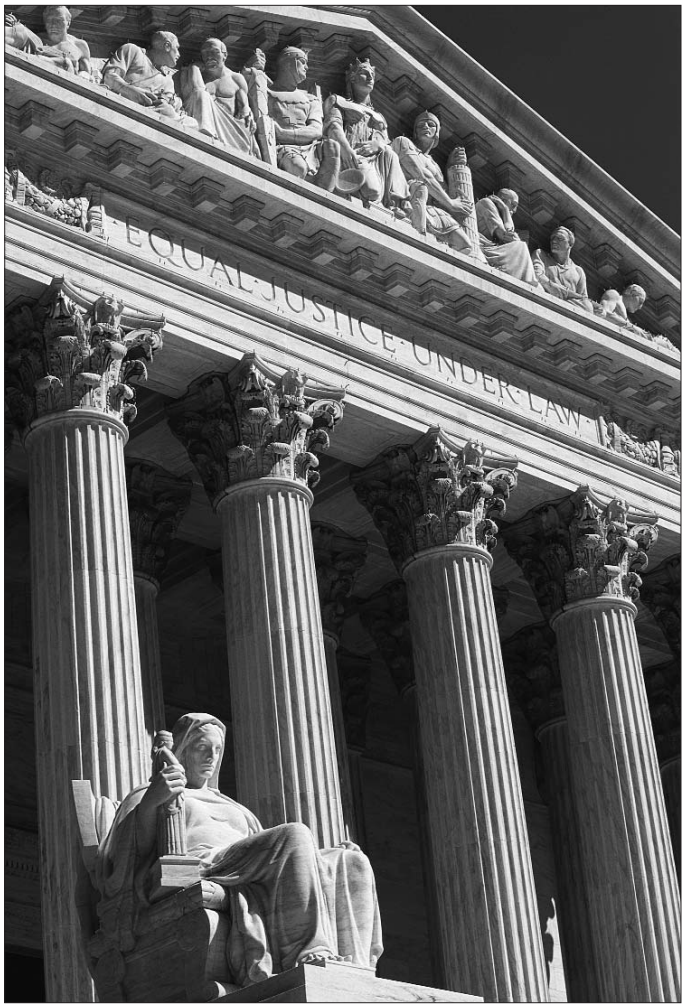


U.S. Supreme Court in Washington, D.C. (1935)
Photograph © Dennis Degnan/Corbis.

Judicial Independence

Sandra Day O'Connor, Linda Greenhouse, Judith Resnik, Bert Brandenburg, and Viet D. Dinh

Welcome and Introduction by Richard L. Revesz, Martin Lipton, and John Sexton

This panel discussion was given at the 1931st Stated Meeting, held in collaboration with New York University School of Law and Georgetown University Law Center on November 6, 2008, at Tishman Auditorium, New York University School of Law.

Richard L. Revesz

Richard L. Revesz is Dean and Lawrence King Professor of Law at New York University School of Law. He has been a Fellow of the American Academy of Arts and Sciences since 2007.

Welcome

It is a great pleasure to welcome you to this wonderful event, which we are cosponsoring with the American Academy of Arts and Sciences and the Georgetown University Law Center. I am very grateful to my colleagues, Alex Aleinikoff, Dean of the Georgetown Law School; Meryl Chertoff, Director of the Sandra Day O'Connor Project on the State of the Judiciary at Georgetown; and Leslie Berlowitz, Chief Executive Officer of the American Academy, for coming together tonight to create this terrific event.

It is a great honor to welcome Justice Sandra Day O'Connor back to the law school. It seems that whenever something very good happens at the law school, Justice O'Connor is here. I'll give you only two examples in the interest of hearing from Justice O'Connor herself. On September 28, 2001, the law school celebrated the groundbreaking for Furman Hall, our wonderful academic building that now houses half our classrooms, our clinical programs, our lawyering programs, and many important administrative offices. That was an important day and Justice O'Connor was here. It meant an enormous amount to us, and she spoke passionately and persuasively about the important role of lawyers and legal education in the new world that we would have to construct after the 9/11 disaster.

My second example: Our Institute for Judicial Administration has played a very important role in the training of judges in this country, both at the federal and state levels, and has, I think, on average trained about two-thirds of new federal district-court judges. In October 2006, the Institute was named the Dwight Opperman Institute for Judicial Administration in honor of Dwight Opperman, a trustee of the law school who had been involved with the Institute since its inception in the 1950s. Justice O'Connor was here again and talked about the importance of judicial independence, a topic that we'll come back to today.

It is fitting that since retiring from the Supreme Court, Justice O'Connor has devoted a significant amount of time and energy to promoting the cause of judicial independence, which she has persuasively argued is increasingly under attack.

It is now my privilege to introduce the Chairman of the Board of Trustees of the University, Martin Lipton. Marty graduated from NYU School of Law, and the history of the transformation of the law school during a period of about 50 years is tied very closely to the roles that Marty played in making that happen. He and his other founding partners at the law firm of Wachtell, Lipton, Rosen & Katz, all of them alumni of our law school, started one of the great institutions of American corporate law. Marty, from the beginning, was involved in creating the structure that would make it possible for the law school to become a leading academic institution. He eventually became Chair of the Board of Trustees of the law school and then was elevated to his current position as Chair of the University's Board. Thank you, Marty, for being here with us today, as you are on so many other special occasions in the life of the law school; we're extraordinarily grateful to you.

Martin Lipton

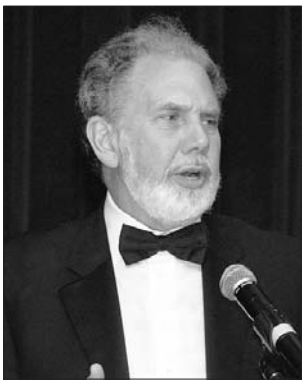
Martin Lipton is a Founding Partner of Wachtell, Lipton, Rosen & Katz and is Chair of the Board of Trustees of New York University. He has been a Fellow of the American Academy of Arts and Sciences since 2000.

Welcome

On behalf of the University and of the American Academy, I'm delighted to add my welcome to all of our distinguished speakers and guests. The American Academy has been exploring issues facing the courts for a number of years. Using its unparalleled ability to convene some of the keenest minds in the nation for careful reflection and non-partisan independent study, the Academy has advanced our understanding of the judicial system during a time of change and challenge.

The topic of judicial independence is not only critically important, it is also quite complicated. And to help us better understand the issues and appreciate what is at stake, we are about to have the pleasure of hearing from an extraordinary group of legal scholars and practitioners. Everyone in this room understands that a fair and impartial judiciary is a cornerstone of our system of government. Today, there are critical challenges to the independence of our courts. They come in the form of increasingly partisan judicial confirmation processes, calls for the impeachment of federal judges when activists disagree with judicial decisions, and unprecedented Congressional intrusion into judicial decision-making. To help educate the public about judicial independence, Justice O'Connor established the Sandra Day O'Connor Project on the State of the Judiciary, which is housed at Georgetown University Law Center. It is my honor to serve on the Project Steering Committee, and I especially want to acknowledge Justice O'Connor and to thank her for her very important work in this area of judicial independence.

Now it's my pleasure to introduce another Fellow of the Academy, John Sexton. John clerked with Chief Justice Warren Burger and is a former Dean of the NYU School of Law. He is the Benjamin Butler Professor of Law and the fifteenth President of New York University.



John Sexton

John Sexton is fifteenth President of New York University and the Benjamin Butler Professor of Law. He has been a Fellow of the American Academy of Arts and Sciences since 2001.

Introduction

The formal life of Justice O'Connor is well known to all of us: a graduate of Stanford and its law school, editor of its law review, a county attorney, a civilian attorney in the Quartermaster Corps, and then an assistant attorney general in Arizona. For six years she was in the Arizona State Senate, becoming the majority leader and the first woman in the country to hold such a high legislative position. Later she became a superior court

judge, then a judge for the Arizona Court of Appeals. She had served in all three branches of government well before I first heard her name in October term 1980, when I was clerking for Warren Burger. In my class on the Supreme Court and religion, with freshmen here at NYU, I described the day that all 32 of us who were clerking at the Court that year were called down to the east room of the Court. In came Justice Stewart to explain to us that that would be his last term. I remember as the weeks unfolded hearing Chief Justice Burger speak in glowing terms of this woman from Arizona.

My class here and the concomitant class I'm teaching on Sundays in Abu Dhabi on the same subject, Religion and Politics Through the Eyes of the Supreme Court, know that I view the 25 years between 1981 and Justice O'Connor's retirement as "The O'Connor Years" at the Court, certainly in the area of the intersection of religion and politics in society. In many ways, Justice O'Connor shaped the court during those years. She shaped this law school, seen by many as the place that gestated a more ecumenical and expansive view of the law. We called it here the Global Law School Initiative, but the idea, in fact, was Justice O'Connor's. It was an idea that was born when she spoke here in the early 1990s at a faculty lunch, and it was an idea that caught my attention as a product of the ecumenical movement from a very earlier time in my life. It was an idea that, as it began to incubate, Justice O'Connor was always here to support.

The very first conference held at NYU's magnificent villa in Florence, Italy, in 1994, was a conference that Justice O'Connor organized with us for justices of four Supreme Courts – four Constitutional Courts, more appropriately: the Constitutional Courts of the United States, Germany, Italy, and the then newly established Russian Constitutional Court. As we, those twelve justices and about eight NYU professors, sat in La Pietra, the Russian Constitutional Court wrestled with its own *Marbury v. Madison*: the constitutionality of the invasion of Chechnya and whether Yeltsin had acted constitutionally. It was wonderful to hear the twelve justices at the conference wrestle with the issue of judicial independence in that context as opposed to the context in which we will discuss it tonight.

In many ways, Justice O'Connor has done the most important work in her life invisibly, person by person. To those of us who have been privileged to come to know her and her magnificent love affair with her husband, she is a model of personal "I thou love" for every married couple; she certainly was for our family. And for others who don't get to know her as well, or as intimately, she still is a model person by person. I'll close with a story to illustrate.

My wife Lisa, our daughter Katie, and our son Jed were with me for that conference in Florence. Jed was the gofer. Lisa sprained her ankle and had to come home, so Katie, then seven, was a host. She, this little girl, stood next to me as the vans with the justices came up the long, tree-lined road that brought them to the main villa. I said, "Now, when the justices get out, you just curtsy and say '*Buon giorno*; welcome to La Pietra.'" Little Katie said and did just that as Justice O'Connor got out of the van. In her own magnificent way, Justice O'Connor embraced this little girl. Justices Ginsburg and Breyer were there too, and Justice Ginsburg spent a lot of time with Katie over the three days. But it seemed Justice O'Connor's hand was always in Katie's hand.

When Katie came home, she brought with her Justice O'Connor's cardboard name card from the conference. She put it on her desk, and when she got to the third or fourth grade and had to pick a person from all of history to be and to present a biography, she chose Justice O'Connor. A friend came over and saw this card on Katie's desk and asked her about it. Katie, now about nine, said, "Oh, Justice O'Connor, she's a friend of mine. She's invited me to come down to Washington, and we spent a lot of time together. And there was this other Justice, Justice Ginsburg, and she was very nice, too." Finally she said, "I didn't spend a lot of time with Justice Breyer, so I can't tell you what he's like." In that way, Sandra Day O'Connor, person by person, made it possible for people, the young Katies of the world, to think that anything is possible for them. And Katie still lives with the tremendous confidence that this great woman instilled.

It is my great, great privilege to introduce to you Justice Sandra Day O'Connor.

Sandra Day O'Connor

Sandra Day O'Connor served as an Associate Justice of the U.S. Supreme Court from 1981 until her retirement in 2006. She has been a Fellow of the American Academy of Arts and Sciences since 2007.

That was quite an introduction. I hope many of you have had the privilege of meeting Katie. She's pretty grown-up now, but what a wonderful girl she is and what a wonderful youngster she was.

Thank you so much, President Sexton, for your introduction. John Sexton's work as an educator, both here at NYU and through all of his other activities, like the Urban Debate League, has set a very high bar for individual commitment to civics education. I want to thank Dean Revesz and the law school for hosting this event. I remember Dean Revesz when he was a law clerk for Justice Thurgood Marshall; he looked a little younger in those days, I think.

John Sexton mentioned some of the events that have been held here. For several years, members of our Court met with members of Russia's Constitutional Court, and we got to the stage where we really could communicate with some of them pretty well. I remember lots of meetings. Now that has stopped, and we are becoming strangers with the Russian Federation. It's a tougher relationship, and whether they would entertain the possibility of restoring some of those meetings, I don't know; but I think it's worth exploring. We certainly had some good meetings here.

Thanks so much to the American Academy of Arts and Sciences, a distinguished group. You probably know that John Adams helped

found the Academy, and at the time that he did that, he was also trying to write a constitution for the state of Massachusetts. It has some pretty forceful language about the importance of judicial independence. The Massachusetts Constitution, thanks to John Adams, says, "It is essential to the preservation of the rights of every individual to be tried by judges as free, impartial, and independent as the lot of humanity will admit." So what did John Adams have in mind when he referenced an independent judiciary more than two centuries ago, back when the notion of a judiciary with power to secure and protect certain fundamental rights was a pretty radical idea? Judicial independence as a concept doesn't lend itself to very precise definition, and maybe the easiest way to understand it is to look at settings where it did not exist.

Judicial independence as a concept doesn't lend itself to very precise definition, and maybe the easiest way to understand it is to look at settings where it did not exist.

I grew up in the Southwest, born in El Paso, and went to school there. In the late 1800s, Judge Roy Bean ran his courthouse out of a saloon in west Texas, not too far from the Lazy B Ranch. Everyone in Roy Bean's court, from defendants to jurors to lawyers, was expected to buy drinks during each one of his frequent recesses. If you didn't buy a drink, the judge would hold you in contempt of court and you would be fined the cost of a drink. The saloon-turned-courthouse had a big sign in front of it that read, "Law West of the Pecos." And just above that sign was another one that read, "Ice cold beer." I would have hoped, at the very least, that the law would have gotten top billing on the marquee, but it didn't: he was selling ice cold beer and law, in that order. In one typical case, Judge Bean sentenced a young man to hang, only to discover later that the man had over $400 in a bank account. When Judge Bean learned that, he sensed that there might be some profit in leniency and said, "By gobs, we've made a mistake. This man does not deserve to hang."

In one sense you could say that Judge Bean was independent. He did whatever he liked, and often he was guided purely by monetary concerns. But that's not what I mean when I talk about judicial independence, and I don't think it's what John Adams had in mind either. I mean somebody, a judge, who's constrained by what the law says and requires, and a judge who's independent from external influences. Of course, a judiciary that's subject to strong external influences is not just a thing of the distant past. We've seen evidence of that all around the globe. And while our federal judges in this country receive appointments for good behavior, a significant percentage of our state-court judges are elected for a term of years, and they are elected in partisan campaigns quite often – campaigns that have become increasingly expensive, unwieldy, and nasty. Such destructive campaigns, I think, erode the public's perception of the judiciary because it's difficult to believe that judges can remain neutral when they so often have to think about the popularity of their opinions and who it was that donated to their campaigns. You hear horror stories of lawyers going to trial in Texas, which is a state that has elections like I described, and the first thing they do is to find out how much the lawyers on the other side have already given to the judge. If they can find that out, then they have to match it or exceed it, or they don't go to trial.

What kind of a system is that, and why do we want to tolerate that kind of thing in our country? I don't know. It isn't difficult to see how corrupting that money, which is injected into these campaigns, can become. After being elected to the Illinois Supreme Court in 2004, after a judicial election in which the candidates spent more than $9 million combined, Justice Lloyd Karmeier asked, "How can people have faith in the system when such obscene amounts of money are used to influence the outcomes of the elections?" And he was the one who won the race. You can only imagine what the losing candidate might have said afterward – probably nothing we would want to repeat in public.

A significant percentage of our state-court judges are elected for a term of years, and they are elected in partisan campaigns that have become increasingly expensive, unwieldy, and nasty. Such destructive campaigns erode the public's perception of the judiciary because it's difficult to believe that judges can remain neutral when they so often have to think about the popularity of their opinions and who it was that donated to their campaigns.

Or consider the Massey Coal case from West Virginia, where the justice who cast the deciding vote to overturn a $50 million verdict against Massey Coal Company had received more than $3 million in campaign contributions from the company's owner while the appeal was pending in the court. The U.S. Supreme Court is currently looking, I believe, at a cert petition in that case that raises the question of whether at some point the due process clause requires a judge to recuse himself or herself when the perception of bias is so strong. I don't think that a litigant giving a $3 million contribution to a judicial candidate's campaign is what John Adams had in mind when he envisioned judges who were as impartial and independent as the will of humanity would admit.

We can do better than that in this country, and thanks to some of you who are in the social sciences, there's a growing body of empirical research that demonstrates how these campaign contributions and judges' fear of reprisal for making unpopular decisions do, in fact, have an effect on judicial

decision-making. I encourage those of you in the social sciences to continue collecting and reviewing the empirical data that demonstrate the effects that campaigns like that have on the judiciary.

The judiciary's authority and legitimacy rest really on public trust and the agreement of the public in general to abide by rulings of the courts. We can't afford to have a judicial system that is perceived as being corrupt, biased, or otherwise unethical. Judges, after all, don't have any real means of enforcing most of their rulings: our gavels aren't that big, and we can't swing them that hard. Our courts rely on the other branches of government and the public to follow and acquiesce in the rulings made by the courts, and it's somewhat amazing how the other branches of government normally through the years have abided by and enforced court rulings, whether it was President Eisenhower who sent the 101st Airborne to Little Rock, Arkansas, to ensure that the schools were integrated after *Brown v. Board of Education* and *Cooper v. Aaron*, or whether it was President Nixon, who sealed his own fate and turned over incriminating tapes and documents in response to the Supreme Court's decision in *United States v. Nixon*. While we have been fortunate to have a judicial system that is generally respected, it should not be taken for granted.

Statutes and constitutions don't protect judicial independence, people do. And while we are not at the stage where protestors might overrun the U.S. Supreme Court building like they did in Zimbabwe not too long ago, the time to address the concerns I have described is now, before those concerns become so large we can't solve them. I hope we can help educate all Americans in this country on what we mean by judicial independence and, particularly, explain why it matters – because it does. I hope that in time we can persuade some of the states that still hold partisan elections to develop a somewhat better forum of judicial selection, similar to that which the esteemed framers of our Constitution developed when they met in Philadelphia so long ago.

Linda Greenhouse

Linda Greenhouse is the Knight Distinguished Journalist in Residence and Joseph M. Goldstein Senior Fellow in Law at Yale Law School. For nearly 30 years she covered the U.S. Supreme Court for "The New York Times." She has been a Fellow of the American Academy of Arts and Sciences since 1994 and serves as a member of the Academy's Council.

It was my pleasure, along with Meryl Chertoff, to put together the Fall 2008 issue of *Dædalus*, focused completely on the topic of judicial independence. As Justice O'Connor said, this is an educational effort; it's an outreach effort. It's to get people talking and to have a sophisticated conversation about what sounds on the surface like a very simple issue. Of course everybody's for judicial independence; but as we probe deeper, it's a complicated and challenging subject.

The American Academy started a project on the independence of the judiciary back in 2002. Originally called Congress and the Courts, the project grew out of a perception on the part of many people that the relationship between the Supreme Court and Congress had run off the rails. The Court was striking down a series of federal civil rights statutes on the grounds that Congress lacked the constitutional authority to enact them; it was a freighted situation. So the Academy formed a committee to look at how it could serve its historic role, in this context, as a neutral arbiter to examine the many dimensions of the relationship between Congress and the Court. There was a series of private, closed-door meetings among the various stakeholders – Supreme Court justices, key players on the Hill – and the Academy facilitated a valuable conversation that resulted in insightful discussions about this subject. There was also a series of lectures and panel discussions that focused on other topics related to the judiciaries: career paths of judges, judges' compensation and benefits, and the confirmation process.

The project developed and so did the relationship between Congress and the federal judiciary. The relationship, in fact, turned around, and just as the Court had challenged Congress earlier, Congress began to challenge control of the judicial branch, including limitations on the ability of federal judges to travel and efforts to prohibit federal judges from citing foreign law, an effort of which, I would assume, Justice O'Connor took a rather dim view.

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All of these issues benefit from public conversation and scholarly inquiry, and that's what brings us together this evening. This meeting occurs, as I mentioned, in conjunction with the publication of the Fall 2008 issue of *Dædalus*, the quarterly journal of the American Academy, on this theme. It contains essays by each of our speakers, as well as a number of eminent scholars, practitioners, and judges.

The issue of *Dædalus* draws from two complementary and ongoing efforts to examine judicial independence today, to define it in its historic context, assess its current function, and address the perception that it is

currently under attack. The American Academy of Arts and Sciences, under the auspices of its project on The Independence of the Judiciary, has held several meetings that have brought together scholars, public officials, and state and federal judges. Essays in the issue by Senator Charles Schumer, Judge J. Harvie Wilkinson III, Chief Justice Ronald M. George of California, Chief Justice Margaret H. Marshall of Massachusetts, and Professors Judith Resnik and Robert Post are drawn from those sessions.

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The Sandra Day O'Connor Project on the State of the Judiciary at Georgetown University Law Center held conferences in 2006, 2007, and 2008 that drew the attendance of six sitting Supreme Court justices and hundreds of scholars, business and political leaders, and representatives of the nonprofit sector. The essays in the volume by Justice O'Connor and Justice Breyer are drawn from the first two of those conferences, as are those by Chief Justice Ruth V. McGregor of Arizona, Professor Kathleen Hall Jamieson and Bruce W. Hardy, Professor Viet Dinh, Professor Stephen Burbank, Professor Bert Brandenburg, Professor Roy Schotland, Professor Vicki Jackson, and Professor Charles Geyh.

The result is a collection of diverse perspectives from those who study the question of judicial independence as scholars and those who live it as judges, a contribution to a conversation as old as the republic and as current as today's news. That is the background of what brings us together.

Judith Resnik

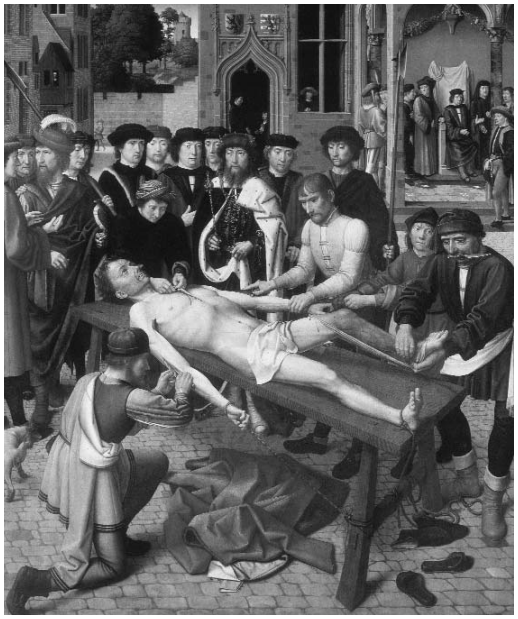
Judith Resnik is the Arthur Liman Professor of Law at Yale Law School. She has been a Fellow of the American Academy of Arts and Sciences since 2001. Her comments draw from an essay published in "Dædalus," Fall 2008, on "Interdependent federal judiciaries: puzzling about why & how to value the independence of which judges," and from a forthcoming book, "Representing Justice: The Rise and Decline of Adjudication as Seen from Renaissance Iconography to Twenty-First Century Courts" (co-authored with Dennis E. Curtis and to be published by Yale University Press in 2010).

The degree to which we take for granted the concept of judicial independence makes it worth looking, briefly, at the history of judges, going back hundreds of years. Adjudication is an ancient practice, long predating democracies. Medieval and Renaissance rulers put on spectacles of justice in which judges took center stage. But while sovereign powers relied on judges, it was not because judges were independent actors.

One way to catch a glimpse of these traditions is through looking at the imagery put deliberately into town halls, Europe's first civic buildings, where court sessions were held. Hence, I invite you to look at a few such paintings. The first image comes from the diptych of 1498 called *The Justice (Judgment) of Cambyses*, a painting by Gerard David that can today be found in the Groening Museum. But it once hung in the town hall of Bruges in what is now Belgium. The left panel of the diptych, *Arrest of the Corrupt Judge*, shows at the far back a tiny vignette of a man in a red robe (a judge) taking a bribe (a bag of money). In the foreground, one can see that judge taken from the seat of judgment; he is being arrested. In the *Flaying of the Corrupt Judge*, which is the right panel of the diptych, the judge is being flayed alive.

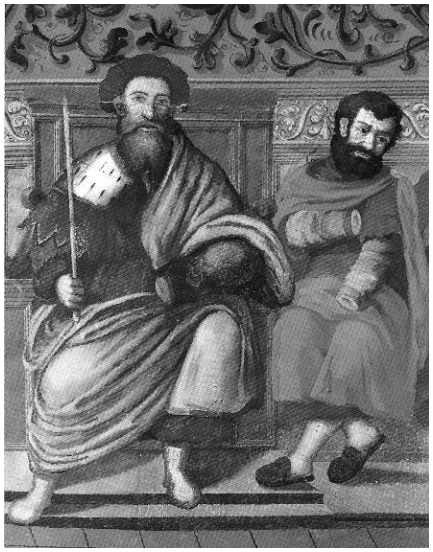
The reproductions do not do justice (if I may borrow that word) to the actual paintings, which are larger than life and gruesome in their brightly colored details – even hundreds of years later. The story's denouement can be found in the background of the *Flaying*, where another small vignette is provided.

***Arrest of the Corrupt Judge*, left panel of the diptych *The Justice (Judgment) of Cambyses*, Gerard David, 1498, Musea Brugge, Belgium. Copyright: Musea Brugge, Groeningemuseum. Image reproduced with the permission of the copyright holder.**



***Flaying of the Corrupt Judge*, right panel of the diptych *The Justice (Judgment) of Cambyses*.**

***Les Juges aux mains coupées*, Cesar Giglio, circa 1604, Salle du Conseil (Council Chamber), Town Hall of Geneva, Switzerland. Photograph reproduced with the permission of Le Centre d'Iconographie Genevoise. Thanks to Ursula Baume-Cousam, Cäsar Manz, and Livio Fornara for help in obtaining permission to reprint.**



Detail, *Les Juges aux mains coupées*.

The son of the corrupt judge, now the new judge, is forced to sit on his father's skin. I have used a spectacular example from Bruges but this scene is not unique to that city's town hall. Rather, paintings of it were in many town halls in cities around Europe.

Move forward a hundred years plus to Geneva, Switzerland, to 1604 to the huge mural *Les Juges aux mains coupées*, by Cesar Giglio, which was displayed in the Salle du Conseil (Council Chamber) of the town hall. A detail of the mural shows judges with their hands cut off, along with text from *Exodus* 23:8: "Thou shalt not accept gifts for a present blinds the prudent and distorts the words of the just."

About 50 years later, in 1655, architect Jacob van Campen's magnificent Town Hall (now called the Royal Palace) opened in Amsterdam. Inside, one room is called the Tribunal (*Vierschaar*), where death sentences were pronounced. Public spectators and defendants alike saw elaborate carvings there, including *The Judgment of Brutus*, by the sculptor Artus Quellinus. The Roman envoy Brutus ordered his own sons to death for treason. Another carving features *The Blinding of Zaleucus*. Zaleucus was a judge whose son violated the laws of the state, a crime that carried the punishment of gouging out one's eyes. Instead of taking out both of his son's eyes, Zaleucus took out one of his own as well.

Works such as these (again, commonplace in civic buildings) help me make a first point: the judicial role then was conceived to be dependent, not independent. These exemplary allegories instructed judges to serve as loyal servants of the state and showed, furthermore, that enforcing the state's law came at personal pain. Misbehave and you would be flayed alive or lose your limbs; be loyal to the state even if it means sending your own children to death or to dismemberment.

Why were these images set out? Rulers created rituals and spectacles of power aimed at providing instruction to the public watching from the streets or inside these state buildings. Public proceedings were aimed at underscoring the authority to make and enforce laws. But as Michel Foucault has taught us, those who produce rituals and spectacles cannot control the consequences of what is seen. The people who watched

Exterior of the Town Hall (Royal Palace) of Amsterdam, Architect: Jacob van Campen, 1648–1655, Amsterdam, the Netherlands. Photograph reproduced with the permission of the Amsterdam City Archives.

Interior of the Tribunal (*Vierschaar*) on the ground floor of the Town Hall (Royal Palace) of Amsterdam, the Netherlands. Photograph reproduced with the permission of the Amsterdam City Archives.

moved from being passive spectators to becoming more active, more watchful observers – to understanding themselves as having some power to sit in judgment of those imposing judgment. Over the course of centuries, as they saw these rituals of power and as republican and democratic precepts grew, they began to make claims *on* the state.

The seventeenth, eighteenth, and nineteenth centuries saw two parallel and related developments pertinent to our discussion. One was the growth of the idea of judges as impartial and specially situated employees of governments. The second was the obligation to render judgment in public. Rites, R-I-T-E-S, became rights, R-I-G-H-T-S, of public access to courts as judges moved from servants of rulers to independent actors authorized to sit in judgment of the state itself.

To explain some of this, I need to switch from artwork to texts and cross the Atlantic to the United States. One example comes from the laws of West New Jersey in the 1670s. As that document reads: "That in all publick courts of justice for tryals of causes . . . any persons of the Province may freely come into and attend the said courts, and hear and be present . . . at all and any such trials . . . that justice may not be done in a corner nor in any covert manner." A century later, this commitment was reiterated in 1777 in the Constitution of Vermont that read: "All courts shall be open, and justice shall be impartially administered, without corruption or unnecessary delay."

State constitutions also lead the way on judicial independence; Massachusetts provided for tenure for its judges. That point became central in 1789 to Article III of the U.S. Constitution, the icon of the federal system, which enshrined this new conception of judges, protected from being fired (life tenure) and with salaries not to be diminished. (Our current judges remind us that what is missing is the lack of even cost-of-living increases.)

Now let's move to the twentieth century. The European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 and the International Covenant on Civil and Political Rights of 1966 both avow that independent judges and open courts are necessities. In 1996, the new constitution for South Africa made the same commitments.

A fast summary of three points from the past 500 years is in order. First, the role of the judge was once to be subservient. Second, public rituals were used to instill this

***The Judgment of Brutus* [or *Brutus*], Artus Quellinus, circa 1655, the west wall of the Tribunal. Photograph copyright: Royal Palace Foundation of Amsterdam. Thanks to Professor Eymert-Jan Goossens for help in obtaining this image and permission for its reproduction.**

***The Blinding of Zaleucus* [or *Zaleucus*], Artus Quellinus, circa 1655, the west wall of the Tribunal. Photograph copyright: Royal Palace Foundation of Amsterdam.**

idea in both judges and public spectators. Third, over time public practices became a springboard for rights, as participants laid claim to procedural fairness, to democratic precepts, and as persons employed by the state grew to understand themselves as able to sit, independently, in judgment, even sometimes of the state itself. These ideas are reflected in constitutional texts that, time and again, link open courts and independent judging. As Jeremy Bentham explained in the mid-1800s, publicity was "the very soul of justice." The judge, while presiding at a trial, was "on trial" – watched and assessed by an audience. From the baseline of political ideas in Renaissance Europe, that is a pretty radical endowment of authority in "we the people."

With the enhancement of democratic norms during the twentieth century, demands for adjudication have soared. Only within the last 150 years have all of us in this room become full "juridical persons," recognized as rights holders, able to sue and be sued, to testify in court, to vote, to be members of all professions, and to sit in judgment as jurors and judges. Democracy has endowed us all with this new stature and new rights, enabling new opportunities to bring claims to court. One way to capture this point is to look at the growth in life-tenured federal judges. In 1901, as we see in Chart 1, authorized life-tenured judgeships in the federal system numbered just over 100 around the entire United States. By 2001, that number had grown to more than 850.

But even that increase was insufficient to meet the needs. Judges, lawyers, Congress, and the courts, working cooperatively, invented new kinds of judges for the federal system authorized through a variety of statutes. Two groups, magistrate and bankruptcy judges, do not have life tenure or guaranteed salaries; instead, they are creatures of statutes and given fixed and renewable terms. First chartered in 1968 and 1984 respectively, their numbers also have grown such that by 2001, together they too were about 850, and thus a cohort of a size comparable to the trial level life-tenured judges (see Chart 2).

All of these judges are a vital part of activities in every federal courthouse around the United States. Taking as one measure the times when witnesses testify orally in proceedings before Article III, magistrate, or bankruptcy judges, a good estimate is that about 100,000 such proceedings occur yearly throughout the United States.

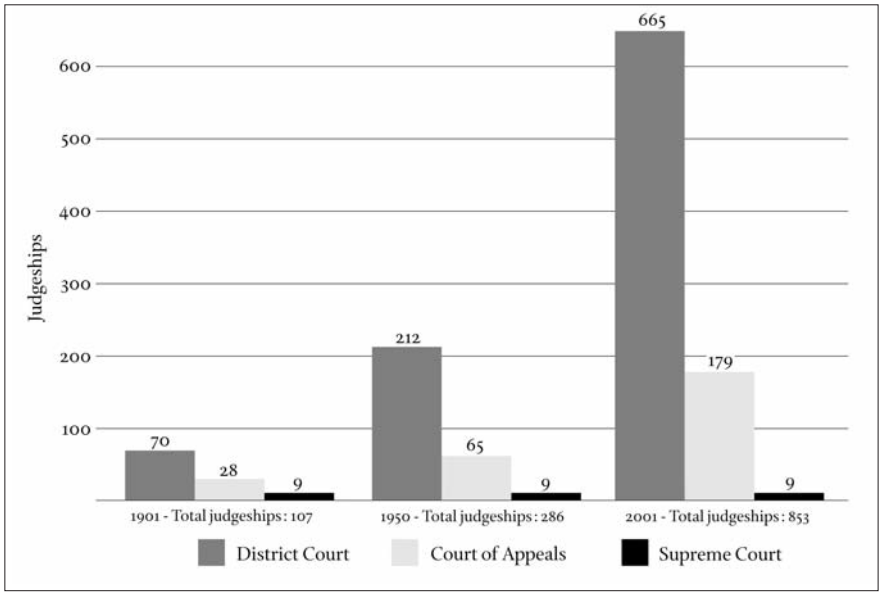


Chart 1. Article III Authorized Judgeships: District, Circuit, and Supreme Courts: 1901, 1950, 2001

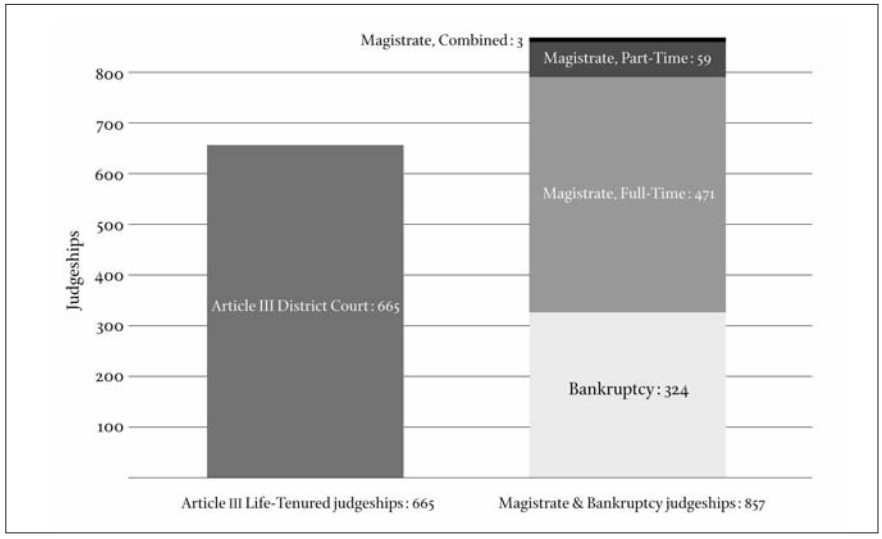


Chart 2. Authorized Trial-Level Federal Judgeships in Article III Courts (nationwide, 2001)

In contrast, consider the volume in federal administrative adjudication. From available data on proceedings in four federal agencies – Immigration and Naturalization Services, the Social Security Administration, the Board of Veterans Appeals, and the Equal Employment Opportunity Commission – we estimate that more than 700,000 evidentiary hearings occur yearly. Who are the judges for those proceedings? Not life-tenured judges nor magistrate and bankruptcy judges who work in federal courthouses. Instead, some are "administrative law judges" (ALJs) chartered under the Administrative Procedure Act and others may be hearing officers who can be general employees of a particular agency. Their number (more than 4,700 as of 2001) far outweighs the 1,600 plus, which represents the combined set of magistrate, bankruptcy, and Article III judges (see Chart 3).

At this, the beginning of the twenty-first century, we in the United States have many documents making textual commitments to

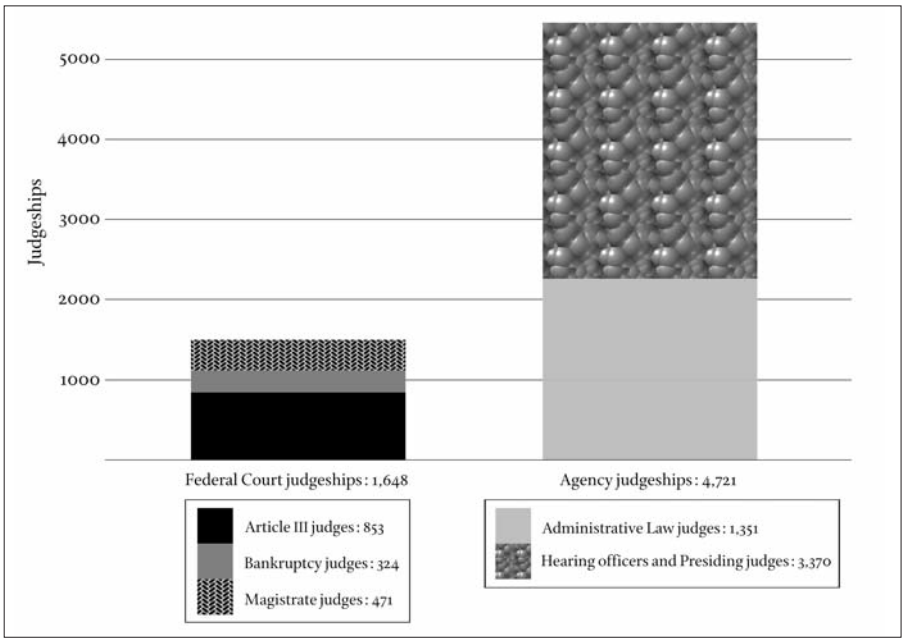


Chart 3. Numbers of Authorized Judgeships in Federal Court Houses and in Agencies (as of 2001)

independent and impartial judging and to open and public courts. Yet hundreds of thousands of federal agency proceedings do not occur in large public buildings, but in office buildings that are neither inviting to street traffic nor easily located even by those in search of attending. Moreover, we have had examples of "judges" (such as those who staff the immigration courts) reassigned when their bosses in the Department of Justice appeared not to like some of the decisions that they were making.

In shifting business away from life-tenured judges to administrative judges, Congress did not provide and the Supreme Court has not (yet) insisted that the rights we associate with judges – open trials, public access, robust independence – go all the way down the judicial food chain to lower echelon judges working in these lower echelon administrative courts. And we can see that this lack of protection matters. Judges are no longer flayed alive but they have been reassigned or fired.

Further, focusing only on the risks to judges coming from the executive or legislative branch misses an important development during the twentieth century. "Repeat player litigants" – from the Department of Justice to corporations and interest groups – focus on courts and on how to affect selection processes. Some of them contribute enormous sums to campaigns when there are judicial elections. In the case of judicial appointments, some groups try very hard to influence those decisions as well. Several organizations are famously involved – the National Council of Manufacturers, the Chamber of Commerce, the Federalist Society, and the American Trial Lawyers. Thus, we need to understand that a variety of different associations, NGOs, and the like could be either friends or foes of judicial independence.

Our law ought to reflect that judges can't be reassigned or fired, nor should we support provisions that permit them to hear witnesses and render judgments behind closed doors or to outsource and devolve their work to closed settings.

Another shift over the twentieth century has come from the media whose powers have been amplified through technological developments. Media have a huge impact on our knowledge about courts; many judges and lawyers complain about how various media pay no attention or too much attention to courts. Some issues (sex offenders, for example) are singled out and become major vehicles of education about "the courts."

Much more needs to be said but it is time to conclude. To do so, I want to pick up a theme introduced by Justice O'Connor. Texts like Article III of the U.S. Constitution, state constitutions, the South African Constitution, or the International Covenant on Civil and Political Rights are terrifically important, yet none is sufficient to create judicial independence. The challenge is building a culture of commitment to independent judges, and then spreading it from our most visible federal and state judges to those other judges working in less visible, but incredibly important settings – where, in fact, the bulk of the adjudicatory procedures in the United States takes place.

My own view is that both courts and legislators should insist on public processes as part of the structural protections for all these kinds of judges. Our law ought to reflect that judges can't be reassigned or fired, nor should we support provisions that permit them to hear witnesses and render judgments behind closed doors or to outsource and devolve their work to closed settings. Of course, privacy concerns may be brought to bear but we should reject a general presumption that the public be excluded.

We need to nurture the public dimensions of adjudication because they are part and parcel of judicial independence. Judges have (appropriately) substantial powers, disciplined and legitimated through their obligations to do a great deal before the public eye and to explain their judgments. Indeed, adjudication is itself a democratic practice shaping our understanding of government. Participants are required to treat each other with dignity and respect, and members of the public, as an audience, can be engaged observers, sometimes moved to seek to change laws or procedures given what they have seen.

In sum, and as I argued in the *Dædalus* volume that this symposium celebrates, we have many judiciar*ies*. By pluralizing the concept, we can take all of "our" judges into account. We need them to be independent because we are very dependent upon them.

Bert Brandenburg

Bert Brandenburg is Executive Director of the Justice at Stake Campaign. He was director of public affairs and chief spokesperson for the Department of Justice under Attorney General Janet Reno.

What I would like to do is give you a quick guided tour (and fill out a little bit of what Justice O'Connor was beginning to talk about) of threats to our state courts in particular. They, of course, are our workhouses, for all the glamour that the federal courts and rock stars like Supreme Court justices get. State courts handle something like 98 percent of our legal proceedings in America, and more than 85 percent of our state judges in America have to face an election of one kind or another, either a competitive election against an opponent or a retention race in which a judge can be either kept or fired. And these judicial elections, which used to be relatively tame, are under growing pressure. There is now a new politics of judicial elections featuring money, ads, and questionnaires. The people who are bringing this about want to make courts accountable to interest groups and partisans instead of the law and the Constitution. Justice O'Connor has described them as becoming political prize fights, and I think that is very apt.

There is now a new politics of judicial elections featuring money, ads, and questionnaires. The people who are bringing this about want to make courts accountable to interest groups and partisans instead of to the law and the Constitution.

Since 1999, state supreme court justices, for example, have raised in excess of $150 million, often from the very people who appear before them in court. Fifteen states have smashed their spending records. TV ads are threatening public confidence in impartial courts. Questionnaires that judges receive on the campaign trail on hot button issues, like abortion and same-sex marriage, essentially seek to intimidate judges into complying with political demands: check-the-box justice, as it were – Are you with us or are you against us? Voter turnout in judicial races is often very low, and, therefore, voters are easily swayed by pressure and partisanship. For example, two years ago in Dallas County, Texas, 19 Republican judges were turned out simply because they had an R by their name and it happened to be more of a Democratic Party year.

Public confidence is ebbing. Three in four Americans believe that these campaign contributions influence judges' decisions; 80 percent of business executives agree. Even scarier to me is that nearly half of state judges agreed with that statement – that campaign contributions are affecting decisions in the courtroom. In addition to the fear of what this does to justice and the judges' decisions, it has a palpable effect on the quality of candidates who are willing to run if races are going to be this way.

So what happened in 2008? I would say it's been another tough year. In states that elect their supreme court, we saw 23 seats contested in 13 states, and the final pre-election disclosures (a figure certain to go up as we get in more reports) showed that the candidates had raised in excess of $29 million. That's almost identical to the figure raised at the same point in 2006. Estimated spending on TV ads, which are becoming the way you now run for state supreme court, totaled $17 million, a little bit more than 2006 (that is, by the way, thanks to almost $5 million that was spent on state supreme court ads in just one week on the run-up to the 2008 election). The most expensive election occurred in Alabama, where the two opponents together raised a total of at least $3.8 million; this figure, too, will probably climb. A group based in Virginia – not in Alabama – wanted to influence that election so it put in another $800,000 of its own on behalf of one of the candidates, who I believe won in a squeaker. So, according to what we are hearing, that influence may well have been decisive.

Voter turnout in judicial races is often very low, and, therefore, voters are easily swayed by pressure and partisanship.

As I mentioned, $17 million was spent on TV ads in this year's campaigns, some of which we can see now. *[Editor's Note: Brandenburg played several TV ads for state judicial races. The text of those ads is included below.]*

[From Wisconsin]

> Meet Mike Gableman. He wanted to be a judge, but he had a few problems. Burnett County needed a judge, but Gableman lived 290 miles away. An independent panel recommended two finalists, but he didn't make the list. He even missed the application deadline. But weeks before the selection, Gableman hosted a fundraiser for Governor Scott McCallum and gave him $1,250. Guess who McCallum picked? Gableman. Tell Mike Gableman we need higher ethical standards for our judges.

[From Wisconsin]

> Unbelievable. Shadowy special interests supporting Lewis Butler are attacking Judge Michael Gableman. It's not true. Judge, district attorney, Michael Gableman has committed his life to locking up criminals to keep families safe, putting child molesters behind bars for over a hundred years. Lewis Butler worked to put criminals on the street, like Rubin Lee Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child. Can Wisconsin families feel safe with Lewis Butler on the Supreme Court?

[From Alabama]

Here, outside Washington, D.C., there's a bank account with half a million dollars from the likes of the gas and oil industry. That money is paying for the ad you see here. Should we have judges like Greg Shaw? It sounds nice, but the half million dollars paying for it doesn't come from Alabama. So when you see the ad, ask yourself, "What do the likes of the gas and oil industry want from our court?"

[From Michigan]

Newspapers call Diane Hathaway unqualified for the Supreme Court. Remember the low sentence Hathaway gave a sex predator that targeted a minor? There's more. Hathaway gave probation to a man who was arrested in camouflage paint while carrying a loaded AK-47. His web page praised terrorists and declared his own personal jihad. Probation for a terrorist sympathizer? We're at war with terrorists. Diane Hathaway, out of touch.

[From Michigan]

One story's a fairy tale, the other's a nightmare. The fairy tale, Sleeping Beauty. The nightmare, the sleeping judge, Cliff Taylor. Judge Taylor fell asleep several times in the middle of our argument. How could he judge based on the facts when he was asleep? Taylor was voted the worst judge on the state supreme court and fellow judges called for an investigation of Taylor for misconduct and abuse of power. The sleeping judge, Cliff Taylor; he needs a wakeup call.

[From West Virginia]

On the French Riviera, where the rich and famous play, Spike and Don spent a very pleasant day. While together, the time they were spending, a matter of millions in court was pending. Now, when Massey first won their appeal, it was Spike's vote that sealed the deal. Justice is blind, but you can see Spike showed bad judgment in hearing this plea. Spike has recused, but what will it take for the justice himself to admit his mistake? You decide how this story ends. Is justice for all or just between friends?

In politics, information is the lifeblood of what a voter needs to make an informed choice. But in terms of educating the public, given how low-profile these races are, and given how little information people have when they go to vote, if these ads are the mainstay of the diet, they're the equivalent of what French fries are to nutrition in terms of the ability to make an informed choice. We saw examples this year of special-interest support itself becoming a core issue in judicial elections. Chief Justice Taylor, described as the "sleeping judge," lost his election, which came as a surprise. Part of his defeat was attributed to a different set of ads attacking him for being too close to business interests. I would add as well that I've heard credibly that the allegation that he fell asleep in the courtroom may well be a lie. (The ad was a reenactment.) And if that is indeed the case, we may have someone who was essentially ousted because of what somebody could make up and put on a television ad. The chief justice in Mississippi lost his seat this year for being tied to business interests as well, and the justice in West Virginia who you saw in the last ad also lost in the primary because he was linked to a particular business executive he vacationed with in the French Riviera. These photos came out and his career was over.

What we see increasingly is that the courts are vulnerable to whatever the political wind of the year is.

What we see increasingly is that the courts are vulnerable to whatever the political wind of the year is. What happened in Dallas County, Texas, two years ago just happened again in Harris County, which is where Houston is. Twenty-two out of 26 experienced, Republican circuit-court judges were swept off the bench because of a straight ticket Democratic vote. We are also seeing signs that the runaway spending that we track mostly at the state supreme court level is continuing to trickle down to more local judicial races. We've heard one report that in Los Angeles, for example, combined spending on two of the five superior-court races there exceeded $500,000 for circuit-court seats.

One other interesting trend worth noting is that the voters in a few counties around the United States had a chance to vote on a different way of selecting judges. Merit selection and retention systems – a screening committee up front and then retention elections on the back end – which many states have, are often seen as a desirable alternative to the Wild West of contested elections. But they're very hard to enact from a political standpoint. They cut against the populist grain: America does like to elect its judges. Significantly, perhaps in reaction to what's been going on over the last decade, we saw several counties this year embrace merit selection, in one case rejecting an effort to do away with it, in other cases actually enacting it in very conservative counties in Missouri and Alabama.

What was also significant this year, compared with two years ago, was what was *not* on the ballot. There were no statewide referenda aimed at weakening the courts or compromising them as fair and impartial arbiters. There was a proposal two years ago in South Dakota called Jail for Judges, which essentially would have done away with judicial immunity, destroying the ability of any judge to be able to do his or her job and not be sued for making a decision. It was defeated decisively two years ago, and we were pleased to see it has not come back, because the public rejected it so decisively.

Looking ahead to the next cycle, two years from now, there will be more meltdown contests. Candidates from 16 states are scheduled to contest 35 supreme court seats; in 10 states there will be multiple races, with several justices up at the same time. We usually see this as a signal that interest groups will get more value for their dollar if they jump in. There is, however, growing interest in measures to address the problem. I mentioned merit selection; several states are looking at moving there. In addition, any state that elects judges can consider public financing of their judicial races so that judges don't have to dial for dollars from the people who are going to appear before them. There's also growing interest in recusal as a possible

solution. Nonpartisan voter guides can help people get the information they need to make the kind of nutritious choice I mentioned before. And campaign conduct committees can help temper some of the campaign conduct that judges feel increasingly pressured to engage in, or that interest groups inflict on some of these races.

I will close by echoing what's becoming a theme here in terms of the importance of independent courts. Courts can only be impartial if they are sufficiently independent. The American people, just as the framers of the Constitution, want judges to be independent and accountable. This is always messy and complicated because, as Justice O'Connor described, everyone has different definitions of independence; Roy Bean had his own. There are different definitions of accountability at work, too. We know we want judges to be accountable, but to whom are they accountable? The risk is that they won't be accountable to the law and the Constitution; that the pressures building up on them will make them accountable instead to partisans, interest groups, and special-interest pressure. I don't expect the Academy necessarily to take up this issue at its 1932nd meeting. I hope, though, it won't be another 2,000 meetings before you come back to this, because it's absolutely true, as has already been said, that the life of the courts depends upon strong support and people standing by them, even if they disagree with the courts' decisions. This country has had a rather good run in that regard. However, as we have seen overseas, without vigilance that support can erode.

Viet D. Dinh

Viet D. Dinh is Professor of Law and Codirector of the Asian Law and Policy Studies Program at Georgetown University Law Center.

I will end our discussion by returning to what Justice O'Connor started with, namely the essence of judicial independence and why it is so important in our constitutional structure. The definition of the rule of law in our country, that we are a government of laws and not of men, has often been repeated since *Marbury v. Madison*. Justice Marshall

The essence of the role of judicial review and the judiciary is to ensure that ours is a government of laws and not of men.

borrowed the definition from the Massachusetts Constitution. There's a much lengthier derivation from ancient times, but one can see that that is the essence of the role of judicial review and the judiciary: to ensure that ours is a government of laws and not of men. When one looks at the phrase, one sees immediately why we need to protect the independence of judges: So that they are not subject to the external pressures of men and women and the rest of our population. And so that our Constitution and the law are the ultimate safeguards of our liberty, not just the whims and passions of any particular movement or temporal majority – what Madison called tyranny of the majority. That's what the Constitution is there to protect.

However, one only needs to repeat the phrase again to see the corresponding danger with judicial independence. That is, we want our judges to be guardians of the law, but what if they act outside the law? Then we become a government of men again – not the popular, elected men, but rather the men and women who inhabit the judicial role. That's what complicates the discussion, a discussion we've had since the beginning of the Republic. Public criticism of judges has endured over many centuries, starting with the presidency of George Washington and coming to even this last Congress. Many painful examples in the last decade or so tend to suggest that ours is a new phenomenon of attacks on judges, yet one only has to look to a few pages of history to see that this phenomenon has a long vintage. And despite all that, we can be optimistic because, after all, our republic thrives and our judiciary survives. But our job to do today, and I hope enduringly, is to help our judges make sure that we are indeed a government of laws and not of men.

Since one sees the double edge of judicial independence, one cannot exclude public criticism of judges altogether. Rather, one wants to channel constructive criticism into improving the work of judges and thereby making more robust the form of independence that we want to protect – that is, independence from external factors, but faithfulness to the Constitution and the role of judges. Chief Justice William Howard Taft put it this way: "Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intellectual and intelligent scrutiny of their fellow men and to their candid criticism." The question, then, is how do we determine what is valid criticism and what are invalid threats to judicial independence? I'll explore this by asking three questions: How are judges criticized? Why are they criticized? And by whom are they criticized?

First, the how. I hope it is commonplace, or at least generally agreed, that verbal assaults, personal attacks, ad hominem invectives are out of bounds. We can criticize, but at the same time one has to recognize that simple but effective communication of valid criticism is constructive. Once you take out the

illegitimate forms of criticism – which, unfortunately, make up the majority of the criticism that we see today – the real issue then becomes the *why* of people's criticism of judges, not necessarily the *how*. I think that if we accomplish nothing more, if we eliminate from the public discourse those out-of-bounds forms of communication we have gone a long way. But the intellectual conversation continues.

What is a valid criticism? I think in this regard one has to consider for what exactly we are criticizing judges. Are we criticizing judges simply for being wrong in a particular case? Is that valid in a way that should begin a general public discourse? Think, for example, of Judge Baier's famous decision with respect to the Fourth Amendment search and seizure that was of such celebrated controversy a decade-and-a-half ago. I think that kind of criticism is not valid for the type of public discourse in which democracy should engage. That's exactly what the appellate process is for, in order to ensure that mistakes, if made and upon recognition that they were made, will be corrected in due course by the litigants and other judges, or in Judge Baier's case, by the judge himself once he recognizes the error in law.

The kind of criticism to which judges respond and the real, immediate threat to judicial independence comes not from the mass media or from the general population, but rather from political and legal elites because they know how to criticize judges where judges hurt.

What about if a decision is not only wrong with respect to a particular case, but so wrong that one would consider it to be out of jurisprudential bounds – that is, so wrong that it bespeaks an incorrect judicial framework? Even then I do not think it is valid to launch a public campaign on that type of error because that's exactly why the political checks on the judiciary are there – the nomination and confirmation processes and all of the other types of checks that are in our Constitution. One can indeed have a valid debate about the jurisprudential framework; mine happens to be that text, history, and structure should be the sole criteria for decisions related to judicial decision-making. Others – many of my colleagues in the academy – disagree with that, looking for more expansive sources of interpretation. That is a valid intellectual debate; that is not cause for personal attacks upon judges.

When, then, is criticism of the judiciary and judges valid? For what reasons? I think at some point judicial decision-making can be so far out of bounds (this is a rarity) that it calls into question the judge's fealty to his judicial oath – in essence that he has failed the judicial role and the exacting standards of judging. That kind of action, which threatens the structure of our government and undermines the limited role of the judge (so that we ensure that we are a government of laws, not of men), deserves criticism. When judges act outside of their role and respond not to their internal intellect and their fealty to the law, but rather to external pressures of whatever type – monetary, political, or even personal policy preferences – in those rare cases, criticism is not only valid, but is demanded of the political process and of an engaged democratic polity – which leads to the question of criticism by whom.

Unfortunately, many missteps come from criticism by the mass media and the general population. I think you can tell from Bert's representative ads that legal concepts, the question of the judicial role, and the jurisprudential framework of a judge are not concepts that are easily communicated through mass medium and through general, popular political activism. Rather, results are communicated, and the population simply focuses on what I consider to be illegitimate reasons for criticizing a judge or a decision – for example, simply because it is wrong or you disagree with the result. That type of mobilization carries with it a significant danger of thwarting the judicial role, not because judges would change their ways – I think judges, lawyers, and scholars recognize that those forms of criticism are illegitimate – but because over time, if repeated and if repeated effectively, those illegitimate forms of criticism erode public confidence in the judicial role and, more insidiously, affect the way judging works because it's no longer independent of the general political process.

More directly, however, the kind of criticism to which judges respond and the real, immediate threat to judicial independence comes not from the mass media or from the general population, but rather from political and legal elites because they know how to criticize judges where judges hurt. They know how to make arguments and couch them in terms of judicial activism, in terms of the lack of fealty to the judicial role, or in terms of failure to follow the Constitution. We elites (I do not mean that pejoratively) know how to criticize judges in ways that are designed to be effective, we hope, in forcing them to change their behavior. It is that type of criticism that brings the greatest danger to judicial independence, to the actual independence of the judges and how they decide cases, because it comes with that kind of elite criticism by scholars, lawyers, senators, and presidents and is an implicit threat that the judge may not be elevated to the next judicial position if they so desire, or in the extreme, may be censured or impeached. I think that type of elite criticism has a much greater effect on the everyday behavior of judges simply because it hits judges where they hurt most.

In our failure to activate these reforms lies the greatest danger, both in terms of actual threats to judicial independence and also residual threats to the legitimacy and respect that the judiciary rightly should hold in our constitutional Republic.

Sandra Day O'Connor

My perspective over the years on judicial elections is that, at the federal level, we have a process that works fairly well: the President nominates the federal judge, and the Senate gets to conduct what inquiry it wants to conduct. In the case of Supreme Court justices, it turns out to be quite a show. We see it on national television, and there are days of questions that go on. But that's an exceptional court and an exceptional situation. Most federal judges at the district-court level, and even at the appellate-court level, are not subjected to the same degree of questioning.

The judicial branch is a critically important branch, and we want to have all of our courts staffed by judges who are decent and honorable. The question is how are we going to get it.

I am more concerned with what is happening in the various states. As I told you at the outset, the framers of the Constitution met and tried to figure out a better form of government, and they did: I have to say I think we have been very blessed in this country with what they designed. They did not envision the election of judges; judges were appointed. And every one of the colonies, later the states, followed a similar pattern. They provided for appointment of judges at the state level with some kind of confirmation process in the legislature or other scheme as they devised it. It wasn't until President Andrew Jackson came on the scene that states began to move to a system of electing state judges. Jackson had some populist tendencies, I think, and he tried to spread them across the country.

We have learned through the years that perhaps there's a better way to select state-court judges, and that is to return to an appointive system, probably headed by the governor, who gets suggestions for nominations from a chosen committee. States that have turned to that kind of system have tended to set up a statewide commission, comprised of a number of citizens of that state and sometimes including lawyers (sometimes not), that receives applications from people who would like to be a judge. The commission reviews applications, interviews the applicants, considers carefully the qualifications, and then provides a list of people that the commission thinks are qualified for appointment should the governor choose to make an appointment. That's a pretty good system. Most systems like this involve setting up periodic elections, which ensure that judges at the state level all serve for a term of years. (No state provides for lifetime appointment of judges.) At the end of a term, many of the states that allow appointment of state judges then let the judges' names go on the ballot to give voters a chance to determine whether or not they want to retain a judge.

As a voter you need to have a little information about the judge, and some states have done something that I think is quite helpful, gathering information year in and year out in the courtrooms from all of the people who were in contact with the judge. Every juror, every litigant, every witness, every person in the courtroom is invited to fill out a form and leave it with the bailiff at the court, noting the things that the person wants to note about the judge. Was the judge polite? Courteous? Did the judge appear to know the law and communicate it well? Were there problems and, if so, what? These materials are collected over a period of time, and then at the time of a retention election an election office tabulates all of this. They also include evidence of disciplinary proceedings, if any, that might have been brought against the judge. This seems to work pretty well because the voters then have some basis on which to make a fair judgment. I think we'd be better served if more of our states would use a similar system.

I hope that the American Academy of Arts and Sciences will maintain some kind of interest in this issue, because it matters. The judicial branch is a critically important branch, and we want to have all of our courts staffed by judges who are decent and honorable. The question is how are we going to get it, and I thank you for listening and being part of finding the answer to that question. ■

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