The Promise of Neutrality

Reflections on Judicial Independence

By Hon. Margaret H. Marshall

There is law, and then there is justice. As a leader in South Africa's anti-apartheid student movement in the 1960s, I was acutely aware of how an oppressive government could draw the distinction. In the South Africa of my youth, law was whatever the apartheid-driven Parliament declared it to be. And the role of the South African judges was to enforce Parliament's will. Were black South Africans confined by statute to shanty towns? So be it. Did Parliament declare advocacy of social justice treasonous? Case closed. The principle of parliamentary supremacy tied judges' hands. If we define justice as equal treatment under laws that are fairly administered, and if we define justice as effectively checking attempts by the politically powerful to arbitrarily impose their will on the politically weak, then the South African government of my youth was a perversion of justice.

Those who grow up in the United States—with its vibrant constitutional democracy—may take for granted the concept of a just government. But as one who has had personal experience of the random, often brutal abuse of official power, I never can. Constitutional democracy is an American invention—and our greatest gift to human progress. It is the structure of government in which a foundational, written charter apportions public power, guarantees fundamental rights, and entrusts the ultimate protection of those rights to an impartial judiciary.

In thinking about our structure of government today, we would do well to recall how our government came to be, and why it came to be. The Massachusetts Constitution of 1780, in which the principle of constitutional democracy first gained institutional and practical form, begins with a ringing promise: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their Lives and Liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness." Grand words in theory,

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but would they serve their purpose on the ground? John Adams, the drafter of this constitution, secured the answer. To the bifurcated government of the British model, he added a third, equal-standing department: the judiciary. Judges, long regarded as subordinate to the will of the powerful, would now be "subservient to none," in the words of the Massachusetts Constitution, except to the rule of law. Judges might now restrain the hands of the legislative and executive branches when government action threatened guaranteed rights.

Threats to American Judicial Independence

Constitutional democracy so defined is the foundation of our collective and individual security and prosperity. From Canada to India to Lithuania and beyond, it has become the gold standard of government of those seeking to secure basic individual freedoms and property rights. Yet as it gains ground abroad, constitutional democracy is under threat here at home. The threats are multiple, they are homegrown, and they manifest most dangerously in our state courts.

Fully 95 percent of our nation's litigation takes place in state courts. Commercial contracts, property disputes, grandparent visitation rights, insurance regulation, environmental law, consumer fraud, the right to assisted death, employment disputes, and numerous other matters are adjudicated in state courts, and state court decisions have an enormous impact on our daily lives and on the development of the law. Even a sizeable portion of each year's U.S. Supreme Court docket originates in state courts.

In the past twenty to thirty years, state courts increasingly have been called on to decide controversial issues. Often these cases spark controversy over hot-button topics like marriage equality and school funding. This phenomenon has highlighted the importance of state courts and made them the lightning rod for corrosive, partisan attacks that, combined and unchecked, are undermining the source of our freedoms.

Three developments in particular bode ill for the principles of judicial neutrality. First, unhappy with court decisions, politicians are increasingly attacking the very principles of judicial neutrality. Invoking the meaningless catchphrase "judicial activism," they propose and enact a variety of measures, such as removing certain types of disputes from the jurisdiction of the courts. Second is the recent influx of enormous amounts of special interest money into judicial contests. Millions of dollars are now funneled into attack ads on judicial candidates by groups whose unvarnished intent is

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to "buy" a certain ideological notion of justice. Finally, the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), fanned the flames of judicial politicization by loosening the ethical restrictions on what judicial candidates may say in pursuit of office. The decision blurred the line between judicial accountability and political accountability. (Indeed, the Supreme Court granted certiorari on November 18, 2008, in *Caperton* v. *A.T. Massey Coal Co.*, 2008 WL 918444 (W. Va. Apr. 3, 2008), which examines the refusal of an elected state supreme court justice to recuse himself from a case involving his largest campaign contributor.) It is now no longer uncommon to find a judicial candidate in a hotly contested state race loudly signaling a predisposition to rule a certain way on certain cases.

Thirty-nine states employ some type of judicial election scheme to choose judges, and surely the electoral process itself, a unique feature of American constitutional democracy, can exacerbate all of the issues I have identified. In my view, however, the pressures to politicize the judiciary are most severe in those states that employ a retention system, whether elective or appointive. Whenever sitting judges face some form of reconfirmation or reaffirmation, they inevitably are evaluated on their "record." In the now hostile environment, every judicial decision can be turned into a message of allegiance to—or failure to align with—partisan constituents, much like a legislator's voting record. Judges who have rendered decisions that run counter to an interest group's agenda are tarred as "procriminal," "antibusiness," or the like. Fair and neutral judges, knowing that each written opinion may be scrutinized as statement of political partisanship by interest groups, may feel tremendous pressure to look over their shoulders, to abandon the principles of judicial neutrality, when deciding cases. Judges themselves tell us so. They are acutely aware, in the words of one, that "[i]f you don't dance with them that brung you, you may not be there for the next dance." Not surprisingly, public opinion polls also suggest a growing general cynicism about our courts, with a widespread perception that justice is for sale.

Criticism is vital to the growth of our courts. Judges and judicial systems must be held accountable for their actions. But judicial accountability and political accountability could not be more different. "Cases" are not "issues." Judicial decisions are not policy statements. We expect, we rely on, our elected representatives to promise specific action to accomplish specific results that will lead the community in a specific direction. But we expect judges to adjudicate, not advocate. Implicit in our constitutional compact is the guarantee that judges will give us a fair hearing; that they will treat each litigant who comes before them nonpreferentially; that they will weigh all the evidence presented in court, and only the evidence presented in court; that they will not look outside the courtroom to find their sense of justice.

Responding to Negative Pressures

Many organizations are acting forcefully to halt the encroaching politicization of state judiciaries. In 2003, the American Bar Association's Commission on the 21st Century Judiciary issued a report, *Justice in Jeopardy*, calling for state judges to be appointed by the governor from a group of qualified applicants, or elected by the people, for a single lengthy term. For states that keep retention systems, the commission urged nonpartisan reappointment criteria. I was honored to be a member of the commission and fully support its recommendations. The Conference of Chief Justices, of which I am president, has called for promoting a culture of judicial elections that protects the reality and appearance of judicial fairness and neutrality.

State courts themselves are securing judicial independence by improving accountability and transparency in the administration of justice. In Massachusetts, New Jersey, Utah, and elsewhere, state courts have instituted reorganizations and objective performance standards, including judicial evaluations, to improve judicial performance and judicial accountability. In Massachusetts, for example, each trial court judge who has been sitting since May 2001, the date judicial performance evaluations began, has been formally evaluated at least twice by more than one hundred court constituents, including attorneys, court employees, and jurors. In addition, an Access and Fairness Survey first implemented in 2008 asks Massachusetts court users about their experiences in accessing the courthouses and conducting business in them. Such measures provide us with real-time, on-the-ground information that allows us to speed the delivery of justice and to enhance the public's faith in its courts. As part of our commitment to excellence, and a spur to further innovation, we publish hard data about court performance on our website, for all to see. Transparency is a necessary component of judicial accountability, and both are components of judicial independence.

"The law makes a promise: neutrality. If the promise gets broken, the law as we know it ceases to exist." These words of Supreme Court Justice Anthony Kennedy remind us that judicial independence is not a free-floating principle. It is the vessel that contains and protects the rule of law. It is an imperfect vessel, to be sure, but it is the most useful humankind has yet devised to further human liberty. And it is fragile. Those of us concerned with human progress have a choice: Will we strengthen judicial independence with effective accountability measures, or will we allow it to shatter, and with it our vision for a more perfect society?

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