

Judicial Independence in the Pursuit of Justice

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As Editor-in-Chief of this esteemed magazine for the next year, I encourage all members of the bench and bar to submit articles geared towards life, liberty and the pursuit of happiness, among other issues that enrich our profession, and society in general. Upon becoming editor, I considered several issues but decided on judicial independence in the pursuit of justice as my inaugural editorial commentary.

As I highlighted in my 2005 Temple Law Review article “Judicial Independence and the Minority Jurist: The Shining Example of Chief Justice Robert N.C. Nix, Jr.,” some commentators refer to judicial independence as just another mushy, noble-sounding legalism. But to me, judicial independence is simply the ability of jurists to ensure that each litigant, of whatever gender, race, age, national origin, or sexual orientation, obtains fair and impartial justice. There are two types of judicial independence: decisional and institutional. Decisional independence is the right or ability of each judge to decide a case without fear of societal or political pressure. Institutional independence, on the other hand, is the ability of the judicial branch to interpret laws without fear of the executive or legislative branches of government. Institutional independence empowers the judiciary to strike down laws by the legislature and/or executive branch actions deemed inconsistent with the respective constitution. Examples of institutional independence include *Marbury v. Madison*, 5 U.S. 137 (1803), the seminal U.S. Supreme Court case establishing the principle of judicial review, and the very recent U.S. Supreme Court case of *Department of Commerce v. New York*, No. 18-966, 588 U.S. (June 27, 2019), which invalidated the attempt of the Trump administration to place a citizenship question on the 2020 census.

How is “justice” defined, and how does judicial independence advance justice? The answers to these questions are complicated. Most of us have ideas of what “justice” is. The Roman/Byzantine emperor, Justinian, is quoted as defining justice as “the constant and perpetual wish to render everyone his [or their] dues.”

Simply put, justice, in my opinion, is the right of each person to receive their just dues without the perverting influence of bias, partiality or prejudice. As professionals trained in the law and jurisprudence, lawyers and judges have an obligation to advance justice, particularly since, perhaps more than any other group, we know or should know, the devastating consequences of injustice. We should not only look to our training, experience and knowledge to advance justice but to other resources, including biblical injunctions. One of these is set forth in 2 Chronicles 19: 6-7, which recommends thinking carefully before pronouncing judgment and judging fairly without partiality, so that justice is not perverted. Members of the judiciary have a special obligation to further justice because of their roles as interpreters of the law. One of the potentially compelling judicial tools for ensuring justice is judicial independence.

Judicial independence is certainly not a panacea for justice, but it is a noble principle that can be exercised to advance justice. Although multiple shameful examples abound of when judicial independence has been used to perpetuate injustice, our history, fortunately, also contains examples of judicial independence in the pursuit of justice.

In *Powell v. Alabama*, 287 U.S. 45 (1932), also known as the Scottsboro Boys trial, the Alabama Supreme Court exercised institutional judicial independence in perpetuating injustice by affirming the conviction and death sentences by electrocution, of eight out of nine African American teenage males for the alleged rape of two Caucasian teenage females, despite

overwhelming evidence that the alleged victims only alleged rape after their Caucasian male companions had lost fistfights to the nine accused. A physician retained by the prosecutor had examined the alleged victims and concluded that there was no rape, and that their accusations were completely false; the attorneys defending the accused included a lead counsel who was so drunk he could hardly walk, and another suffering from early stages of dementia. The jury hung on the death sentence for the ninth defendant, a 13-year-old, even though the prosecutor had not sought a death sentence for him. Defense counsel only had 25



minutes to meet with defendants before the trial started, the entire trial lasted less than 14 hours, and the jury rendered its “verdicts” within minutes of receiving the case.

On appeal, the U.S. Supreme Court reversed and remanded for a new trial. Retrial was assigned to Alabama State Court Judge James Edwin Horton, Jr. Upon conviction of one of the defendants on retrial, even though one of the two alleged victims had recanted and admitted to making up the rape allegation, Judge Horton courageously exercised decisional independence in pursuit of justice by setting aside that jury’s verdict on the ground that the remaining alleged victim’s testimony was improbable and completely unsupported. Influencing Judge Horton’s ruling was a confession to the judge by the physician initially retained by the prosecutor, who confessed (after the prosecutor decided against presenting his findings to the jury), that he had examined the alleged victims, found no evidence of rape and determined that the alleged victims made up the allegations, to which the alleged victims responded by laughing at the physician. Judge Horton set aside the verdict while confessing that he was probably finished as a judge in the state of Alabama. He was right. He lost re-election in 1934 after running unopposed in his previous election in 1928.

In *Dred Scott v. Sandford*, 60 U.S. 393 (1856), the Supreme Court, in an opinion by Chief Justice Roger Taney, brimming with white supremacy and reckless indifference to the rights of Dred Scott, exercised institutional judicial independence in favor of injustice by holding, among other rulings, that Dred Scott was not a United States citizen, that at the time of the Constitution, Blacks were articles of trade who “had no rights which the whiteman was bound to respect,” and that the Missouri Compromise was unconstitutional. The Missouri Compromise had designated a portion of the U.S. territory free from slaveholding and had been the basis for many former slaves regaining their

freedom through lawsuits. Dred Scott legitimized dehumanization of and encouraged unbridled violence against African-American men, women and children. That ruling also immensely contributed to the Civil War.

In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the U.S. Supreme Court, again, exercised institutional judicial independence in favor of injustice by holding “separate but equal” constitutional under state law, despite its own express acknowledgment that “the object of the 14th Amendment was undoubtedly to enforce the absolute equality of the two races before the law.” *Plessy* legitimized state-sponsored racism and brutal oppression against African American men, women, and children. *Plessy* remained the law of the land until *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Brown*, the Supreme Court exercised institutional judicial independence in favor of justice under the leadership of Chief Justice Earl Warren, by unanimously overruling the ignoble *Plessy* decision and holding that “separate but equal” violated the 14th Amendment. Arguably, *Brown* positively impacted the Civil Rights movement.

Department of Commerce v. New York, 588 U.S. (June 2019). In *Department of Commerce*, 18 states and the District of Columbia, along with numerous non-state actors, challenged the March 2018 decision of the Secretary of Commerce Wilbur Ross to add a citizenship question on the 2020 census on the alleged ground that he was simply acting on a request from the Department of Justice to obtain data through the citizenship question in order to better enforce the Voting Rights Act. Plaintiffs, and others, alleged that since history and available data clearly indicated that inclusion of the citizenship question would discourage responses by households with non-citizens and lead to a less accurate census, inclusion of the question violated the enumeration and equal protection clauses of the Constitution, and of the Administrative Procedures Act. The government moved

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for dismissal, arguing that the secretary's decision was judicially unreviewable and that plaintiffs failed to state cognizable claims under either the enumeration or equal protection clauses of the Constitution. The district court dismissed the enumeration clause claims but allowed other claims to move forward.

Over the course of the litigation, plaintiffs contended that the administrative record, allegedly relied on by Secretary Ross for his decision, was incomplete. The district court held a hearing and determined that the record was incomplete, resulting in a stipulation between the parties for the "inclusion of more than 12,000 pages of internal deliberative materials as part of the administrative record, materials that the court later held were sufficient on their own to demonstrate pretext." The additional materials revealed that contrary to merely responding to a request from the DOJ for inclusion of the citizenship question on the census, it was Secretary Ross who began plotting for inclusion of the question soon after he was confirmed to his position in early 2017. These materials further revealed that Secretary Ross directed his staff to make inclusion of the question happen by reaching out to other government agencies, including the Department of Homeland Security, to request the Commerce Department to include the question. When that outreach failed, Secretary Ross personally contacted the attorney general to convince the DOJ to request inclusion of the question for alleged better enforcement of the VRA. Soon after that personal communication with the AG, the DOJ formally requested the Commerce Department to include the question for better enforcement of the VRA. After a bench trial, the district court found Secretary Ross' inclusion of the question was arbitrary, capricious, and pretextual. That court then enjoined inclusion of the question on the census. The government appealed to the Second Circuit but, simultaneously, sought certiorari from the Supreme Court on the ground that the case involved an issue of great importance and that the census questionnaire required finalization for printing by the end of June 2019.

On granting certiorari, the Supreme Court held that Secretary Ross' decision was subject to judicial review, ultimately deciding that the major issue was whether the Secretary's proffered reason for

inclusion of the citizenship question was pretextual. In a 5-4 decision in part V of the opinion by Chief Justice John Roberts, the court emphasized that it was not ruling on the constitutionality of Secretary Ross's inclusion of the question on the census but held that his broad discretion is not limitless. The court further emphasized

agency action. What was provided here was more of a distraction." The court reversed in part, affirmed in part, and remanded.

Consistent with his history of mostly callous jurisprudence on the rights of minorities and the socially disfavored (see my article with Professor Philip Aka, Title VII, "Affirmative Action, and the March Toward Color-Blind Jurisprudence," Temple Political & Civil Rights Law Review, Vol. 11, Fall 2001), Justice Clarence Thomas, joined by Justices Gorsuch and Kavanaugh, berated the majority for questioning the motive of Secretary Ross and questioned whether Secretary Ross' decision was even judicially reviewable.

This case demonstrated institutional judicial independence in furtherance of justice, mostly because the internal 12,000 pages of material the government was compelled to produce, and media publications, revealed that the true reason for Secretary Ross' inclusion of the citizenship question was to depress responses to the census by non-Caucasians and non-citizens, all to the benefit of Republicans in the apportionment of congressional seats and in the distribution of government funds, which rely on the census data.

In conclusion, although not a panacea for securing justice, judicial independence, when justly exercised, can further the goals of justice, which essentially is ensuring that each person gets his or her just dues without the influence of bias, prejudice, or partiality. ■

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that "[w]e now consider the District Court's determination that the Secretary's decision must be set aside because it rested on a pretextual basis, which the Government conceded below would warrant a remand to the agency." The 5-4 majority then held that the Secretary's VRA enforcement rationale—the sole stated reason—"seems to have been contrived." The court continued "[w]e do not hold that the agency decision was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for

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