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Remarks on Judicial Independence

Ruth Bader Ginsburg

Essential to the rule of law in any land is an independent judiciary, judges not under the thumb of other branches of Government, and therefore equipped to administer the law impartially. As experience in the United States and elsewhere confirms, however, judicial independence is vulnerable to assault; it can be shattered if the society law exists to serve does not take care to assure its preservation.

On the essence of independent, impartial judging, a comment by former U.S. Chief Justice William H. Rehnquist seems to me right on target. Using a metaphor from his favorite sport, he compared the role of a judge “to that of a referee in a basketball game who is obliged to call a foul against a member of the home team at a critical moment in the game: he will be soundly booed, but he is nonetheless obliged to call it as he saw it, not as the home crowd wants him to call it.”¹

My remarks concentrate on judicial independence in the system I know best, the Third Branch of the U.S. Government—the federal courts—and on efforts by the political branches to curtail that independence.

I.

Under the U.S. Constitution, federal judges hold their offices essentially for life, with no compulsory retirement age, and their salaries may not be diminished by the legislature.² (Canadian judges enjoy similar “security of tenure,” although retirement at age 75 is mandatory.³) Through life tenure and compensation that cannot be reduced, the founders of the United States sought to advance the Judiciary’s independence from Congress and the President, and thus to safeguard the judges’ ability to decide cases impartially. Yet I doubt that constitutional insulation would have protected the federal bench if we did not have a culture that frowns on attempts to make the courts over to fit the President’s or the Congress’ image.

A well-known illustration of that culture. Some 70 years

ago, a proposal to pack the U.S. Supreme Court was announced by President Franklin Delano Roosevelt. The Supreme Court of that day had resisted President Roosevelt’s New Deal program. In a 13-month span, the Court held unconstitutional 16 pieces of federal social and economic legislation.

Frustrated by his inability to replace the “nine old men” then seated on the Court, President Roosevelt sent to the Senate a bill to overcome the Court’s recalcitrance. He proposed adding one justice for each member of the Court who had served ten years, and did not retire in the six months following his seventieth birthday.⁴ FDR’s proposal would have immediately swelled the Court’s size from nine to 15 members. (If the 1937 plan were to be applied to the current Court, we would today have a 13-member bench.) Two developments, manifest by the end of 1937, contributed to the defeat of Roosevelt’s plan: public opposition to the President’s endeavor to capture the Court; and a growing understanding among the justices that it was appropriate to defer to legislative judgments on matters of social and economic policy. FDR’s idea has never been renewed. Those who care about the health and welfare of our system appreciate that packing the Court to suit the mood of the political branches (Congress and the President) would severely erode the status of the Judiciary as a coequal branch of government.

II.

I turn now to some recent threats to the security of U.S. judges who decide cases without regard to what the “home crowd” wants.

A headline-producing case in point. Early in 2005, federal courts sitting in Florida confronted a cause célèbre. On order of the Florida state courts, a hospital had removed the feeding tube from Terri Schiavo, a severely brain-damaged woman whose situation sparked a huge controversy over the right to

Editor’s Note: These remarks were delivered by Justice Ginsburg on September 27, 2007, at the annual educational conference of the American Judges Association. Because the conference took place in Vancouver and was a joint conference with two Canadian judicial organizations, she included some references to Canadian sources.

Footnotes

1. William H. Rehnquist, *Dedicatory Address: Act Well Your Part: Therein All Honor Lies*, 7 PEPPERDINE L. REV. 227, 229-30 (1980).
2. The Constitution guarantees that federal judges “shall hold their Offices during good Behavior . . . and shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art III, § 1, cl. 2. Proposals have been made to place term limits on U.S. Supreme

- Court service. See, e.g., R. CRAMTON & P. CARRINGTON, *THE SUPREME COURT RENEWAL ACT: A RETURN TO BASIC PRINCIPLES, IN REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* 467-471 (R. Cramton & P. Carrington eds. 2006) (proposing 18-year limits on active service); Calabresi & Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. POL’Y 769 (2006). But so far, discussion of such measures has remained largely academic. See, e.g., L. Greenhouse, *New Focus on the Effects of Life Tenure*, N.Y. TIMES, Sept. 9, 2007, p. A20 (stating that the legislation proposed by Profs. Cramton and Carrington “has not found a sponsor”).
3. See Constitution Act of 1867, §§ 99-100.
 4. See Judiciary Reorganization Act, S. 1392, 75th Cong. § 1(a) (1937), *reprinted in* Reorganization of the Federal Judiciary, S. Rep. No. 75-711, p. 31 (1937).

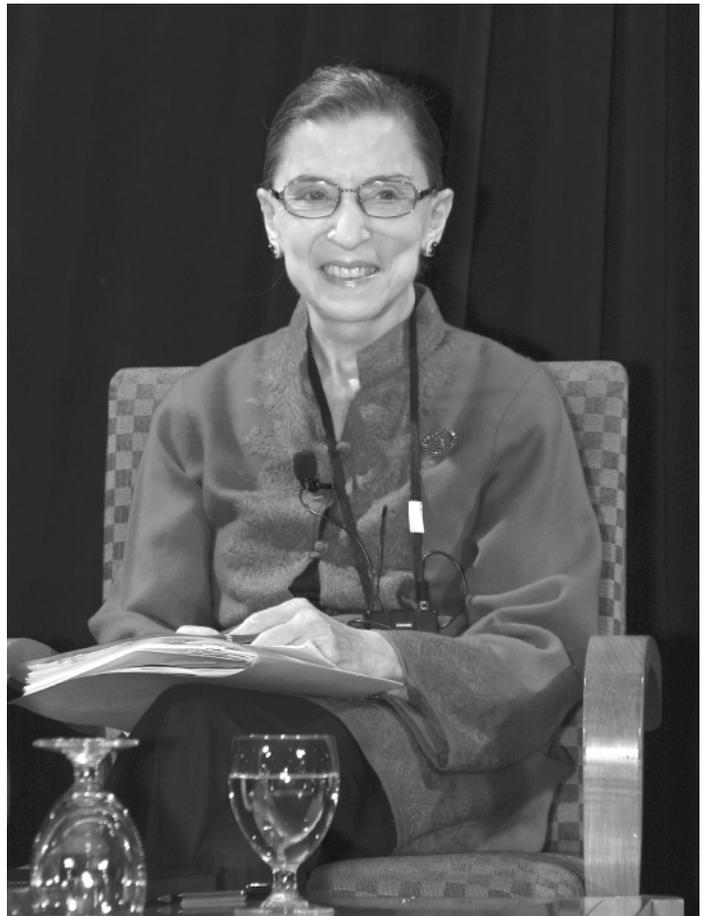
refuse life support. Congress entered the fray by passing a most unusual statute giving the federal courts jurisdiction to hear the plea of Terry Schiavo's parents, but not altering the governing substantive law.⁵ The federal courts read the statute as it was written, and refused to override the Florida courts by ordering restoration of the feeding tube. This was not the outcome wanted by a goodly number of the members of Congress. In angry reaction, the then House Majority Leader accused federal judges of "thumb[ing] their nose[s] at Congress and the [P]resident."⁶ He warned: "[T]he time will come for the men responsible for this to answer for their behavior."⁷ "Congress," he amplified, "for many years has shirked its responsibility to hold the judiciary accountable. No longer."⁸

Similarly unsettling, in the same year, 2005, two episodes of violence against judges shocked the nation. A state court judge was murdered while on the bench in Atlanta and a federal judge's mother and husband were murdered at the judge's home in Chicago.⁹ Shortly thereafter, a prominent Senator gave a widely reported speech on the Senate floor. After inveighing against "activist jurists," he suggested there may be "a cause-and-effect connection" between judicial activism and the "recent episodes of courthouse violence in this country."¹⁰

The blasts from Congress were not merely verbal. In May 2005, the House Judiciary Committee considered creating an "office of inspector general for the federal judiciary."¹¹ The office would investigate allegations of judicial misconduct and report them to Congress. The Committee's chairman said, in announcing the proposal, that judges must "be punished in some capacity for behavior that does not rise to the level of impeachable conduct."¹² If the then chairman's subsequent action indicated the role he envisioned for the proposed inspector general, judges had good cause for concern. In June 2005, that chairman's office dispatched a letter to a U.S. Court of Appeals, complaining that the court had affirmed an unlawfully low sentence for a narcotics-case defendant. The letter called for a "prompt response . . . to rectify" the decision,¹³ even though the government sought no further review of the sentence.

Another troubling congressional initiative: proposals to prohibit federal courts from relying on foreign law.¹⁴ A misunderstanding appears to underlie the opposition to foreign law citations. As Justice Stephen Breyer explained in a recent interview, citations to foreign laws and decisions should not be controversial.¹⁵ "References to cases elsewhere are never bind-

ing," Justice Breyer emphasized. We interpret and apply only our own Constitution, our own laws. But it can add to our store of knowledge "to look at how other people [with a commitment to democracy similar to our own] solve similar problems." (In this regard, I have found enlightening decisions of Canada's Supreme Court.) Justice Breyer compared references to the decisions of foreign and international tribunals to references to a treatise or to a professor's work.



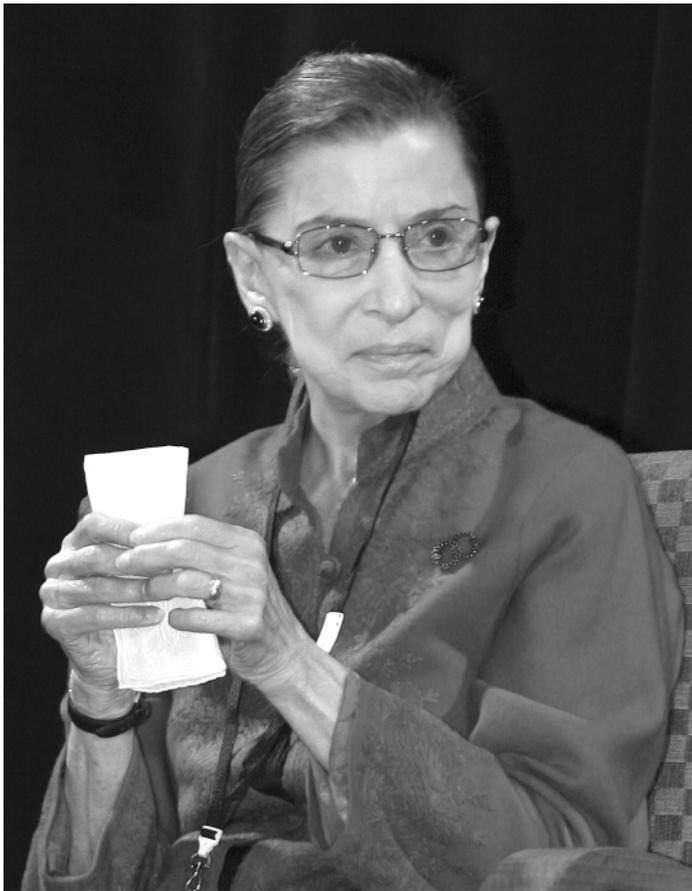
Lest I appear to be spreading too much gloom, I should emphasize the vocal defenders of the Judiciary, intelligent voices that do not divide along party lines. The *New York Times*, a paper some regard as "liberal," recently editorialized: "The courts will not always be popular; they will not always be right. But if Congress succeeds in curtailing the judiciary's

5. See Act for the Relief of the Parents of Theresa Marie Schiavo §5, Pub. L. No. 109-3, 119 Stat. 15, 16 (Mar. 21, 2005) ("Nothing in this Act shall be construed to create substantive rights . . .").
 6. Quoted in Carl Hulse & David D. Kirkpatrick, *Even Death Does Not Quiet Harsh Political Fight*, N.Y. TIMES, Mar. 31, 2005, at A1.
 7. Quoted in *id.*
 8. Quoted in Editorial, *Attacking a Free Judiciary*, N.Y. TIMES, Apr. 5, 2005, at A22.
 9. Editorial, *Judges Made Them Do It*, N.Y. TIMES, Apr. 6, 2005, at A22.
 10. Quoted in Charles Babington, *Senator Links Violence to 'Political' Decisions; 'Unaccountable' Judiciary Raises Ire*, WASH. POST, Apr. 5,

2005, at A07.
 11. Quoted in David D. Kirkpatrick, *Republican Suggests a Judicial Inspector General*, N.Y. TIMES, May 10, 2005, at A12.
 12. Quoted in *id.*
 13. Quoted in Maurice Possley, *Lawmaker Prods Court, Raises Brows; Demands Longer Term in Chicago Drug Case*, CHI. TRIB., July 10, 2005, at C1.
 14. See S. Res. 92, 109th Cong. (2005); H. Res. 97, 109th Cong. (2005); Constitution Restoration Act, S. 520, H.R. 1070, § 201, 109th Cong. (2005); American Justice for Americans Citizen Act, H.R. 1658, § 3 (2005).
 15. Toward "Active Liberty," HARV. L. BULL. 14, 18 (Spring 2006).

ability to act as a check on the other two branches, the nation will be far less free.”¹⁶ Former Solicitor General Ted Olson, generally perceived as conservative, published a similar view: “Americans understand,” and I hope he is right, “that no system is perfect and no judge immune from error, but also that our society would crumble if we did not respect the judicial process and the judges who make it work.”¹⁷

History suggests that Congress is unlikely to employ the nuclear weapon—impeachment—against judges who decide



cases in a way the “home crowd” does not want. In the 219 years since the ratification of the Constitution, the House of Representatives has impeached only 13 federal judges; in only seven instances did impeachment result in a Senate conviction,¹⁸ and those judges were removed not for wrongly interpreting the law, but for unquestionably illegal behavior, such as extortion, perjury, and waging war against the United States.¹⁹

Although politically driven impeachment of federal judges is a remote prospect, yet another threat to judicial indepen-

dence cannot be discounted so easily. In President Clinton’s second term, it bears reminding, political hazing of federal judicial nominees was unrelenting. The confirmation process in those years often strayed from examining the qualifications of each nominee into an endeavor to uncover some hidden “liberal” agenda the nominee supposedly harbored. For many Democrats, President Bush’s successive terms have been pay-back time, an opportunity to hold up or reject Bush nominees to the federal judiciary on ideological grounds.

Injecting politics prominently into the nomination or the confirmation process means long delays in filling judicial vacancies, and delay, in the face of mounting caseloads, threatens to erode the quality of justice the U.S. federal judiciary can provide. Vacancies in large numbers inevitably sap the energy and depress the spirits of the judges left to handle heavy dockets.

I should mention, too, the host of jurisdiction-curtailing measures lately placed in the congressional hopper. One bill would have severely limited the scope of federal habeas corpus review.²⁰ Another would have removed federal courts’ authority to decide any case concerning the Ten Commandments, the Pledge of Allegiance, and the National Motto, “In God We Trust.”²¹ Yet another would have taken away from the federal courts authority to adjudicate free exercise or establishment of religion claims, privacy claims (including those raising “any issue of sexual practices, orientation, or reproduction”), and any claim to equal protection of the laws “based upon the right to marry without regard to sex or sexual orientation.”²²

All these proposals, and other like-minded bills, failed, as students of history could have predicted. Jurisdiction-stripping reactions to disliked decisions have been proposed perennially. In the 1950s, desegregation and domestic-security cases were on some legislators’ strip lists; in the 1960s, federal court review of certain criminal justice matters; in the 1970s, busing to achieve racial integration in schools; in the 1980s, abortion and school prayer. None of these efforts succeeded, and most of the more recent endeavors to curb federal court jurisdiction have fared no better. A simple truth has helped to spare the Federal Judiciary from onslaughts of this character: It is easier to block a bill than to get it enacted.

I note, finally, a Congress-Court confrontation proposed in 2004 and revived the next year. The most recent try, titled the “Congressional Accountability for Judicial Activism Act of 2005,” would allow U.S. Supreme Court judgments declaring a federal law unconstitutional to be overturned by a two-thirds vote of the House and Senate.²³ (Canada’s Charter of Rights and Freedoms, if I recall the “notwithstanding clause” correctly,²⁴ allows for a legislative override of a Supreme Court

16. Editorial, *supra*, note 8.

17. Theodore B. Olson, *Lay Off Our Judiciary*, WALL ST. J., Apr. 21, 2005, at A16.

18. Federal Judicial Center, *Impeachments of Federal Judges*, http://www.fjc.gov/history/home.nsf/page/topics_ji_bdy (last visited Aug. 28, 2007).

19. Maria Simon, Note, *Bribery and Other Not So “Good Behavior”:* *Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617, 1617 n.2 (1994).

20. Streamlined Procedures Act, U.S. 1088, H.R. 3035, 109th Cong. (2005).

21. Safeguarding our Religious Liberties Act, H.R. 4576, § 2, 109th Cong. (2005).

22. We the People Act, H.R. 4379, § 3, 109th Cong. (2005).

23. Congressional Accountability for Judicial Activism Act of 2005, H.R. 3073, § 2, 109th Cong. (2005).

24. Charter of Rights and Freedoms § 33(1).

decision holding a statute incompatible with a Charter-protected right. But the Parliament, is it not so, has yet to avail itself of that prerogative.)

A Constitution providing for legislative override of court decisions resolving constitutional questions, author and journalist Anthony Lewis observed, “would be more democratic in the sense that it would remove constraints on majority rule.”²⁵ But, Lewis rightly reminds us, in the words of Aharon Barak, former president of the Supreme Court of Israel: “Democracy is not only majority rule. Democracy is also the rule of basic values . . . values upon which the whole democratic structure is built, and which even the majority cannot touch.”²⁶ The founders of the United States did not envision a rule of law based on pure majoritarianism,²⁷ and I see no cause to open the door to a legislative override now.

Particularly since the 2006 election, I am pleased to relate, rapport between Congress and the federal courts has markedly improved. No bills of the kind I have described have been introduced in the current Congress, and one sees far fewer broadsides against “activist judges” reported in the press.

A note on U.S. state courts, whose judges in most states, at least at some levels, are chosen in periodic elections. A question I am often asked when traveling abroad: “Isn’t an elected judiciary totally at odds with judicial independence?” How can an elected judge resist doing “what the home crowd wants”? I have no fully satisfactory answers to those questions.

To return to my starting line, when former Chief Justice Rehnquist described an independent judiciary as the USA’s hallmark and pride, he was repeating a theme sounded since the United States became a nation. James Madison was perhaps most eloquent on the subject. When he introduced in Congress the amendments that became the Bill of Rights, he said:

[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of th[e]se rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.²⁸

Madison may have put the matter with more force than history confirms, but his basic idea remains vibrant.

It is fitting, I think, to close with the words of two U.S. legal scholars from different ends of the political spectrum—one, Bruce Fein, known for his “conservative perspective,” the other, Burt Neuborne, known for his “progressive vision.” Though often on opposite sides in debate, they joined together to speak with one voice on the value of judicial independence.

Their co-authored essay concludes:

Judicial independence in the United States strengthens ordered liberty, domestic tranquility, the rule of law, and democratic ideals. . . . It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans.²⁹

To that, I would add only “Amen.”



Ruth Bader Ginsburg has been an Associate Justice of the United States Supreme Court since 1993; she was appointed to the Court by President Bill Clinton. She had previously served as a judge on the United States Court of Appeals for the District of Columbia from 1980 to 1993, and she was a law professor at Rutgers University School of Law (1963–1972) and at the Columbia Law School (1972–1980). In 1971, she was instrumental in launching the Women’s Rights Project of the American Civil Liberties Union; she served as the ACLU’s general counsel from 1973 to 1980. She received her B.A. from Cornell University, attended Harvard Law School, and received her LL.B. from Columbia Law School.

25. Anthony Lewis, *Why the Courts*, 22 *CARDOZO L. REV.* 133, 137 (2000).

26. *Id.* (quoting Aharon Barak, president of the Supreme Court of Israel).

27. See *THE FEDERALIST* No. 51 (James Madison).

28. James Madison, Address to the House of Representatives (June 8, 1789), reprinted in *THE MIND OF THE FOUNDER* 224 (Marvin Meyers ed., 1973).

29. Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 *JUDICATURE* 58, 64 (2000).