

SOME THOUGHTS ON JUDICIAL INDEPENDENCE

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Once every four years we are asked to look closely at our unique democracy and ask ourselves how well it's working and whether we need to make some changes. Invariably, for those who take the time to reflect, it becomes a reminder of the genius of the original design: a separation of powers to give the ship of state balance, a political system—legislative and executive—to implement the will of the majority, and a judicial system to protect the minority from being deprived of rights so basic no majority should be powerful enough to deny them. Tonight we discuss how that design is being tested by recent events.

The futurist, Alvin Toffler, says that in the years ahead, as the Internet entwines more and more of us, we'll be able to replace our legislative bodies with direct, issue-by-issue electronic voting by the people, from their homes and offices, in a kind of perpetual poll.¹ Some in Congress said publicly that it sounds like a good idea.² But I suspect most of them are not lawyers. It's easier to see the appeal to the layman. The intuitive appeal of genuine democracy, with a space-age excitement about it. Each of us with an immediate say in how the country's run. We all like to feel we have efficacy—the ability to influence things around us.

So why not have pure, direct democracy? Are your elected representatives smarter than you, or more fair-minded? Do they compre-

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¹ See Alvin Toffler & Heidi Toffler, *Creating a New Civilization: The Politics of the Third Wave* 99-102 (Turner Publ'g, 1995) (1994) (calling for decentralization and restructuring of political decisionmaking through use of modern technology and communications).

² See Newt Gingrich, Foreword to Toffler & Toffler, *supra* note 1, at 13, 17 (arguing that development of "Third Wave" political system utilizing rapid distribution of information is "so central to the future of freedom and the future of America that it must be undertaken"); see also Edmund L. Andrews, *Congress and White House Split on High Tech*, N.Y. Times, Jan. 3, 1995, at C19 (observing that House Speaker Gingrich's ideas regarding technology and politics draw upon works of Alvin Toffler); E-lectioneering, *Economist*, June 17, 1995, at 21, 21 (noting Tofflers' belief in "semi-direct democracy" and commenting upon close relationship between Tofflers and Gingrich); Paul Starobin, *The Politics of Anxiety*, Nat'l J., Sept. 30, 1995, at 2402, 2402 (describing Gingrich's belief—derived from Tofflers—that spread of computer technology will transfer political powers from Washington bureaucracies to ordinary citizens).

hend the challenges of your life better than you do? Think of it: Together with fifty-one percent of the other poll-punchers, you could run America, not to mention your state and your hometown—probably everything but the Bar Association. So for a lot of people, agreeing with the Toffler notion is a joyride—quick, easy, and thrilling because it seems a little out of bounds.

But for the more cautious of us—and especially the lawyers—it should be a little scary. Imagine taking a poll to determine the maximum allowable size of a nuclear warhead, or to decide whether we should deregulate a prescription drug, or to allow airplanes to fly in certain kinds of ice storms. A survey taken prior to the O.J. Simpson criminal trial revealed that fifty percent of respondents believed that a person is probably guilty, merely because he has been brought to trial.³ I don't think we're ready for the "future shock"⁴ of a world built on polls like that, especially with regard to our vital justice system.

What's happening? Well, one thing, for sure. The steady and occasionally explosive growth in violence and indignity in recent years has frightened us, outraged us, and produced an increasing public sympathy for the idea that we should be able to "correct" certain judicial decisions with which we disagree. And because it's popular, it is politically irresistible to some politicians who will respond with Pavlovian sureness to whatever the polls say. The result has been politicians excoriating, mocking, and ridiculing legal decisions and judges—occasionally with an excessiveness that lifts the castigators' standing in the polls, but that also suggests intimidation—thereby damaging public confidence in the judiciary and weakening the entire system.

How bad has it become? Well now, Robert Bork, former Federal Court judge, who was only a short step away from a seat on our highest court, has become a leading voice in the critics' chorus, and he says the Supreme Court is wildly out of control⁵—possibly because it lacks the calming influence of his prudence and thoughtfulness. He goes on to propose that we repudiate *Marbury v. Madison*,⁶ as finally canonized in *Cooper v. Aaron*⁷ in 1958, and ditch altogether our two-

³ See Maura Dolan, *Impartial Jurors Can Be Found, Court Experts Say*, L.A. Times, July 9, 1994, at A1.

⁴ The phrase is borrowed from Alvin Toffler, *Future Shock* (1970).

⁵ See Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* 96-119 (1996); see also *id.* at 96 (decrying Supreme Court for "almost invariably advanc[ing] the agenda of modern liberalism").

⁶ 5 U.S. (1 Cranch) 137 (1803).

⁷ 358 U.S. 1 (1958).

hundred-year-old democratic legacy.⁸ Here it is, in his words, from page 117 of his new book, *Slouching Towards Gomorrah*:

There appears to be only one means by which the federal courts, including the Supreme Court, can be brought back to constitutional legitimacy. That would be a constitutional amendment making any federal or state court decision subject to being overruled by a majority vote of each House of Congress.⁹

He cites the British system as proof that we can get by without judicial review, letting the politicians do it all for us.¹⁰ He says, "There is no reason to suppose that representatives and senators would be skilled interpreters of the Constitution, but then the Court isn't either—or rather chooses not to be."¹¹ That is, frankly, an alarming statement, especially from one who was so close to joining the great Court himself.

It is not too much to say that Judge Bork is suggesting an entirely different America from the one we enjoy—and have enjoyed—for more than two hundred years. I see no reason to believe it would be a better America:

- Would the Congress of the time have overruled *Brown v. Board of Education*?¹² Almost certainly.
- Would Congress even now wriggle its way past the First Amendment into extensive censorship, all in the name of "family values"?
- Would women be able to count on the protection of *Roe v. Wade*?¹³
- What would happen to the relationship between church and state?

So, the recent spate of criticism of our courts, it seems to me, is more than an insignificant recurring phenomenon. Considering what is happening politically—and Judge Bork's already-celebrated revolutionary suggestion—the whole matter is worthy of our most careful consideration.

One way to begin is to ask the questions that form the topic for tonight. Is political pressure on the judiciary ever appropriate? When is it too much? And what do we do to protect our courts and ourselves?

⁸ See Bork, *supra* note 5, at 109, 115-19.

⁹ *Id.* at 117.

¹⁰ See *id.*

¹¹ *Id.*

¹² 347 U.S. 483 (1954).

¹³ 410 U.S. 113 (1973).

The first point to make is that judges and their decisions should not be considered beyond criticism. Criticism can be a healthy—and healthful—exercise of our constitutional prerogatives. But it is a different matter when criticism becomes an attempt at influence or control, not just by politicians, but by politicians who have the power to intimidate.

Perhaps we should look first at why a significant portion of people might welcome public pressure on judges. The current argument seems to come in two parts. First, that the courts are prone to wildly “liberal” judgments which put the so-called rights of criminals above the needs of their victims and the wishes of the general public. Second, that the right agents to correct this chronic injustice are politicians, because they are close to the people—not as close as a Toffler poll but closer than a cloistered judge—and they understand what the people want.

Actually, the allegation that too many criminals are getting released on technicalities because of so-called liberal judges is nothing more than political rhetoric, the kind that’s used as a cover for inferior intellectual merchandise. Here in New York state, where some of the fiercest criticism has poured down on our highest court,¹⁴ a recent study shows that the judges of the Court of Appeals have upheld the prosecutor’s position in three out of four cases.¹⁵ Indeed, considering that in the last twelve years New York has built more state prison cells than we did in our nearly two hundred years before that,¹⁶ and that as

¹⁴ See Norman A. Olch, *Soft on Crime? Not the New York Court of Appeals*, N.Y. L.J., May 6, 1996, at 1 (referring to statement of State Attorney General Dennis Vacco that New York Court of Appeals is “intent on coddling dangerous criminals”); Gary Spencer, *Pataki Targets Defendants’ Rights*, N.Y. L.J., Jan. 4, 1996, at 1 (stating that in second annual Message to Legislature, Governor Pataki vowed to close “criminal-friendly loopholes” allegedly created by New York Court of Appeals). See generally Dorothy J. Samuels, *Mistaken Identity: Bum Rap Against New York Court*, N.Y. Times, May 26, 1996, § 4, at 10 (noting that politicians and others have attacked New York Court of Appeals by “[u]sing inflammatory language, and fixing on a handful of difficult and controversial cases where the court has tossed out a defendant’s conviction because of procedural errors in the police search or the trial”).

¹⁵ See Olch, *supra* note 14, at 1 (surveying criminal cases decided by New York Court of Appeals from December 1994 through November 1995, and finding that of 127 cases, defendants prevailed only 31 times).

¹⁶ See, e.g., Michael Beebe & Dan Herbeck, *Inmate Crisis Shackles State: 25 Years After Attica, the Numbers Soar*, Buffalo News, Sept. 8, 1996, at A-1 (stating that, since 1983, New York spent \$1.6 billion to construct new prisons and add cells at older prisons); Charles Oliver, *The Trade-Offs in the Drug War: Drug Dealers Displacing Violent Criminals in Jail*, Investor’s Bus. Daily, May 4, 1995, at A1 (estimating that New York state prison system holds approximately 66,000 inmates, as compared to 28,500 inmates in 1983); Editorial, *Wasteful Criminal Justice*, N.Y. Times, May 14, 1996, at A22 (noting construction of dozens of prisons between 1982 and 1994, and doubling of prison population).

a nation we have become the greatest prisoners of convicted people in history,¹⁷ it seems clear judicial leniency is not our problem.

It is also frequently true that those raising the loudest cries of outrage about judicial decisions don't know the facts of the case. Professor Bright may have some examples to illuminate this point for us. There are many, and that should not surprise anyone who has dealt with the complexities of fact in the contentious process that is at the heart of our system of justice. Frankly, a lot of the mischief and intimidation would be avoided if the public knew—and understood—that there are more and better ways to keep our system effective in meting out justice than by stirring up a public outcry over a particular case and burning our judges in effigy on the op-ed page.

Many of the attacks on individual decisions are premature, before the justice system has had time to apply its own remedy—the whole deliberate mechanism of legal appeal and review. If the people knew all the remedies available, would they be so easily inflamed? If a judge is egregiously wrong, the decision can be contested by appeal. And if the appeal court is egregiously wrong about a nonconstitutional issue, a statute can be passed. And if the court is wrong about a constitutional point, you can wait for another court to make it right, as in the “salute to the flag” cases, *West Virginia State Board of Education v. Barnette*¹⁸ and *Minersville School District v. Gobitis*.¹⁹ Or you can pass a constitutional amendment. And, of course, if a judge is corrupt, there's always impeachment. All these avenues are necessary and proper, and they are the rules we have played by successfully for more than two hundred years. But a good part of the public has not had the privilege of learning all of this.

What is corrosive and could be destructive is a proliferation of attempts to change a judge's decision, not by appealing to a higher court, but by appealing to his or her desire to win an upcoming election or a possible appointment or reappointment, or even just to avoid public ridicule. These are all invitations to substitute personal expediency for the rule of law.

Can these coercions and seductions work? What do you think? Do you think some politicians will change their opinions on important matters because they think doing the “right” thing will hurt them politically? Do you think some judges might behave similarly: start giving tougher sentences, or higher bail, or stricter rulings, because a

¹⁷ See, e.g., Alan B. Fischler, *The Incarceration of America*, N.Y. L.J., Nov. 6, 1992, at 2 (arguing that United States rate of incarceration, estimated at 445 per 100,000 persons, is “the highest of any country in the civilized world”).

¹⁸ 319 U.S. 624 (1943).

¹⁹ 310 U.S. 586 (1940).

drumbeat of negative publicity threatens their chance for elevation? Hasn't media-magnified intimidation produced at least one well-publicized reversal,²⁰ at least one reassignment,²¹ and who knows how much inhibition of proper legal process up and down the courts?

Whatever the whole truth is, one thing is clear to me: We ought not to encourage these kinds of acts of intimidation by ignoring them when they occur. We ought, at the very least, to find ways to protect against them and to protect the integrity of our current system, which assumes an independent judiciary—that is, one that's free to speak its own honest judgment within the established rules.

There are some obvious things we should do. In some cases, the best antidote is simply making sure the whole truth gets told. It should not come as a shock that a politician describing a complicated fact pattern might omit, exaggerate, or invent facts, deliberately or inadvertently. And even a good journalist might be taken in. Nor should we be surprised that the public does not understand the appeal system or the established modes of reform.

Well, how do you get the whole story out? How do you let the public know more about the relevant facts than they have read in the papers—and more about how the system works—if they don't have Court TV? The court is not in the best position to do it, because becoming involved in an extrajudicial discussion raises all sorts of possible misunderstandings, conflicts, false appearances, and other problems.

Then who should? We should. You and I. Lawyers—the part of our citizenry that is equipped to know all the facts and who can help put things in perspective—we should speak.

And we have been doing it. Certainly this Bar Association has. In a modest way, even this evening, but frequently and effectively in the recent past:

- In articles and statements by our former leader, Barbara Robinson,²² and by current president Michael Cardozo.²³

²⁰ See, e.g., Don Van Natta, Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. Times, Apr. 2, 1996, at A1 (describing United States District Judge Harold Baer Jr.'s reversal of original order to suppress evidence of 80 pounds of cocaine, after "avalanche of criticism and calls for his ouster").

²¹ See, e.g., Joseph P. Fried, *Duckman is Returning, but to Civil Court*, N.Y. Times, Apr. 26, 1996, at B1 (reporting that after "furious criticism over his handling of domestic-violence cases," Brooklyn Judge Lorin Duckman was reassigned to hearing only civil cases).

²² See Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. Times, Mar. 22, 1996, at A1 (describing Robinson's criticism of efforts to exploit judicial rulings for political purposes).

²³ See Michael A. Cardozo, *Lawyers' Attacks on Judges Risk Censure*, Nat'l L.J., Aug. 26, 1996, at A19 (urging that public officeholders and candidates who are also lawyers

- By the brilliant Evan Davis²⁴ and others of our best lawyers, in the *New York Law Journal* and other journals.
- Only last Wednesday, twenty-two bar groups spoke out, adding perspective and protecting our judges from reckless, destructive castigation.²⁵

I congratulate them. We all should. And we should join in their effort even more vigorously than before.

Maybe the best protection of all is to have the very best judges selected for the bench to begin with, so that we assure, as far as possible, that we do not invite political influence by using politics to pick our judges in the first place. The framers saw clearly that the judicial branch could play its part in democracy's balancing act only if it were free to maintain its loyalty to the Constitution and the federal law without direct interference by the legislature or executive. And so they made that independence inherent in the structure of the government.

They understood exactly the danger we're courting today. The framers felt so strongly about judicial independence that they also enshrined it in the way federal judges are chosen, through a process designed expressly to insulate them from the pressures of politics: through appointment by merit, not election by popularity. This is our highest form of judicial selection. It focuses on qualifications, not connections; on intelligence, not ideology.

The Court of Appeals is chosen that way in New York. I would prefer it if all our judges were chosen that way. As Governor, I had the privilege over twelve years to appoint all the members of the Court of Appeals and the Court of Claims. I made my decisions without respect to political affiliation, political disposition, or even possible judicial decisions. I considered competence as a lawyer, as a thinker, as a communicator. I considered collegiality, integrity, and experience. And we happened to wind up with three Republicans. One of them I even made Chief Judge. Incidentally, he not only dis-

consider "the ethical implications of reckless attacks on judges").

²⁴ See, e.g., Gary Spencer, Counsel Discuss Attacks on High Court: Governor's Criticism Could Have Chilling Effect, N.Y. L.J., Oct. 7, 1996, at S3 (quoting Davis as stating that "[t]o criticize the Court for following the law because you don't like the result is . . . not only a misleading kind of posturing, but also a damaging kind of posturing").

²⁵ See Candidates Urged to Halt Judge Attacks, N.Y. L.J., Oct. 3, 1996, at 2 (describing joint statement in which bar groups and law school deans exhorted presidential candidates to refrain from personal attacks on judges and argued that such attacks have "chilling effect on an independent judiciary").

agreed with me profoundly, he wound up suing me.²⁶ I think it's safe to call that "independence."

I believe it's time now to push for all judicial selection in this state to be rescued from the perils of the elective process and placed on the high, dry land of merit selection. Fortunately, the ideal moment is almost at hand. In 1997, New Yorkers will have the opportunity to vote on the question of holding a state constitutional convention.²⁷ I believe that having a convention would be a good idea for a lot of reasons, and one is that it would give us the chance to examine the possibility of merit selection throughout our state judicial system. In the end, as hoary and antiquated as it might sound, judicial independence is one of the most precious legacies of our democracy, and undermining it would do a grave disservice to the members of the bench, to the processes of justice, and to our democracy itself.

Maybe the issue is clearer if we look at the alternative. There are numerous instances, from F.D.R. to Ronald Reagan, where presidents and governors have tried to put ideology or party allegiance ahead of judicial excellence in choosing judges for the bench or in denouncing particular decisions. Political supporters say: "After all, if the executive or the legislature believes strongly in the moral rightness of a particular position, why shouldn't they do everything in their power to install judges who agreed with them and who will enforce that moral point of view?"

Several reasons come directly to mind. First, when it comes to choosing judges or approving their decisions, insisting that they march in philosophical or political lockstep with the elected leadership of that moment at the very least reduces the chance of finding the best judicial talent available, simply because it excludes those who may exhibit far superior judicial talent but happen to belong to the wrong party or philosophical school. One example, among many, makes the point: If President Hoover had persisted in demanding someone who agreed with his so-called conservative philosophy, Benjamin Nathan Cardozo never would have made it to the Supreme Court. The truth is that, because he was a so-called liberal, he nearly didn't. Only because Cardozo's judicial merit was so well known and the voices of his

²⁶ See, e.g., Kevin Sack, *Cuomo and Chief Judge Settle Court Budget Fight*, N.Y. Times, Jan. 17, 1992, at B4 (describing Chief Judge Sol Wachtler's suit regarding state judiciary budget and subsequent settlement).

²⁷ See Barbara Paul Robinson, *Committees Strive to Serve the Profession and the Public*, N.Y. L.J., Sept. 11, 1995, at S13 (referring to forthcoming vote regarding constitutional convention).

supporters so insistent did he make it past the impediment of ideology.²⁸

The second reason: To use ideology or political or social philosophy as a standard of selecting judges or assessing their decisions is, I think, to confuse the basic nature of the judiciary. As lawyers, we know that judges are different from politicians, or at least should be. Politicians, whether executive or legislative, make statutes or rules or decisions prospectively, to try to achieve a particular social or political end, using their own best judgment. They need not find a mandate in constitution or the laws, as long as they find no prohibition there. For the most part, in deciding how they feel on a given issue—immigration, tax reform, wetlands protection—politicians use the same rules the people do: a mixture of common sense, life experience, relevant expertise, and self-interest. That's how policy gets made, and it works pretty well. Judges are different. They are not left unfettered to consider their own values, judgments, and views of what is best for the community. They are required to find reasons for their judgments rooted in the law, be it the federal or the state constitution, a statute, or the common law. Judges are required to use different rules from those used by the people on the street, to whom the politician is accountable. Judges are supposed to approach each case with an open mind as to how the law applies to the particular facts and circumstances placed before them in a particular record. The unlimited range of reasoning and information available to persuade the executive and legislator is, by the exquisite design of our law, denied to the judge.

Now, of course, in applying the body of law to a world of ever-changing realities, a general sense of good public policy—perhaps even what Holmes called intuition²⁹—may come into play. It is one thing, however, to recognize that social vision at some point may affect a judge's interpretation in a specific controversy, on a specific record. It is quite another—indeed, it is patently wrong—to use the selection of a judge to attempt to assure a result in advance.

It seems to me that the best way to pick a judge is by picking someone who's good at doing what a judge is supposed to do, not what a president, a governor, a mayor, or a legislator is supposed to

²⁸ See Richard A. Posner, *Cardozo: A Study in Reputation* 3-4 (1990) (discussing factors behind Hoover's appointment of Cardozo).

²⁹ See Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881) ("The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

do. And once they're on the bench, you have to let them do the best job they know how. Will there be wrong decisions occasionally? Certainly, just as there are unwise laws and executive orders from time to time.

But on the whole, the integrity of our justice system depends on the quality and intellectual integrity of our judges, and if we encourage the current appetite for publicly castigating jurists about particular decisions, we promote a dangerous trend. If we allow it to continue, it will tend to chill good legal reasoning that might produce politically inconvenient results. It will unravel the public's already tenuous faith in the justice system, and in the process it will tend to destroy democracy and freedom itself.

In Robert Bolt's play, "A Man for All Seasons,"³⁰ Thomas More, the great sixteenth-century Chancellor of England, is tempted by his son-in-law, William Roper, to put aside "the thickets of the law" because occasionally they allow a guilty person to get away.³¹ Remember that? Sounding a bit like Judge Bork, Roper, the son-in-law, says he would cut down the whole forest of legal technicalities to get at the devil. Thomas More answers him in this way: "This country's planted thick with laws from coast to coast . . . if you cut them down . . . d'you really think you could stand upright in the winds that would blow then?"³² If we need to learn a lesson from the British, that is surely it.

As members of the Bar, it is our special responsibility to carry that message out into the world—to speak out and help our fellow citizens see that the forest of the law is much safer than the desert without it.

³⁰ Robert Bolt, *A Man for All Seasons* (1961).

³¹ *Id.* at 39.

³² *Id.*