

Judicial Independence: The Fortress Threatened from Within

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I want to thank your excellent former U.S. Attorney, Edward L. Stanton III, who is now, as I am, grazing in the green pastures of private practice, for that very kind introduction. And thanks also, of course, to Dean Peter V. Letsou and the Law School for holding this Symposium, and to Pablo J. Davis for organizing it and allowing me the privilege of this podium.

The invitation to speak here actually came last October. You know, time was when you got an invitation several months in advance, you could actually prepare, and if you finished drafting your remarks a few weeks in advance you could at least be assured that what you had to say would sound as timely when you got up to deliver it as it did when you finished writing it.

No more. Given the pace of political events, I think the United States may be in danger of fitting Henry Kissinger's description of Germany, which he called a country that creates more history than it can consume domestically. There is absolutely no assurance that what you write in the morning will necessarily be timely if you deliver it in the afternoon, let alone if you say it a few weeks later. Events have a way of turning prepared remarks into confetti.

So we are in a week in which a judge with an apparently impeccable record and background has been confirmed this morning as an associate justice of the Supreme Court,¹ although at the cost of

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1. Adam Liptak and Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, NEW YORK TIMES (Apr. 7, 2017),

taking perhaps one more step toward turning the United States Senate into a high-class edition of the House of Representatives, where the majority rules and the minority can be rendered virtually invisible.

What does that process do to at least the perceived independence of judges? Well, obviously, nothing good; at least, it doesn't do anything good for those lawyers who may aspire to be judges, and for those judges who may aspire to what my late partner and a former Deputy Attorney General and District Judge, Harold Tyler, who had a wonderful sense of humor, used to call preferment—a quaint term, but so much more refined than “promotion.”

I hope I am not ruining the suspense if I tell you at the outset that I do not actually believe that the independence of judges is really threatened today in the way that reference to a “fragile fortress” might suggest, and certainly not by the occasional insult or criticism by public figures or commentators. Judges—at least this applies to federal judges—have life tenure and a guaranteed salary for that entire tenure. And, of course, state-court judges know going in the nature of the independence that they enjoy, and by and large it's pretty well observed. The Founders put the independence of federal judges right in the Constitution to protect the country from one of the conditions described in the Declaration of Independence, that of judges rendered “dependent on [the Sovereign's] Will alone, for the tenure of their offices, and the amount and payment of their salaries.” In that respect, at least, judges do not live in a fragile fortress.

But there is a danger to judicial independence from another source, and I would suggest to you that much of it comes from *inside* the fortress.

Judges have, for centuries, worn black robes in part as a symbol that they are, or at least are supposed to be, the same: the same to and for everyone, just as the law itself is the same for everyone. It isn't supposed to matter whose head is popping up from beneath the black crepe; they all apply the same law.

Now, that has probably been a little dubious for some time, but it has been at least aspirational: even if all judges are not actually the same, they perhaps should aspire to a careful-enough adherence to an objective law that the result should depend on what the facts are

and what the law is, not on what the opinion trends are and who the judge is. I think what we have seen increasingly is that judges are perceived to be, and in some cases may very well be, political players. And so it can often matter very much who the judge is. It matters to the point where a justice now sitting on the Supreme Court delivered herself of opinions as to one of the candidates in the last election—to only a mild fluttering of eyebrows. Another justice, who was then going through a confirmation hearing, told the Judiciary Committee and the rest of us that a wise woman of her background might very well have something to offer to the process of deciding a case that would not be available from a white Anglo-Saxon Protestant male—even a wise one. No one challenged her; no one suggested that the comment was the least bit objectionable, or even remarkable.

More recently, news reporters describing a panel of Ninth Circuit judges who were sitting to decide a case that involved what has been referred to as the travel ban, referred to the panel as “bipartisan”—meaning that it included at least one appointee of each of our political parties. And these reporters thought the term was not only accurate but actually complimentary of the panel.

When did this all begin, and how did we come to this point?

Now, there are those who might say that it began at the latest when President Roosevelt, as you heard earlier today, sent to Congress something called the Judicial Procedures Reform Bill of 1937. And I will tell you that that, like any other piece of legislation whose title includes the word “reform”, the bill contained a lot of mischief (indeed, any time I see that word in a piece of legislation, I automatically start to read it much more carefully). It soon became known as the “court-packing” plan.

You will recall that the plan to pack the Court did not go through, and didn’t have to because the justices kind of took the hint and decided to permit some New Deal legislation to stand, thereby carrying out what became known as “the switch in time that saved nine.”

But I would bring the date a lot closer in time—specifically to 1965—when the Supreme Court decided *Griswold v. Connecticut*² and, for the first time, articulated as a constitutional construct the

2. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

right to privacy. I use the phrase “as a constitutional construct” advisedly, because those of you familiar with the actual words of the actual Constitution, and its amendments, may be aware that the word “privacy” appears nowhere in the document.

Griswold involved a Connecticut statute that was probably considered uncommonly stupid even in 1965, that banned the sale and distribution of contraceptive devices. Now, even though the statute generally went unenforced, a number of professors and students at my alma mater, Yale Law School, along with one or two cooperative physicians, decided to arrange a test case to challenge the constitutionality of the law. So the physicians duly distributed contraceptives, and were duly fined a symbolic \$100, and the case wound its way up to the Supreme Court, which decided in 1965 that the statute was unconstitutional. The Court held that the statute violated the right to privacy, and that although the word “privacy” was not to be found anywhere in the written Constitution, the concept of a right to a zone of privacy could be found in what was described as “penumbras” formed by “emanations”³ from the amendments that *were* in the written Constitution.

Of course, once you start enforcing emanations that form penumbras, it really isn’t that long a distance to defining the “heart of liberty” as having to include “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁴ That was in another, later, Supreme Court opinion—although the mystery of human life could be terminated by the right to define one’s own concept of existence and of meaning, or so it seems from the result in *Planned Parenthood v. Casey*, where that passage appeared. Even the right to define one’s own concept of existence, or at least the existence of one’s unborn child, might have to yield when it is found, as held in *Gonzales v. Carhart* in 2007, in a passage written by the same justice who said we all have the right to define our own concept of existence, that “[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman.”⁵

3. *Id.* at 484.

4. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

5. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1633 (2007).

The point here is not simply to skip rocks off the Supreme Court, or even only Justice Kennedy, who wrote all of the passages that I've just quoted. The point, rather, is to lift the lid off a tendency in the judiciary that I suggest to you is having and is going to have far more profound effects on the independence of the judiciary than the occasional brickbat or epithet hurled in the direction of one or more judges. (And I will tell you parenthetically, having been a judge, that it isn't the unjustified criticism that hurts, it's the *justified* criticism—that hurts a lot more, even though it's a lot rarer, as we know.)

It is quite simply the tendency to see every societal problem as one that can and probably should be solved by judges. I don't mean here to blame solely the judiciary for this tendency. Far from it. After all, Congress has the power to define—and of course to limit—the jurisdiction of federal courts, and Congress could use that power any time it wished to constrain the courts or at least to limit them to a proper exercise of their subject-matter jurisdiction.

Rather, it would seem that Congress is at the least passively complicit in the process, if it does not actually encourage it actively. After all, it is far easier to duck controversial issues, such as abortion and other privacy-related issues, and simply to shrug and say the courts have spoken, than it is to have to try to resolve such issues through the political process of give and take, and risk offending some active constituency.

Once judges start down that road, they risk becoming political functionaries like any other, expected to serve the will of whatever theory or thought is current among those regarded as right-thinking people.

The most current arrogation of power by courts concerns an issue that at least arguably engages the duty and authority of the executive with respect to protecting our national security—namely, the executive order, or orders, embodying the so-called “travel ban.”⁶

There was a time when judges did not need to be reminded of the limits of their mandate, particularly in matters of national securi-

6. For the first such order, see President Donald J. Trump, Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry into the United States) (Jan. 27, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

ty. Justice Jackson, writing for the Court in *Chicago & Southern Air Lines v. Waterman Steamship Corporation*,⁷ in 1948, explained why national security issues were the responsibility of those branches of government with political accountability. Such decisions, he wrote, are

wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility, and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.⁸

That was the rule in ordinary times. But we are not, as you know, in ordinary times, and particularly with respect to the current president. Because currently fashionable thought in some circumstances regards everything he does as the act of someone who cannot be regarded as a president. Because although he was duly elected, his taking of a solemn oath to uphold the Constitution is not to be taken seriously because he has not shown he is the sort of person who understands what a solemn obligation actually is. That, I'm afraid to say, is the underlying reasoning that seems to be the only support for the judicial decisions invalidating the travel-ban order.

Now, as you know, the order in question bars entry into the United States of any non-U.S. citizen who does not have either a visa or a green card and who is traveling from any of six nations, all predominantly Muslim. These nations were already singled out by the prior Administration and by Congress for particular concern. Despite the recitation in the second edition of that order⁹ of the reason why

7. *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948).

8. *Id.* at 111.

9. President Donald J. Trump, Executive Order 13780 (Protecting the Nation from Foreign Terrorist Entry into the United States) (Mar. 6, 2017),

each of these countries presented a legitimate cause for concern, and despite an explicit statute¹⁰ that grants the president authority to exclude any alien or group of aliens so long as he avers that it is in the national interest to do so, a few district judges have held that the order in question violates the Establishment Clause of the Constitution by disfavoring a particular religion—the Muslim faith—in contrast to others.¹¹

Interestingly, the cited support for this conclusion, in each case, does not lie in the effect of the order, which after all does not apply to most Muslim countries. Rather, the cited support is from statements made by the president who signed the order—in some cases, made during his campaign for president, when he said he would impose a ban on Muslims; in other cases, made years before he ran for president and in contexts other than immigration; and, finally, made by him and by others after he was elected, to the effect that the order in question essentially embodies the promises and positions he took during the campaign.

What the judges who decided those cases have done is to say, essentially, that so long as the order emanates from Donald Trump, it cannot be given the normal presumption of regularity that would attach to the order of another president or, indeed, another executive officer who had taken an oath to uphold the Constitution and who was acting on a stated basis that was facially neutral and non-discriminatory. In essence, what they seem to be saying is that this president's acts are permanently tainted by whatever statements of improper motive he has ever made or others have ever made on his behalf.

Now, all of this would be of limited interest—after all, these orders are on their face temporary and in any event deal only with one discrete issue—if not for the fact that whether we acknowledge it or not, we have been for decades the main targets of a war being

<https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states> (last accessed June 9, 2017).

10. Immigration and Nationality Act, § 212(f), 8 U.S.C.S. § 1182(f).

11. For a prominent example of such reasoning, see: Order Granting Motion for Temporary Restraining Order, *Hawaii v. Trump*, CV No. 17-00050 DKW-KSC (Mar 15, 2017).

waged by a death cult. It is a war that we did not choose, and that will go on whether we acknowledge it or not, and whether we say it's over or not. It is a war that we may well have to fight on our own soil, and that we may well have to fight "hot" during the Trump presidency. And if courts will not permit the government to act because the motives of the person who heads it are suspect, we may be in for tragically difficult times.

Now, this didn't start on September 11, 2001, or even in February 1993 with the first World Trade Center bombing. It actually started way back in the 1940's when one of the leading lights of what became the Muslim Brotherhood, Sayyid Qutb, an Egyptian working in the Education Ministry in Cairo, was awarded a traveling fellowship that was actually meant in large part to get him out of the country because he was a troublemaker. And he chose—just our luck—to travel to Greeley, Colorado. There, in post-war, small-town America, he encountered Western society for the first time, with jazz music, crew cuts, dancing. He is reputed to have walked in on a church social when people were dancing to a recording of "Baby It's Cold Outside" and he was scandalized. He decided that Islam as he knew it would have to be eternally at war with such a society.

He went back to Egypt, and continued to agitate in the fashion that had, in the late 1940's, gotten him the award of a traveling fellowship, except this time, in the late 1960's, it got him hanged. Many of his followers left Egypt for Saudi Arabia, where Qutb's brother wound up teaching the spoiled son of a wealthy Saudi construction family—a young man named Osama bin Laden. And the rest, as they say, is history.

To fight this ideology, it is going to take not only force—although it will certainly take that—but also support from those within the Muslim world who favor reform. And they are there. In 2014, President Abdel Fattah el-Sisi of Egypt, who visited the White House earlier this week and was received warmly by the president although skeptically by network commentators, delivered a remarkable speech at Al-Azhar University in Cairo, the seat of Sunni learning and the venue for President Obama's 2009 outreach to the Muslim world. President Sisi addressed the imam of Al-Azhar University—looked him straight in the eye—and the other imams who were present, and told them that Islam as then being preached was bringing death and

destruction on Muslims, and urged them to put an end to it. He urged that curricula in Egypt be reformed so as to eliminate the teaching that strict Islam had to dominate the world, by force if necessary, and that it is the personal duty of each Muslim to bring about that domination.

That imam, Ahmed el-Tayeb, followed up with his own speech, which he delivered in Saudi Arabia, arguing that Muslim young people were being misled and ruined by an erroneous interpretation of the religion. Although latest reports from Egypt indicate some backsliding from that position by those in control of the University, the government itself apparently remains committed to the reform effort.

I'll be willing to bet dollars to doughnuts that there isn't anybody in this room who had ever heard of either of those speeches.

There are those in our own country who preach the same message, but they have not been until now the focus of the government or of its outreach, which instead has gone to organizations like CAIR, the Conference on American Islamic Relations, and ISNA, the Islamic Society of North America, both of which are affiliated with the Muslim Brotherhood. The Muslim Brotherhood, of course, sounds like a fraternal organization along the lines of the Elks or the Rotary Club. It is not. The slogan of the Muslim Brotherhood from the time of its founding until now has been, "Allah is our objective, the Prophet is our leader, the Qur'an is our law, jihad is our way, and dying in the faith of Allah is our highest hope."

CAIR, as a matter of fact, was named as an unindicted co-conspirator in the terrorism financing case against the Holy Land Foundation—the largest such case ever tried in this country. They are the people who in the last Administration were regularly invited to the White House and are recognized as representative of Muslims in the United States.

The last Administration's blindness to the secondary effect of this outreach was stunning. Imagine what the reaction is bound to be from the average Muslim resident of the United States when high government officials confer on ISNA the mantle of respectability that comes with being wooed by such officials. How likely do you think it is that such an average resident would reject the counsel of CAIR and ISNA and opt instead for the teaching of those who believe that

those organizations are intent on subverting the values of this country? It's not very likely at all.

No doubt the claim would be made that if our government favored reform-minded Islamic groups, and enhanced their credentials by engaging *them* rather than organizations like CAIR and ISNA, the government would be picking winners and losers in a religious dispute, and thereby violating the First Amendment's Establishment Clause—the same clause the travel ban was said to violate. Indeed, the Establishment Clause reasoning of the travel-ban cases—to the extent you can call it reasoning—could tend in this direction, particularly if the purported motives of the president continue to be made part of the analysis.

The point here, however, is not a matter of religion but a matter of politics and national security. So I put the question to you: would it be lawful for the government to favor—for political and national security reasons—people who accept our constitutional system of governance, and to oppose those who don't? It was entirely permissible to do that during the Cold War, when our adversaries were communists, who wanted to subvert our constitutional system and replace it with a totalitarian system.

In fighting this war against such an enemy, one that thinks that not only dancing but the very idea that people can choose their own government is a sacrilege, perhaps we should follow the example and take the advice of our greatest president—certainly our greatest lawyer-president—who said this in 1862 about how to deal with an unprecedented crisis that threatened the country at that time: “As our case is new, so we must think anew and act anew. We must disenfranchise ourselves, and then we shall save our country.”¹²

Make no mistake about it: the ideology that motivates the Muslims who are at war with us is a totalitarian ideology. It rules every aspect of life—economics, family law, whatever. It transcends allegiance to the nation-state.

Does this ideology's use of the hallmarks of religion—its call to a god and to a prophet, its reliance on a book (the Qu'ran)—mean that even to the extent it trenches on politics and seeks to impose ob-

12. Abraham Lincoln, Second Annual Message (Dec. 1, 1862), AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29503>.

ligations on non-Muslims, by force if necessary, and even to the extent it endangers our national security by encouraging people to commit violence, we can't fight it the same way we fought other forms of totalitarianism? Do the Free Exercise and Establishment Clauses of the First Amendment tie our hands and prevent us from doing that simply because this ideology can claim to be rooted in a religious faith?

Now, the answer to that hasn't yet been definitively written, at least not in a case or a series of cases. And no doubt if we try to do that, there will be cases, just as there have been cases about intelligence gathering under the Fourth Amendment, and cases about detention under the Fifth Amendment.

But if we take the Constitution seriously—not just one or two of its amendments but the political architecture it put in place for a government that can, among other things, preserve the state and protect its citizens—maybe we can fight the ideology that I have described in the way that I have suggested, in order to save the country that the president I quoted a few moments ago called “the last, best hope of earth.”¹³

That will take the willing participation of an independent judiciary, one that is independent not only of the slings and arrows of politicians—that part is easy; as I pointed out at the beginning, federal judges have life tenure and a salary that cannot be diminished during their lifetime. The judiciary must also stand independent of the temptation to seek popular adulation by following the intellectual fashions of the moment and losing sight of their real strength, which is the perception that they can be relied on to apply neutral principles—in the words of the judicial oath—“without respect to persons.”

I think that trying to help save the country that is the last, best hope of earth by living up to that oath is worth at least a try.

Thank you very much.

13. *Id.*
