decided which votes to count. Despite the immense controversy, Gore congratulated Bush, and the nation went on with its business.

That is probably the best case scenario, the best judicial system in the world at some of its finest hours. To know the value of an independent judiciary, we really should look at the worst case scenario as well, where the judiciary is completely dependent. If you're interested, read the book *Hitler's Justice* by Ingo Muller.

Not approaching that travesty, we do have recurring problems in three or four areas which, somewhat like the picture on a puzzle box, suggest a pattern in the challenges to judicial independence. The facets and hues of each of the areas blend together however, like the colors and textures they use in jigsaw puzzles. You have to study the pieces to see how they fit. The concepts involved are: public hostility and unjustified criticism by media; the judicial selection process; political challenge through manipulation of judicial system; and public confidence issues.

First on the list, criticism of the judiciary soars like the American eagle today. Type in judicial activism on the your Internet search engine. Be Prepared! One of the most ardent, Phyllis Schlafley, a self-appointed expert on the constitution and judiciary, describes the federal bench as the biggest threat to constitutional government today, and charges "The entire existence of our constitutional republic hangs in the balance. We have suffered half a century of activist/liberal court decisions that seriously threaten to undermine our Rule of Law." Phyllis Schlafley is polite compared to most.

Criticism is an American pastime. We pay television performers to tear apart the real life performances of others. We cannot expect in this era of satellites and cell phones to be free from criticism. Even before all that, as early 1787, Thomas Jefferson wrote, " . . . were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

What then is the problem with all this noise about judges? Florida Judge George Greer

gives a wonderful example. He is a Republican, so conservative that some websites question his impartiality for the bench. Yet in his response to the case of Terry Schiavo, Greer, a regular churchgoer, gained the wrath of the religious right. His decision allowing removal of the feeding tube, placed him in the middle of a controversy over the sanctity life.

Rules of judicial conduct required his answer: Silence. "The really difficult part of this job," Greer said, "is that you can't defend yourself." Often misinformation drives the public stories and letters to the editor. Judges attacked by false or misleading criticisms need help to correct factually inaccurate records, and to avoid an appearance that the judge caused the injustice. They need support to continue functioning in their independent responsibilities. Judge Greer for example issued a steady series of rulings despite being targeted for electoral defeat and impeachment, being compared to Joseph Mengele and other Nazis, and even being threatened with death.

The American Bar Association has developed model programs for bar associations and court administrators to support the judiciary in this regard. Wisconsin has such a program through the Director's Office, and it has acted in several cases where judges called for assistance. If you ask around you'll find that Daniel Anderson, Daniel George, Daniel Konkol and others have all endured similar attacks. It looks like we may have decided to throw all Daniel judges into the publicity pit to test their faith in the constitution.

Often, the hostility and animosity evident through media responses, and letters to the editor roll over and become political campaigns. Judicial selection processes dominate independence concerns. Controversial elections in California challenged the Chief Justice Rose Bird, and two other justices on the Supreme Court. They all lost retention elections which revolved around death penalty cases. In 1996, Tennessee Supreme Court justice Penny White also lost a retention election over a death penalty case. It doesn't require the death penalty to create hostile judicial campaigns. These are only a few of many instances.

Money plays a huge role in the outcome of these cases. In a recent race for a seat on the Supreme Court in tiny West Virginia, the candidates and their supporters spent $5 million. Trial lawyers and unions supported the incumbent McGraw. His opponent, Benjamin, courted big business and big coal. Donald Blankenship, the CEO of the largest coal producer in the region became a major backer. The company faced a major lawsuit headed to the Supreme Court. Blankenship set a modern record for an individual contribution to a judicial race with approximately $3.5 million spent, about $2 for every person in the State. His candidate won with attack ads and automated phone calls.

The Brennan Center for Justice follows trends and expenses in judicial campaigns. Spending from special interest groups in judicial campaigns has tripled since the 2002 elections. . Proposed tort reforms and medical malpractice insurance drive the debates, and secure the money. The U.S. Chamber of Commerce has spent millions along with other special interest groups. The new record for two candidates? Approximately ten million dollars expended in an Illinois Supreme Court Race.

Some states have accomplished successful reforms. Financial disclosure laws emphasize special interest spending; voter guides provide the public with independent campaign information; North Carolina publically finances judicial elections, and thus eliminates 3rd party advertisements. A similar Wisconsin effort lags behind although recently efforts have been renewed. North Carolina also requires black out periods on ads before the elections, and

prohibits telephone banks and mass mailings.

The disputes extend beyond elections to the appointment process as well. We can't watch the news lately without hearing of the "nuclear option" and I'm not talking about North Korea, but the rules on filibusters in the Senate. The Senate majority leader, Bill Frist, recently appeared on a telecast of a religious organization with the message that those opposing judicial nominations are conducting an assault "against people of faith." The dispute rages over about 7 of President Bush's 205 nominees. Senate Minority Leader Harry Reid has promised to grind the work of the Senate to a halt if the filibuster rules are changed.

If politicians can't change the people in power, they work on the process. It's important to recall that political manipulation of the judiciary isn't a new game. Until 1867, the jurisdiction of federal courts expanded. Then, on a November night, military officers arrested a man named McCardle, the editor of the Vicksburg Times. His criticism of the military occupation of Southern states led to charges for disturbing the peace and inciting insurrection. His habeas corpus petition ended up in the United States Supreme Court. Congress acted quickly to repeal the law that allowed the Supreme Court to hear the case, and the Court then dismissed the appeal. It was the first time Congress had acted to limit the authority of the courts.

Under the Constitution, Congress establishes the lower federal courts, and can make "exceptions" and "regulations" for the Supreme Court's jurisdiction as well. The McCardle decision, coupled with the exceptions clause, allows congressmen to claim they can make a Supreme Court of one person and a card table, and do away with all the other federal courts. It's not quite that simple. Many scholars and jurists argue that Congress may only enact laws about the process or procedure of jurisdiction rather than controlling substantive outcomes.

Despite that, the battle rages on. During the Schiavo case, House Majority Leader Tom DeLay warned that, "no little judge sitting in a state district court in Florida is going to usurp the authority of Congress." He sponsored legislation which allowed federal review of the state court decision without regard to issue or claim preclusion. After her death, he issued an inferred threat to any judge who may have come near the case. Mrs. Schiavo's death is a moral poverty and a legal tragedy. This loss happened because our legal system did not protect the people who need protection most, and that will change. The time will come for the men responsible for this to answer for their behavior, but not today."

Shortly after the incident, The Judeo-Christian Council for Constitutional Reform held widely publicized judicial reform conference in Washington DC. They held a news conference at to announce a Declaration in Support of Tom Delay. The Declaration read:

> "The conservative movement . . . is uniting behind House Majority Tom DeLay. Specifically, the Declaration endorses DeLay's call for judicial reform. Echoing the words of Franklin Delano Roosevelt, signers of the Declaration are saying, "We must save the Constitution from the Court and the Court from itself."

Although it's hard to appreciate how anything might engender the intensity or animosity that the present situation has, their Declaration refers to a situation that came close. By 1936 Roosevelt's legislation had created such a panoply of government agencies for public support that their acronyms came to be known as alphabet soup. Although wildly popular with a public suffering from the Depression, the Supreme Court majority at the time believed the actions to be unconstitutional invasions of the right to contract. When the Court declared the Agricultural

Adjustment Act unconstitutional, public protests erupted. The six members on the majority opinion hung in effigy in Ames, IA.

Fearing the Supreme Court would strike down the Social Security program and the National Labor Relations Act, Roosevelt attempted to "pack the court". He asked congress to appoint an additional justice to the Supreme Court for any member of the court over age 70 who didn't retire. He claimed the issue of the productivity of aged or infirm judges affected the burdens of the federal courts. It touched off a constitutional controversy not seen since the creation of the Republic. At the Senate Judiciary Committee, a Harvard law professor testified, "There are at least two ways of getting rid of judges. One is to take them out and shoot them, as they are reported to do in at least one other country. The other way is more genteel, but no less effective. They are kept on the public payroll but their votes are cancelled." Many suggested that Roosevelt was adopting the tactics of fascism. Both sides believed the future of the country was at stake.

Two unexpected events averted the controversy. One justice switched positions on the issues, and another conservative justice unexpectedly retired giving Roosevelt a majority on the court. With no further risk to his legislative program, the attempt to pack the court died. Roosevelt lost the battle, but won a struggle to legitimize a greatly expanded exercise of power by government.

This exercise of powers drives the ire of those who push for limits on the court today, but the principle involved remains the same. That principle established more than two hundred years ago requires an independent judiciary to maintain liberty through the rule of law. The principle is more important than political power or process. It requires what Judge Learned Hand called a spirit of moderation:

> "What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens - real and not the factitious product of propaganda - which recognizes their common fate and common aspirations - in a word, which has faith in the sacredness of the individual."

Chief Justice Abrahamson had a recent article in the *Wisconsin Lawyer*. She stated: "The basic underlying safeguard for judicial independence is popular support for the concept."

There's an old jury instruction from a simpler time that doesn't appear in the Criminal Jury Instructions Manual. It goes like this: "Now you've heard the facts of the case and the language of the statute. You may give the terms of the statute their plain and ordinary meaning. They require no further definition or elucidation by the Court." Today I've tried to demonstrate some of the epoch dimensions of this problem. Those dimensions do need further elucidation by the court. For until the public senses the importance of this principle for the protection of their own liberty, we are unlikely to enlist their support. I commend you to the task.