Stephen Breyer

Serving America's best interests

A poll was conducted in 2001 that asked people whether they believed that judges decide cases impartially and according to law or whether they believe that judges do whatever they wish as soon as they put on a judicial robe.[1] When that poll was initially conducted, two-thirds of the respondents believed that judges decided cases impartially and one-third thought that judges simply decided cases according to their own preferences. When that same poll was conducted in 2005, however, close to half of the respondents indicated that judges' votes are driven by their personal predilections. This trend is alarming. The skeptical view of judging is not shared by the judges. We believe when we decide a case that we exercise not subjective preference but our judgment based on law. We try to find the correct legal answers to difficult legal questions.

A serious discrepancy between our own view of our own efforts and the view of a large segment of the public is cause for concern in a democracy. That is because the judicial system, in a sense, floats on a sea of public opinion. Do not misunderstand that statement. The Supreme Court does not reach an outcome in a particular case because doing so would be popular; nor does it shrink from issuing a decision that it suspects may prove unpopular, if that decision is what the law requires. I believe that it is impossible to be a conscientious judge with one eye on the *U.S. Reports* and the other eye on the latest Gallup poll. Nonetheless, the judiciary is, in at least some measure, dependent on the public's fundamental acceptance of its legitimacy. And when a large segment of the population believes that judges are not deciding cases according to the rule of law, much is at stake. As Chief Justice John Marshall warned, "The people have made the Constitution, and they can unmake it." And the society around us can undermine the judicial independence that is the rock upon which the judicial institution rests.

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For that reason, I think judges must do more than simply undertake our own jobs as best we can. We must also, in this day of speedy communication, try to explain or to teach why that institution and independence are important, not simply to the judges or to the lawyers, but to ordinary Americans whom ultimately our institution seeks to serve.

In my own view, independence is a state of mind. It reflects an indifference to improper pressure and a determination to decide each case according to the law. Ultimately, only the judge, not third parties, can understand his or her own thought processes. And perhaps, as my colleague Justice Kennedy once pointed out to a group of Russian judges, only other judges can fully understand the loneliness of a judge confronted with the task of independently deciding a truly difficult case.

Constitutional guarantees of tenure and compensation may well help secure judicial independence, but they can by no means assure it. Ultimately independence is a matter of custom, habit, and institutional expectation. To build those customs, habits, and expectations requires time and support – not only from the bench and bar but from the communities where the judges serve. Unfortunately, it may prove easier to dismantle that independence than to attain it. And that, as I have said, is why I think it is important that we explain, not just to lawyers or other judges, but to our fellow citizens, why that independence, which is so important to us as members of the legal community, should be important to them as well.

But how can we quickly and easily explain that concept and its necessity to an ordinary man, with his own concerns, often pressed for time, say as he makes his way into the Star Market at the end of a busy day? Our typical shopper might not be interested in an abstract explanation of a highly abstract concept. He might want to know just what that notion means, how it helps him or her, in daily life.

It would be easiest for me to begin to explain judicial independence by pointing to the negative, its very opposite. Here, I think of my visit to a convention of Russian judges in 1993 when I was a judge on the U.S. Court of Appeals for the First Circuit. This event occurred not long after Boris Yeltsin was elected president of Russia, and I remember him announcing to the assembled judges that he intended to institute a large judicial pay raise. Not surprisingly, the Russian judges greeted this announcement with enormous cheers. I also distinctly remember Yeltsin decrying the Russian practice of something that he referred to as "telephone justice." And, loud as the cheers for the pay raise were, the applause that greeted this announcement was absolutely deafening.

Telephone justice, I subsequently learned, occurred when the party boss called judges and told them how to decide the outcome of a particular case. And the assembled judges spoke about the practice very frankly. When the judges were asked why they would pay attention to the wishes of the party boss or even take his call, the judges explained that they needed apartments and that they wanted to put their kids in good schools. The Russian judges, in turn, asked me whether telephone justice exists in the United States. When I told them that we do not have such a practice, the Russian judges looked at me incredulously. What happens, the judges asked, when the politicians who helped you obtain your judgeship call in a favor regarding a pending case? Again, I told them that no such call would be placed.

It eventually became clear that they thought that I was merely being discreet in an effort to protect my supporters. And as I spoke further with the Russian judges, it became evident that, much as they disdained telephone justice, they had difficulty conceiving of a real-world legal system that operated without telephone justice. I hope, however, that eventually I convinced them that telephone justice plays no part in our legal system.

This example may help our Star Market shopper understand that telephone justice – the absence of independence – amounts to no kind of justice at all. But that shopper may still wonder what concrete benefits the presence of judicial independence confers. I might point out to our shopper that he still must pay for his groceries. And I could add that I once heard Alan Greenspan, former chairman of the Federal Reserve, speak about economic development in foreign countries. Chairman Greenspan said that if he could wave a magic wand and establish a single institution that is necessary for the growth of underdeveloped nations, he would create a judiciary that would decide contract cases in a manner that was neither corrupt nor dishonest. That is to say that he would create an impartial judiciary that possessed the independence to dispose of financial cases fairly and consistently. Without impartial judges deciding contract cases, Greenspan noted, citizens in developing nations will not make investments because those investments would be insecure and subject to the vagaries of an arbitrary judiciary. And without investment, of course, there can be no economic prosperity. It is perfectly reasonable to see a connection between judicial independence in America and the enormous array of goods spread out before us in the store as well as the unprecedented financial security that permits Americans to buy them.

But much more than our wallets are at stake. Alexander Hamilton argued that the Constitution itself would work only if there were some fundamental protections for this fragile entity that we call judicial independence: "The independence of the judges, once destroyed, the constitution is gone; it is a dead letter, it is a vapor which the breath of faction in a moment may dissipate." Indeed, Hamilton, who fought for this nation when it won its independence from Britain, placed judicial independence at the very top of the list of reasons that provoked him to take up arms. "There is no motive which induced me to put my life at hazard through our revolutionary war, that would not now as powerfully operate on me, to put it again in jeopardy in defense of the independence of the judiciary," Hamilton said. "[I]f the laws are not suffered to control the passions of individuals, through the organs of an extended, firm and independent judiciary, the bayonet must."

Hamilton knew that our Constitution establishes a democracy, but it does not establish a pure democracy. Rather, it establishes a democracy of a certain kind. It divides power, vertically between states and the federal government and horizontally among three federal branches so that no individuals or single branch of government can amass too much power. It understands that the majority can oppress the minority. And it offers protection to minorities in the form of guarantees of fundamental rights. The concept of a minority is not limited to racial minorities. Indeed, during the course of our lifetimes, we are all minorities in one respect or another. Our shopper will understand that. He will understand that our Constitution

guarantees a fair trial even to the most unpopular individual in the United States. And he will also understand that, without an independent judiciary, such basic constitutional protections for the minority can become merely empty rhetoric.

Finally, I might tell my new friend about three Supreme Court cases that, taken together, encapsulate this nation's lengthy and hard-fought struggle for judicial independence and the rule of law. The first case, *Worcester v. Georgia*, involved a dispute over land in northern Georgia that arose during the 1830s. White Georgians found gold on land that was owned by Cherokee Indians and the Georgians attempted to appropriate that land. The Cherokees sought to retain the land and filed a lawsuit asserting their ownership. Eventually, after the case made its way to the Supreme Court, Chief Justice John Marshall wrote an opinion for the Court that validated the Cherokees' ownership claim. President Andrew Jackson received word of the decision and dispatched federal troops to Georgia, not to enforce the Court's order, but to evict the Indians. As a result of their eviction, the Cherokees were forced to march along what is known as the Trail of Tears because so many of them died as they made their way from Georgia to Oklahoma. This case is familiar to many because it supposedly spurred Jackson to say: "John Marshall has made his decision; now let him enforce it." In the early nineteenth century, then, it seems fair to conclude that an independent judiciary was on occasion more an aspiration than a reality.

Slightly more than 120 years after *Worcester*, the Court handed down a second case, *Cooper v. Aaron*, that offers insight into the nation's evolving acceptance of judicial independence. In response to the Court's decision in *Brown v. Board of Education*, Arkansas Governor Orval Faubus vowed that the schools in his state would never be integrated. Faubus flouted desegregation orders and instead deployed the Arkansas state militia to Little Rock's Central High School to fulfill his pledge to Jim Crow. In *Cooper v. Aaron*, however, all nine justices of the Supreme Court signed an opinion reaffirming the impermissibility of segregated public schools. While it is certainly admirable that all nine justices signed the opinion, nine thousand judges could have signed the opinion and they still would have been powerless to integrate Little Rock's schools in the face of the state militia. As in *Worcester*, then, the ability of the Court to render unpopular decisions was again implicated. And, once again, the president dispatched federal troops to address the situation. This time, however, President Dwight Eisenhower sent in paratroopers not to subvert the rule of law, but to enforce it. I can distinctly remember seeing images of those paratroopers taking those black children by the hand and walking them through that white schoolhouse door. That moment represented a tremendous victory for integration and equality. But it also represented a tremendous (and far from inevitable) victory for the rule of law in America. That President Eisenhower dispatched the troops even though his feelings about *Brown* were ambivalent only heightens the extent to which sentiments about the judiciary's independence had changed since the days of President Jackson.

The third and final case that completes the nation's journey toward judicial independence is any recent highly controversial case you choose. Take, for example, *Bush v. Gore*. That case, as many of you know, inspired rather strong feelings

from those who disagreed with the majority's reasoning. It is no secret that I disagreed with the majority's reasoning, given that I wrote a long dissent in that case. But while many people disagreed with the Court's decision, I have yet to read about the need for sending in the paratroopers either to enforce or oppose the decision. Indeed, *Bush v. Gore*'s mandate was followed without paratroopers being dispatched, without bullets being fired, without rocks being hurled, and even without punches being thrown. To be sure, people were angry with the decision and they continue to disagree with it. But they have also agreed to follow the decision because that is what occurs in countries that have judicial independence and are ruled according to law.

Reflect for a moment upon how long it has taken for our nation to learn the importance of the rule of law. Think of our ups and downs. Think of slavery. Think of a civil war. Think of eighty years of segregation. Out of those trying experiences and the many others that this nation has endured, we have emerged with at least one substantial attainment: while we may not agree with the outcome of a particular case, we will follow the rule of law. And it is this fundamental belief that binds together our nation of over three hundred million people. Without the independence of thought and spirit that judges exhibit daily in their work in courtrooms throughout the United States, the public would not, for it should not, respect their decisions, and we Americans would lose that hard-won rule of law.

So, judicial independence is a part of my life. It is a part of your life. And, most important, it is a part of the life of our friend, the shopper, whom I detained for ten minutes on his way to the grocery store. Judicial independence does have a profound impact on that shopper's life. It may improve his life materially. It certainly offers protection when he is in the minority. It offers meaningful protection for the fundamental political rights that every American enjoys. And it offers to that shopper, along with the rest of us, the best hope for continued respect for and obedience to law, even when we disagree about the merits of a particular decision.

In a word, judicial independence is an essential component of a rule of law, one that is necessary to tie together our nation of over three hundred million people of every race, every religion, and every viewpoint imaginable. That independence is a national treasure. Other generations created it; we benefit from their work. As long as judges can both meet the demands of independence in our own work and help to teach its value to others, I am confident that our generation shall maintain the independence so necessary for us in our work and for Americans who need independent judicial institutions.