From the Star Chamber to the Separation of Powers

Origins of U.S. Judicial Independence and the Rule of Law

By Justice Cheryl E. Chambers

As Americans, we tend to take for granted certain base assumptions about our system of government, including judicial independence. It is a concept seldom discussed in the news, but myriad elements of our modern lives should compel otherwise. As the past is an excellent predictor of the future, we need not look broadly to understand the necessity for an independent judiciary. At the time of the American Revolution, the very real perils stemming from the absence of an independent judiciary were present in the minds of our nation's founders, who pointedly sought to learn from the mistakes of the past. In this regard, the founders succeeded admirably. But today, do we rest on our laurels?

Our modern digital world and the accompanying social dialogue have fostered a dynamic that would make our ancestors scratch their heads or shudder in fear. Many of our institutions, including the judiciary, are the subject of growing criticism. Unlike in previous times, those criticisms can get picked up in social media and "go viral." However, we must remind ourselves that an independent judiciary, resolving disputes in accordance with the rule of law, remains a cornerstone of our democratic system of government.

The World Justice Project[1] provides a useful working definition of the rule of law in terms of four universal principles: the *accountability* of government and private actors under the law; *laws* that are clear, publicized, stable, and just; an *open government* that sheds light on

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the processes by which laws are enacted, administered, and enforced; and an accessible and impartial *judiciary* to resolve disputes.[2] This article focuses on the last principle of an accessible and impartial judiciary, examining its historical underpinnings in the U.S., and considering opportunities to embrace its continued relevance in our modern society and to foster its vitality going forward.

Defining Judicial Independence

U.S. Supreme Court Justice Ruth Bader Ginsburg wrote of judicial independence:

> "Judges [are] not under the thumb of other branches of government, and therefore equipped to administer the law impartially."[3]

U.S. Supreme Court Justice Clarence Thomas said:

> "Our judicial system is built on a belief that those who judge will do so impartially, and in accordance with the law," and that it is "this ability to render judgment without concern for anything but the law that should distinguish judges from members of the legislature or the executive branch."[4]

Despite the ideological differences between these jurists, both descriptions are remarkably similar.

Judicial independence exists not to elevate the judiciary above the other two branches of government, but rather as a fundamental element that allows for the functionality of all three branches of government. Maintaining judicial independence is paramount, not only to protecting the judiciary from undue pressures, but also to protecting the rule of law from unscrupulous judges who might act in their own interest.

Genesis of American Judicial Independence

In drafting the Constitution, the founders set forth to create a constitutional framework that incorporated the best attributes of the English system, while making a number of important changes.

From English philosopher Thomas Hobbes, whose own writings were deeply influenced by his experience during the English Civil Wars, the founders drew upon the theory of the social contract, and the importance of creating a central government that was robust enough to preserve peace among the various states and defend itself against outside forces.[5]

From French lawyer and philosopher Baron de Montesquieu, the founders embraced the concept of separation of powers,[6] though not in the limited form practiced in England, which Montesquieu had extolled in his seminal work, *De l'Esprit des loix*.[7]

Finally, from English philosopher John Locke, the founders adopted the simple yet powerful idea that all individuals are endowed with inalienable rights, and that the only legitimate government is one ordained by the will of people.

Influenced by Montesquieu, Locke and Hobbes, among others, and informed by English history as well as the vicissitudes of living under colonial rule, the founders drafted the U.S. Constitution. A debatable idea at that time, the U.S. Constitution created an overlapping and interdependent power structure, with each branch relying on the others to fully execute its responsibilities. Then and now, it is precisely that system of checks and balances that allows an independent judiciary to protect personal rights and civil liberties.

Protecting the Judiciary from the Influence of Executive Power

The founders understood that the Constitution could only protect the rights and privileges of the people with empowered and independent judges – free from the influence of the other branches – to assert individual freedom and enforce its terms. The founders were particularly keen to purge the executive branch of anything resembling the royal prerogative, which had caused considerable turmoil in 17th century England.[8]

The 17th century Star Chamber offers an object lesson in the dangers of placing judicial authority at the mercy of an autocratic leader.

Historically, sovereignty in England was concentrated in the Crown, which largely exercised all the powers of the state. Over the centuries, however, those powers, which were collectively known as the royal prerogative, were reduced as a parliamentary democracy and the rule of law developed. A series of statutes enacted in the late 17th century, including the Bill of Rights 1688/9 and the Act of Settlement 1701, were of particular significance for the definitive establishment of the rule of law in England.[9]

Following the promulgation of the Act of Settlement 1701, judges in England enjoyed life tenure, with protection against removal except by impeachment. It is worth briefly recalling some of the events leading up to the Act of Settlement 1701 in order to fully appreciate its historical significance to the English as well as to the founders, who were determined not to repeat the mistakes of the past.

During the 17th century, an English court known as the Star Chamber came to epitomize the pitfalls of

executive influence over the judiciary. According to the Records of the Federal Convention of 1787, "[a] primary goal that emerged in Constitutional debates was preventing the judiciary from devolving into 'America's Star Chamber.'"[10]

Conceived as a supervisor of lower courts in England, the Star Chamber operated from 1487 until 1641. It was comprised of privy counselors (advisors to the king), two judges of the courts of common law, lords (both spiritual and temporal) and no jury. It was considered an honorable and distinguished court for most of its history, but fell into disrepute during the 20-year period immediately preceding its abolition by the Long Parliament in 1641.

In light of the increased propensity of the Star Chamber to act where the crown had a direct interest, and perhaps exacerbated by the vague nature of its jurisdiction, there was always a strong potential for the Star Chamber to be wielded as a political weapon.[11]

One of the most fascinating opponents of the royal prerogative was a jurist named Edward Coke. Coke asserted the supremacy of common law and refused to concede power over the law to the king. While history has softened Coke's edges, mostly portraying him as a courageous advocate of individual rights who stood up to a tyrannical monarchy, the reality is a bit more complicated.

Many narratives on Coke omit his early career as an advocate for the crown as he moved up through Parliament. Coke eventually served on a variety of courts, such as the Court of Common Pleas, the King's Privy Council and the Star Chamber itself. However, as his career progressed, Coke positioned himself more firmly in opposition to the royal prerogative. Coke's criticisms of the Star Chamber and support for judicial independence became cornerstones of the U.S. system of judicial independence.

The *Case of Commendams* (1616) includes King James's rebuke to Coke's claims of supremacy of the rule of law. That case concerned the king's power to grant special rights and privileges to individuals of his choosing. Although the case was assigned to common law judges, the king ordered the court to consult with him before reaching a decision.

The judges, including Coke, balked at such an intrusion into their authority. King James ominously proclaimed the supremacy of the royal prerogative over the law and removed Coke from the bench: "[A]s for the absolute prerogative of the Crown that is no subject for the tongue of a Lawyer, nor is it lawful to be disputed."[12] King James went on to say that "[i]t is a presumption and Treason in a Subject to dispute what a King can do . . .The Judges ought to check and bridle such impudent Lawyers and to disgrace them."[13]

That was a clarion call for courts acting on the king's behalf to silence lawyers who opposed his authority. With the judiciary now firmly in the Crown's grip, in 1629, King James' successor, Charles, set his sights on the legislative branch, adjourning Parliament and effectively placing all three branches of government within his control from 1629–1640. That period was referred to as the Personal Rule, or the Eleven Years Tyranny. Eventually King Charles had to call a Parliament to raise funds for war, and the ensuing conflict between Parliament and the king eventually led to the English Civil Wars and, ultimately, the triumph of the Rule of Law.

Thus, the 17th century Star Chamber offers an object lesson in the dangers of placing judicial authority at the mercy of an autocratic leader. That history, which led, in England, to the promulgation of the Act of Settlement 1701, also caused the founders to write similar protections into the U.S. Constitution, namely a clause enshrining the idea of service during good behavior (i.e. life tenure) for federal judges, as well as provisions protecting judicial salaries against reduction, and calling for the removal of federal judges by no method less than impeachment for criminal conduct.

Our modern society, with a 24-hour news cycle, appearance of fake news and constant charges of bias, presents a significant and new challenge to judicial independence.

As an aside, it is interesting to note that while judges in England had enjoyed life tenure since 1701, their counterparts in the colonies enjoyed no such privileges. In fact, the Declaration of Independence was written as a rebuke of the many abuses of King George III against the colonists, among them his control of the colonial judges through the continued exercise of the royal prerogative.[14]

Although the merits of life tenure for the federal judiciary are still debated today by scholars and politicians, the founders were quite clear in the purpose of such a constitutional provision. In the *Federalist No. 79*, Alexander Hamilton wrote:

> The want of a provision for removing the judges on account of inability has been a subject of complaint. … An attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good.

Consequently, the founders conceived that there must be a place in government where being right is more important than being popular or powerful, and where fairness trumps strength. And in the United States, that hallowed place resides within the judicial branch.[15]

Separating the Judiciary from the Legislature

Although the British system included a separate judiciary composed of judges having life tenure, the decisions of the judiciary could be appealed to the House of Lords, which meant that the jurisdiction of the legislative branch straddled the jurisdiction of the judiciary.[16] The drafters of the U.S. Constitution, by contrast, did not allow such oversight of the judiciary by the legislature. Instead, they created a Supreme Court that had ultimate appellate jurisdiction over all federal courts.

The decision to establish an independent federal Supreme Court was not without controversy. In defending the decision, Hamilton, in *Federalist No. 78*, reasoned that the judiciary, by the limited nature of its functions, would always be the "least dangerous to the political rights of the Constitution" because it held neither the sword of the executive nor the purse of the legislature.

The *Federalist Papers* were written as a response to Antifederalists who – in writings attributed only to Brutus – opposed the establishment of a Constitution that might give rise to a tyrannical federal government. Though Brutus' identity was never officially confirmed, scholars believe the writings to be the work of N.Y. Supreme Court Justice Robert Yates. Brutus' thesis was that the judiciary, like the other branches of government, must ultimately be accountable to the people. However, by creating a federal Supreme Court completely independent of the two other branches of government and consisting of justices having life tenure, the element of accountability was lacking.

The crux of the disagreement between Brutus and Hamilton was not about judicial independence per se, but rather about the proper role of an independent judiciary within our constitutional system. Specifically, who should have the final word in determining whether state or federal legislation is consistent with the terms of the Constitution? Interestingly, Brutus did not dispute that the judiciary ought to have the power to strike down laws that are contrary to the Constitution. Rather, he advocated that if judges are given the power of judicial review, the United States should implement a system similar to the one in England, where the decisions of the judiciary ultimately remain subject to review by the legislature. Brutus reasoned that there is nothing that makes judges inherently more qualified than legislators in interpreting the meaning of the Constitution. The key difference is that elected legislators are accountable to the people, whereas judges are not. Thus, if the legislature interprets the Constitution in a manner that is unpopular with the people, the legislature can be voted out of office. [17]

Judicial Review

The final element of the U.S. version of judicial independence is the power of judicial review, which does not appear anywhere in the Constitution. Although the text of the Supremacy Clause clearly implies that only laws made "pursuant" to the Constitution are valid, the Constitution does not provide which branch of government has the authority to make that critical determination. As noted earlier, the Antifederalists contended that the final word on matters of constitutional interpretation should rest with the legislature. In response, Hamilton, in *Federalist No. 78*, argued that the newly created Supreme Court should be entrusted with this task.

It was not until 1803, when Chief Justice John Marshall penned *Marbury v. Madison*,[18] that judicial review formally became part of our constitutional jurisprudence. To be sure, *Marbury* has had its detractors over the years.[19] Judge Learned Hand famously said that the opinion "will not bear scrutiny."[20] Nevertheless, given the founders' predisposition to view the English Parliament as an instrument of colonial oppression,[21] it was perhaps inevitable that the ultimate power to interpret the Constitution would fall upon the newly created Supreme Court rather than the legislature.

Moreover, even before the American Revolution, the colonists had access to the writings of Edward Coke, whose bold, new ideas about the Rule of Law had more influence on colonial lawyers than in England. In particular, Coke's celebrated dictum in *Dr. Bonham's Case (1610)*, in which he wrote that "the Common Law doth control Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void."[22] Although the dictum in *Dr. Bonham's Case* was never viewed in England as reflecting an accepted proposition of English law,[23] it had a profound influence in the colonies, and was the fundamental premise of James Otis' argument, before the Superior Court of Massachusetts, in *The Writs of Assistance* Case in 1761, that a court could void an act promogulated by the legislative assembly when the court found that the law had transgressed its boundaries.[24]

Today, the authority of the federal judiciary to interpret the Constitution remains firmly established, permitting no serious criticism. "Notwithstanding the deference each branch must accord the others, the 'judicial Power of the United States' vested in the federal courts by Art. III, s 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."[25]

Learning from History

While the concept of American judicial independence is centuries old, it is certainly not static. From its origins during the days of our nation's founding, the lessons learned from the hard-fought battles over the rule of law continue to resonate today.

> A more inclusive judiciary is broadening and deepening our jurisprudence for the better.

For example, in *Doe v. United States*, the legacy of the Star Chamber was recognized as the basis for the Fifth Amendment: "[t]he fundamental purpose of the Fifth Amendment was to mark the line between the kind of inquisition conducted by the Star Chamber and what we proudly describe as our accusatorial system of justice."[26]

In *United States v. Jones*, Justice Scalia acknowledged the role that England's rejection of the Star Chamber played in creating the Fourth Amendment, citing the 1765 English case of *Entick v. Carrington*, which rejected search and seizure performed by the Crown in an effort to crush dissenters, as a "'monument of English freedom undoubtedly familiar to every American statesman at the time the Constitution was adopted.'"[27] *Entick* decried the judicial corruption plaguing the Star Chamber, vowing "'to demolish this monster of oppression, and to tear into rags this remnant of Star Chamber tyranny.'"[28] *Entick* is often cited by scholars as a pillar of the search and seizure laws.

The 1963 Supreme Court decision in *Gideon v. Wainwright* ensured all defendants in criminal proceedings would be guaranteed an attorney, ending the practice of trying defendants without counsel as they did in the Star Chamber.[29]

Youngstown Sheet & Tube Co. v. Sawyer set clear limits on the president's executive authority during wartime, a marked departure from the king's ability to commandeer donations from wealthy landowners to wage wars with other European powers.[30]

Hamdan v. Rumsfeld ensured that prisoners of war would receive fair trials under the Constitution, the Uniform Code of Military Justice, and the Geneva Conventions.[31]

As illustrated in the cases above, the modern era has served as a catalyst to drive even more transformative changes to the concept of judicial independence. Moreover, in a country with an increasing diversity of population and viewpoints, and unprecedented access to raw information broadcast through social media, the judiciary may be more vulnerable than ever to criticism intended to undermine its independence. Thus, it is an opportune time to identify and evaluate what makes for a strong and independent judiciary with legitimacy in the eyes of the public.

Whither Judicial Independence?

According to the World Justice Project's 2016 Rule of Law Index, the United States ranks 18th overall out of 113 data reporting countries. The World Justice Project conducts over 110,000 surveys of the general population and 2,700 legal experts on their perception of the rule of law in their respective countries. For some perspective, the United Kingdom ranked 10th, with Denmark, Norway and Finland topping the list in the first three positions, respectively.

These rankings serve as a useful reminder that the strength of the rule of law depends not only on the robustness of underlying institutions, but also how those institutions are perceived by populations they serve. Our modern society, with a 24-hour news cycle, appearance of fake news and constant charges of bias, presents a significant and new challenge to judicial independence. In the 21st century, the judiciary must be responsive to these dynamic changes in our society. The information revolution ushered in by internet interconnectivity creates new opportunities for government transparency and citizen engagement. A strong rule of law relies on public trust in the faithful and fair execution of the laws and the swift administration of justice.

Three specific areas of critical importance to judicial independence in the internet era: education, finance, and diversity.

Education: More than at any other time in U.S. history, people today have the tools to be informed about the legal process. This is an opportunity for bench and the bar to inform, educate and advocate for intellectual curiosity.

In former Chief Judge Judith S. Kaye's 1996 lecture, *Safeguarding a Crown Jewel*, she emphasized the role of lawyers, legal educators and journalists in educating the public about how our legal system functions.[32] A well-informed population can better interpret and evaluate the jurisprudence coming out of judicial decisions. Judge Kaye called on members of the bar to communicate to the public the importance of the judiciary, while also clarifying its role.

Twenty years later, the widespread availability of legal decisions online — as well as access to statutes and government regulations — bridge the gap between the public and the judiciary and promote greater transparency.

Finance: As it stands, the judicial branch operates on two-tenths of one percent of the federal budget.[33] This paltry sum does not align with the importance and significance of the judicial branch. While the judicial branch should not advocate for lavish spending during a fiscal

crisis, proper funding of the judiciary is vital to judicial independence for two primary reasons:

1. It allows courts to better manage their dockets, settle grievances and process convictions for both the safety of the public and to ensure preservation of the rights of the accused; and
2. It affords courts the resources to write clear, thoughtful and consistent opinions that form the common-law foundation of the U.S. jurisprudence. A slow or dysfunctional judiciary undermines public confidence in the judicial system and, by extension, in the rule of the law itself.[34]

Diversity: A key component of public trust and confidence in our institutions is underpinned by the idea that institutions serving the public should reflect the composition of the general population. Indeed, constituents who are underrepresented in the judicial ranks may feel excluded or that the legal system is working against them. Just as large corporations and academia strive for diversity to fight groupthink and encourage independence, the judiciary must be committed to diversity for the same reasons.

As the nation has become more diverse, so too have the judges sitting on benches across the country. American jurisprudence is designed to be responsive to the changing faces and realities of our nation, and a more inclusive judiciary is broadening and deepening our jurisprudence for the better.

Without vigilance, transgressions against judicial independence chip away at public perception of the judiciary's role. History revealed this danger to the founders, who took steps to protect judicial independence in the written Constitution. Today, the threats to judicial independence in the United States do not come in the form of a tyrannical king seeking to exert his will over the law. Nevertheless, there are other challenges from public officials, political pundits, lobbyists and those seeking a political advantage in the judicial system.

Protecting judicial independence is not a partisan issue; it transcends political ideology. It is an undeniable duty that falls upon each of us. What is more, history has taught us that an independent judiciary is vital to the rule of law and democracy. Education, robust funding, and increased diversity all contribute to readying judicial independence for a bright and challenging future. The vision of our founders to keep the judiciary free from outside influence is a full-time pursuit that requires our undivided attention. Today, do we rest on our laurels? The answer should be a resounding "no." ■

1. The World Justice Project is a multi-disciplinary, multi-country non-profit focusing on improving the rule of law throughout the globe. Founded by former president of the American Bar Association William H. Neukom, the Rule of Law Index compiles data on 113 countries from surveys of 110,000 citizens and 2,700 legal experts.

2. *See* World Justice Project, (Nov. 7, 2017), https://worldjusticeproject.org/about-us/overview/what-rule-law (accessed on 11/7/2017).

3. Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 Neb. L. Rev. 1 (2006).

4. Clarence Thomas, *On Judicial Independence*, an address to the Federalist Society's Annual National Convention Banquet on November 12, 1999, http://fedsoc.server326.com/pdf/Judicial%20Independence%20-%20Clarence%20Thomas.pdf.

5. *See*, in particular, The Federalist No. 6 (Alexander Hamilton).

6. *See* Sam J. Ervin, *Separation of Powers: Judicial Independence*, 35 Law & Contemporary Problems 108, 108-9. (1970).

7. *See* The Federalist No. 47 (James Madison).

8. *See generally*, The Federalist No. 69 (Alexander Hamilton).

9. *See R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, at paragraphs 40 *et seq.*, http://www.bailii.org/uk/cases/UKSC/2017/5.html.

10. James F. Ianelli, *The Silence: Eligibility Qualifications and Article III*, 6 Seton Hall Cir. Rev. 55, 61-2 (2009) quoting *The Records of the Federal Convention of 1787*, at 635 (Max Farrand, ed., 1911).

11. *See* Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 Am. J. Legal Hist. 326, 334 (2010).

12. Ryan Patrick Alford, *The Star Chamber and the Regulation of the Legal Profession 1570-1640*, 51 Am. J. Legal Hist. 639, 700 (2011), quoting The Political Works of James I 333 (Charles McIlwain ed., Harvard Univ. Press 1918).

13. Alford at 700, quoting *British Library*, Hargrave MS 132, f. 68b. (2009).

14. *See* Robert Reinstein, *Limits of Executive Power*, 59 Am. U. L. Rev. 259.

15. Nina Totenberg, *Justice O'Connor Criticizes Campaign Finance Ruling*, NPR, All Things Considered Transcript, Jan. 26, 2010, https://www.npr.org/templates/story/story.php?storyId=122993740.

16. In fact, it was not until October 2009 that the UK established its own Supreme Court, which assumed the judicial functions of the House of Lords and finally ended parliamentary oversight of judicial decisions.

17. *See generally*, Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 Const. Comment. 7 (2006).

18. 18(5 US 137 [1803]).

19. *See generally*, Samuel R. Olken, *The Ironies of Marbury v. Madison and John Marshall's Judicial Statesmanship*, 37 J. Marshall L. Rev. 391 (2004).

20. Alexander M. Bickel, *The Least Dangerous Branch* 2 (Yale Univ. Press, 2nd ed. 1986).

21. *See* Francisco Fernández Segado, *James Otis and The Writs of Assistance Case (1761)*, in *Common European Legal Thinking* (H. J. Blanke et al. eds., 2015).

22. *Id*. at 3.

23. *See* A.E. Dick Howard, *Magna Carta's American Adventure*, 94 N.C. L. Rev. 1413, 1416 (2016).

24. *See* Segado, *supra* note 21.

25. *United States v. Nixon*, 418 U.S. 683, 704 (1974).

26. *Doe v. United States*, 487 U.S. 201, 220.

27. *United States v. Jones*, 565 U.S. 400, 405, quoting *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

28. Ianelli, *supra* note 10, at 61 n.32, quoting 19 Howell's State Trials 1029 (1765).

29. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

30. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

31. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

32. *See* Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 Hofstra L. Rev. 703 (1997).

33. *See* Robert Barnes, *Chief Justice John Roberts warns of a not-so-wonderful life for judiciary amid budget cuts*, Wash. Post, Politics, Dec. 31, 2013, https://www.washingtonpost.com/politics/chief-justice-john-roberts-warns-of-a-not-so-wonderful-life-for-judiciary-amid-budget-cuts/2013/12/31/40dd7bdc-7255-11e3-8b3f-b1666705ca3b_story.html?utm_term=.cc656bf7b76e.

34. *See* Chief Justice John Roberts, *2013 Year-End Report on the Federal Judiciary* at 9-10, https://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf.