

# Judicial Independence and the Rule of Law

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The rule of law provides two basic protections against arbitrary or discriminatory government action. It provides that the rule applied to a particular case must be reasonably predictable. And it provides that the rule must be predictable without regard for the identity of the parties. We know the importance that the rule of law has for our society, our democracy, and the kind of civilization we want, but we rarely take the time to think about what the components of the rule of law are and how we assure that the rule of law continues. Why has this country been successful—much more successful than most societies—in preserving the rule of law? How can we continue to be successful? How can we lead societies emerging into the democratic arena to adopt the rule of law and then protect and preserve it?

America, of course, did not invent the rule of law. The rule of law as a principle, philosophical and otherwise, has been in existence for centuries. Philosophers and legal scholars have talked about it, written about it, and attempted to implement it. But the American democratic experiment made two important contributions to the rule of law: one was the principle of judicial supremacy and the other was the principle of judicial independence.

## I. THE RULE OF LAW, JUDICIAL SUPREMACY, AND JUDICIAL INDEPENDENCE

More than two hundred years ago, when our democracy began, the principles of judicial supremacy and judicial independence were not intuitively obvious. No other society in existence at that time had them.

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The principle of judicial independence at the federal level was written into the Constitution when it was decided that we would appoint, rather than elect, our federal judges,<sup>1</sup> and give them lifetime tenure to remove them from the political process.<sup>2</sup> Shortly thereafter the Supreme Court, particularly in Chief Justice Marshall's decisions (namely *Marbury v. Madison*<sup>3</sup>), articulated the principle of judicial supremacy. The Supreme Court held that the interpretation of constitutional provisions was the province of judges.

Judicial independence and judicial supremacy work together in an attempt to guarantee that the rule of law will not be eroded by the political pressures in existence at any particular point in time. By removing the ultimate interpretation of constitutional provisions from elected officials, the principle of judicial supremacy reduces the likelihood that basic legal protections will fall victim to the passions of the moment. Insulating judges from political influence advances the same objective. Of course, neither the principle of judicial supremacy nor the principle of judicial independence guarantees the rule of law, as the cases of *Scott v. Sandford*<sup>4</sup> and *Korematsu v. United States*<sup>5</sup> remind us. Nevertheless, they are important underpinnings to the rule of law which we cannot afford to take for granted.

The principle of judicial independence is particularly under attack today. We all remember the Terri Schiavo case, and we all remember the criticism and the attacks that were directed at the probate judge in Florida who, quite contrary to his personal beliefs, decided the case the way he believed Florida law required him to decide it. This decision was affirmed by a series of appellate courts, both in the state and federal judicial system. For making that decision the judge was subjected to an unceasing series of personal attacks by legislators in the state of Florida and in the Congress of the United States. Rather than try to change the law, which they had the power to do, these legislators attacked the judge for interpreting the law according to the

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1. U.S. CONST. art. II, § 2, cl. 2.

2. *Id.* art. III, § 3, cl. 2.

3. 5 U.S. (1 Cranch) 137 (1803).

4. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1857).

5. 323 U.S. 214 (1944).

way it was written. This kind of attack undercuts more than the reputation of an individual judge; this kind of attack undercuts the premise of our judicial system: judicial independence and respect for the judiciary.

Ted Olson, who is a wonderful friend and a great lawyer, was among a number of the people from his party who were fighting these attacks on the judiciary during the Terri Schiavo case. He was very forthright in standing up for the principle of judicial independence and deserves a lot of credit for that. The same was true for the former solicitor general, Ken Starr, who joined me on a number of occasions in trying to prevent these attacks and in trying to counter them. This is not a republican or democratic issue. It is not a partisan issue. It is an issue of judicial independence which is important to all citizens, and particularly to all lawyers. Our profession has both an interest and an obligation to stand up for the principle of judicial independence when these kinds of attacks are made on judges and the judicial system, especially because judges, by virtue of the constraints on their conduct and comments, are in an extremely poor position to defend themselves.

The average person on the street often does not understand about the importance of judicial independence to the preservation of the rule of law. It is up to the legal profession, teachers and practicing lawyers to try to fill that gap, and to support and explain the role and significance of a judiciary independent from partisan pressure. Neither an individual judge nor judges generally can defend the principle of judicial independence—particularly when it is both the most difficult and the most important to do so, which is in the middle of a controversial issue. We, as lawyers, also tend to shy away from being involved in controversial, political issues. We are much more at home arguing our cases in the courtrooms. But this is an issue that we know is fundamental to the preservation of the legal system that has given us, and our society, so much. Unless we are prepared to defend the principle of judicial independence when it is under attack, even in the most controversial circumstances, that principle of judicial independence will not be available when we most need it.

Think about the developments in this country, in civil rights and in other human rights, which have been accomplished over the last half-century. Try to imagine how those could have occurred on

anything like the timetable on which they did occur without an independent judiciary emboldened with the power to enforce dormant constitutional rights. Think, for example, how long it would have taken to articulate and enforce the principles of *Brown v. Board of Education*<sup>6</sup> if we had waited for state or federal legislators to pass legislation supporting equal rights for African Americans. It was the principal of judicial supremacy that empowered the courts to declare the meaning and scope of the constitutional guarantee of equal protection,<sup>7</sup> and it was the principle of judicial independence that protected the courts enough to allow the effective exercise of those powers. This was not accomplished easily. Some people, who are as old as I am, remember the round-the-clock guards that various judges in the Deep South required as a result of their enforcement of the Supreme Court's mandate. That was an attack on judicial independence. It was an attack that was met at that time by the executive branch, legislators, and the organized Bar; and as a result we were able to move this country in a most remarkable way.

However, there is still much to be done to eliminate the vestiges of discrimination. Those of us who have watched this country change over the last half-century recognize the importance of the judiciary in accomplishing that change, and the essential contribution of judicial independence and judicial supremacy in making that change possible.

As I mentioned earlier, reliance on judicial supremacy and independence to foster the rule of law was not necessarily inevitable at the time of the early development of our constitutional principles. An alternative to judicial supremacy could have been to leave interpretation to the legislature. A compromise approach was to say that the courts should enforce those principles that guaranteed a democratically elected legislature but that once you had guaranteed these principles a democratic legislature ought to make the determinations of the reach and interpretation of substantive constitutional protections. In a democratic society the compromise approach has some power, some force, and some persuasiveness. If you have a democratically elected legislature why is it not better to

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6. 347 U.S. 483 (1954).

7. U.S. CONST. amend. XIV, § 1.

permit these representatives, whom the people have chosen, to interpret the Constitution rather than unelected judges?

I suggest to you that, based on two centuries of experience, the decision two hundred years ago not to divide the power of final constitutional interpretation between the judiciary and elected officials was the right decision, and that it was the right decision for two reasons. First, it is very hard to draw the line between what is necessary to secure a democratically elected legislature and what issues involve other constitutional concerns. One reason that it is hard to find the exact line is that so many of the decisions concerning human and civil rights center on the effectiveness of participation in our democracy. For example, throughout the period of de jure segregation all people of all races were theoretically entitled to participate at the polls. The problem was that the other aspects of discrimination in society made it impossible for African Americans to actually exercise the theoretical franchise that they had. You could look at a case like *Brown*<sup>8</sup> and say that it is not part of guaranteeing a democratic political process; it does not go to the right to vote; it does not go to accessing voting lists; it does not go to who can run as a candidate; and so you ought to allow that issue to be decided by legislators and not by the courts. The point that is missing is that if you do not have equal educational opportunities and equal, related rights (whatever your theoretical access to democratic procedures, access to voting, access to running for office) your access to the democratic political process is unlikely to be effective. That was, in fact, the case during the period of segregation. As such, the first reason I think it was right for Judge Marshall and the early Supreme Court not to fragment the principle of judicial supremacy is because it is very difficult, in practice, to distinguish between those cases that are required for the preservation of democratic institutions and those that are not.

The second reason why I believe the decision not to divide the power of final constitutional interpretation between the judiciary and elected officials was correct is that we, as a society, believe that part of the rule of law is not only majority rule but also the preservation of

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8. *Brown*, 347 U.S. 483.

certain minority rights. Even if you have a democratically elected legislature which makes a decision there is concern if that decision infringes on the rights of a minority so that it offends basic constitutional guarantees. This is something that ought to be protected against—regardless of the democratic will at any point in time. This, in turn, requires independence from the political process. Legislators cannot do this because if they do not abide by the will of the people they will be replaced by legislators who will.

The ability of judges to interpret the law free from the political pressures of the moment is dependent on the interpretation of the role that they bring to the bench, the extent to which (and the time schedule on which) they can be replaced, and the nature of the attacks that follow unpopular decisions. The genius of the American judicial system's implementation of the rule of law is that it has coupled the principle of judicial supremacy with the principle of judicial independence; the latter enables judges to fulfill the function that the former gives them.

## II. THE INFLUENCE ON THE RULE OF LAW BY JUDGES AND JURORS

Public hostility to the principle of judicial supremacy and independence in the face of unpopular decisions is not the only obstacle to the rule of law. Perhaps the two greatest potential obstacles to the rule of law in the United States are judges and jurors. Even with all of the best constitutional protections of judicial independence and judicial supremacy we will not fulfill the promise of the rule of law if judges and juries do not do their job.

Remember, the rule of law has two components. One is that the result in a particular situation should be reasonably predictable. You should know what the rule of law is and you should know it in advance. The second principle is that the result should be predictable independent of the identity of the parties.

In the Deep South in the 1930s and 1940s it was reasonably predictable that in a lawsuit between a Caucasian and an African American, the Caucasian was going to win. That did not make it consistent with the rule of law. The result was predictable, but it was not predictable independent of the identity of the parties. Even today, in some jurisdictions, the identity of the party is very important to

juries; sometimes it is even important to judges. One of the struggles that we have in making the rule of law a real, practical protection instead of a theoretical protection is to try to make the judges and the juries as consistent as possible in the way that they approach the resolution of legal disputes.

As far as judges are concerned improving quality and consistency is directly related to how we entice and retain the best judges, particularly on the state courts. We need to do more to recruit and retain the best judges for the federal bench as well. Because of the prestige of the federal bench we have been surprisingly successful in getting lawyers to leave much easier, and more lucrative, positions to accept the burden of judging, and to continue in that position despite many other alternatives. This is much harder to do in state courts where the demand for judges is much larger and often there is less prestige and even less money. One of the things that we as a society must do if we believe in the rule of law, and if we believe in judicial independence, is to be prepared to pay the money necessary to recruit and retain the best people available for the judiciary. If you think about the costs of injustice in the system, if you think about the extent to which the vagaries of the American justice system continue to plague individuals and corporations in this country, I think that you can see that it would be a relatively small and very worthwhile investment to invest more money into getting and keeping the very best people in the judiciary. Judging has historically been, and ought to be in the future, the highest aspiration of every lawyer. In order to assure this we have to preserve the prestige of judging; we have to preserve the ability of people to take these jobs while not suffering economically.

It is also important that we demand the highest level of integrity from those persons to whom we entrust the awesome power of judging—and that the Bar and public, as well as appellate courts and legislatures, enforce that demand. Just as it is important for lawyers to defend judicial independence in the face of a public uproar over an unpopular decision, it is equally important to speak out when judges, either through bias, incompetence, cronyism, or, in rare cases, outright corruption, abuse their power and position. The vast majority of judges, state and federal, are honest, qualified, and dedicated

public servants. However, those that are not damage our justice system, and the public's faith in it, disproportionately.

Lawyers are disinclined to criticize judges, even in the worst cases. In part, this has to do with the natural, and desirable, respect that we are trained and inclined to give judges. In part, this is due to the fact that one side may be happy with the result, however obtained, and the other side may not want to appear a sore loser. In part, this is due to the fact that if we plan to continue to practice law we have to take into account that it is likely that not only the judge criticized but other judges as well will usually take umbrage at the suggestion that one of them lacks integrity or competence. Too many judges appear to believe that recognizing the faults of any one of them damages the judiciary generally. I suggest it is the opposite.

The other obstacle to the rule of law is juries. Suppose you had a difficult question involving complicated economic and technological issues that you wanted help in deciding. And you came to me and I told you that the way we were going to decide it was this:

We are going to go out in the street. We are going to pick twelve people at random who do not know anything about your subject. Indeed, if we find somebody who knows something about your subject we are going to tell them to get lost. We are then going to put them in a room and we are going to tell them that they cannot look anything up in books, they cannot use the Internet, they cannot talk to friends, and they cannot do any investigation at all to help them find an answer to your question. These people are going to go into another room where they are going to listen to people ask and answer questions. Neither the people asking nor the people answering the questions are picked by the deciders and there is no requirement that either the asker or the answerers be neutral. And the deciders are not going to be able to ask any questions themselves. If they are unclear about something they must wait until somebody happens to clear it up or remain confused. Moreover, the parties cannot give them anything in writing that explains their position.

I suggest to you that if somebody told you this you would say, "I'm going to find a different way."



We have a jury system in this country for many great reasons. Jurors are actually extremely good at doing some things, and one of them is figuring out who is, and who is not, telling the truth. The real problem in our cases is that often they do not come down to such a simple question. Not only do we have conflicting witnesses, we have very complicated issues and it is not merely a question of trying to decide who is lying and who is not lying. And juries need help.

I am not an advocate of eliminating the jury system, although we are about the only country in the world that uses the jury system today for complicated civil cases, though such use has been decreasing in areas like patent law. What I *am* an advocate of is trying to make the jury system better by giving the jurors more of the tools that we can provide to facilitate their arrival at the right result in complicated cases.

One of the tools that most judges already allow is to permit jurors to take notes, particularly in a long case. Another option that a few judges, but not very many, allow is to permit jurors to actually ask questions during the case: they can give a question to the judge by passing him a note. If he concludes that it is a relevant question, he will then pose it to counsel or the witness in order to clear up some of the jurors' misunderstanding. (No judge that I know of allows a juror to jump up, raise their hand, and say, "I want to know something from a witness," that could be pretty disruptive.) In the few cases in which I have been involved where such note-passing has been permitted it has been a great help because it allows the attorney to find out and address what is at the heart of the jurors' concern instead of sitting there trying to figure out what a juror is thinking, and usually doing a terrible job of figuring it out.

One of the very first cases I had as a young lawyer was an antitrust case in which I was representing the defendant. It was about a three-month trial and there was one juror, an older woman, who fit the profile of a good defense juror: educated, owned stock, and participated in mutual funds (hopefully a mutual fund that owned our client's stock, we thought). She seemed like she would be a great juror on paper and, sure enough, throughout the trial she would nod at us and smile when we were making points. After the case was over and we won, though with a directed verdict from the judge (so the case never got to the jury), we interviewed the jurors. This particular

woman was absent from the interviews and we asked the other jurors, “Well, were we right, did she really like us? Was she really on our side?” They said, “Oh, Mrs. X, she was senile. Nobody paid any attention to her. She didn’t have a clue what was going on.” We all recognized that we cannot figure out what jurors are thinking about and, if we can find a way to get the jurors to communicate with us in an organized way, we will do a better job of addressing their issues and get more consistent justice. If we get more consistent justice we will have a more practical application of the rule of law.

Another thing that a few judges do to assist juries in their decision-making process is to allow interim statements by lawyers to the jury. Generally, lawyers only speak directly to the jury twice: in the opening statement and in closing arguments. In a three- or four-month trial those statements can get lost. Certainly the opening statements can get lost, particularly if you represent a defendant when a plaintiff goes on for six or eight weeks. If you have the ability to make interim statements you can try to keep the jury focused on the points you want to make. You can respond to points that are made. You can try to put things in perspective.

Many dramatic things happen in trials, and those dramatic events are great fun for the lawyers. Occasionally they even provide some amusement for the judge. Put in proper context this can often play an important role in revealing bias, inconsistencies, or even a lack of candor. However, without the proper context, they can be potentially disruptive to the rule of law because they are something that potentially focuses the jury, and sometimes the judge, on an issue that is very dramatic but actually peripheral to the central issues in the case.

In the Microsoft antitrust case I represented the Department of Justice and we had two things to prove. First, we had to prove that the defendant had monopoly power. Second, we had to prove that the defendant acted in an anti-competitive way. We had to do both. Merely having monopoly power is not an antitrust violation. In the Microsoft case each side had an expert witness and we each had one of the best economic experts in the country. I had picked one, they had picked one, and we had both picked the one that the other would have had if we were making a second choice. These were very, very experienced expert witnesses—first-rate economists who had gotten

numerous awards and were very articulate, persuasive presenters. When Microsoft's case began we made some points, as plaintiffs typically do, and the defense wanted to, I believe, reverse the momentum. So they took a bold step that many lawyers would not have taken: they put their economist, their only economist, on the witness stand first. Economists are very important in an antitrust case because so much of the case depends on how you interpret the principles of economics and the economic data. If they were successful with their economist they could really change the momentum of the case. If they were unsuccessful with their first witness they would be in a deep hole because they would not have an economist to bat clean-up, which is often the way economists are used in such cases. When the time came for me to cross examine Microsoft's economist I knew that I needed to make some substantial points and try to damage the aura of credibility that he had quite successfully built up because of his background, experience, and qualifications.

One of the subjects I addressed with him was the extent to which profits were an indication of monopoly power. Microsoft had very high profits and if I could get him to admit a connection it would be an important piece of evidence. He responded that profits were irrelevant to the issue of monopoly power. I then asked him a question that might have alerted him, but did not, as to whether he had ever thought that profits were relevant to the issue of monopoly power. Again, he said no. He had previously pointed out that my own expert did not think that there was a significant relationship between profits and monopoly power—which was true and why I had not asked my expert that question when I was examining him. I then showed the defense's expert a copy of a Harvard Law Review article written by him in which he said that one of the three indications of monopoly power was persistently high profits. I handed him the article and he looked at it, looked back up at me, looked back at the article, looked back up at me, and finally shook his head and said, "What could I have been thinking of?" And that was just the reaction of the courtroom. For the rest of the trial he was known as the What Could I Have Been Thinking of Expert. Now that was a mistake. It was a mistake in preparation. It was an unacceptable mistake because, while you can miss some things that experts have written

because everybody writes so much nowadays, it is hard to miss something in the Harvard Law Review. I did not go to Harvard but it still prints a well-recognized law review and it is one of the places you look. It was great for me and my client but it was not necessarily the kind of thing that ought to itself decide the merits of the case. It was proper examination. It was important examination. It went to credibility, and credibility is important. But the advantage of having the ability to get up and talk about what has just happened and try to explain the significance from each side's perspective allows the jury to stop and think it and to see beyond the dramatic, interesting event to what they are really after: the truth.

Since the Microsoft case was a bench trial each side had the opportunity to argue the significance (or insignificance) of evidence as we went along. Similar opportunities in a jury case could help jurors put courtroom occurrences in context while understanding the importance of what they are hearing.

Another example of the benefits of having the ability to place things into context in a trial from the Microsoft case occurred when Microsoft called their second witness. He was a good witness for them, and an unbelievably tough witness to cross examine. His name was Paul Maritz. The third witness they put on was initially even better. He was one of their top executives, a very highly skilled technologist and he came with a killer videotape. We were saying that Microsoft had violated the antitrust laws by combining the operating system which they already had a monopoly on with a browser in order to lock out other competitive browser companies. His videotape showed two things. It showed that by combining the operating system with the browser you were able to accomplish great new things for consumers. He also showed that if you tried to add somebody else's browser to it the system deteriorated, slowing down.

When my turn came to cross examine him I did a pretty good job of demolishing the first of those points because I was able to show that you could get every one of the nice things that he talked about by using a stand-alone operating system and a stand-alone browser, thereby allowing the consumer to choose which browser to put on their computer. Exactly the same results were achieved so you did not have to tie them together.

However, I did not know what to do with his second point. We could not figure out how he had accomplished this result. We had experts of our own attempt it; they had not been able to succeed. One thought that occurred to me was to get up and say, "Now you didn't really do this did you, because I tried and I couldn't," but I thought that probably would not work. He would probably say, "I did it because I know how to do this; you don't, Mr. Boies."

So I did what you do sometimes: I decided not to cross examine him on that point. I thought we had made a fair amount of progress with his first point and that his credibility had been damaged because he had made it appear to the judge that you needed to link these things together to get the benefits and we demonstrated that was not true. So I made the decision to drop the cross examination and, if Microsoft had not done any redirect, the poor son-of-a-bitch would have been free to go home. Microsoft, however, elected to do a redirect that lasted more than an hour, which meant we broke for the evening. They also elected to hold a press conference and tell reporters that I had been afraid to cross examine the witness about this critical point and that tomorrow they were going to go back and show the judge just how important that was. Now after hearing that, we worked all night. I did not work all night, but people worked all night trying to figure it out. But when I left for court the following morning we still did not have an answer. Fortunately, by the morning break these people had enough information to allow me to do a cross examination.

In the courtroom we had a huge screen on which we played depositions and showed documents. We took the witness's videotape and I played the relevant portion, which was only four and one-half minutes long in its entirety, so the judge would have the situation in context. The witness had testified that this was a single computer and that nothing had happened to it. All they had done was switch the browsers. No programs had changed. No programs had been added. It was just the computer and the programs that consumers received straight out of the box. I then played the tape for about forty-five seconds and I froze it. In the upper left-hand column of a computer screen icons are listed which represent programs, and I could not tell then and I cannot tell now, what those icons meant. But I could count, at least up to five, and in the second column there were three icons

and I pointed this out to the witness and he said, “Yes, there are three icons.” And the judge is sort of looking at me, like he was thinking “Yeah, and what is the point of that?” I then played the tape for another thirty or forty seconds and froze it, directing the witness’s attention to that same column. Now there were only two icons there. I asked the witness to explain how that could happen and he did not have an explanation because he agreed with me that programs cannot just disappear in the middle of a running computer. I then played the tape for another forty-five seconds and froze it again. At this point every eye in the courtroom goes up to that column and the third icon has reappeared. The courtroom was completely silent and in that silence we could hear one of the lawyers at the Microsoft table whisper, “Oh, shit.”

What they ultimately admitted was that this was not one computer running; it was actually a series of tapes that had been spliced together to accomplish this impression. Now, again, that is one of those dramatic moments that we all love in a courtroom, and I think it did say something important about credibility. It is also, however, the kind of thing that, with a jury, could arguably be blown out of proportion and overwhelm some of the other evidence. Either way it is the kind of testimony that you would want the ability to get up and try to explain, to argue the significance or insignificance of it. And I suggest that, if you are interested in the justice system, allowing this period of explanation is something that can be advantageous to the judicial process.

#### CONCLUSION

We do have juries. We are going to have juries for a long time. We need to try to figure out ways not to just criticize the jury system, not to debate whether you should have juries or not, but to determine how we make the jury system better. Like judicial supremacy, like judicial independence, like the quality of judging, the capability of jurors to deal with these kinds of complex issues is critical to the rule of law and the rule of law is critical to all of us.