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THE INTERDEPENDENT RELATIONSHIP OF A FREE PRESS AND AN INDEPENDENT JUDICIARY IN A CONSTITUTIONAL DEMOCRACY

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Abstract: For nearly 240 years, we have recognized, at least constitutionally, that it is essential to the very existence of a constitutional democracy that there be an independent judiciary and a free press. What is not often appreciated is how dependent these two vital institutions are upon each other. Certainly, judges and journalists rarely think in such terms. But events occurring at home and around the world in fledgling and failing democracies should heighten our awareness and appreciation for their interdependence, and help us better understand the liberties and fundamental rights they protect.

In the Declaration of Rights to the Massachusetts Constitution of 1780 (the oldest written constitution in the world still in effect), John Adams identifies two rights as “essential” to the security of freedom and the preservation of all other rights—a free press and access to an independent judiciary.¹ These important rights are broadly recognized as fundamental to human rights and to a constitutional democracy, both in the United States Constitution and internationally.²

A well-informed citizenry is necessary in order to participate in the public debates leading to the election of our democratic leaders. The primary vehicle for creating informed citizens is an independent, robust press in its many var-

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¹ See MASS. CONST. pt. I, art. XVI (“The liberty of the press is essential to the security of freedom in a state”); *id.* art. XXIX (“It is essential to the preservation of the rights of every individual . . . that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.”).

² See U.S. CONST. art. III, §§ 1–2 (independent judiciary); *id.* amend. I (freedom of the press); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 10 (Dec. 10, 1948) (independent judiciary); *id.* art. 19 (free expression through media); *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 (“Right to a fair trial”); *id.* art. 10 (“Freedom of expression”); International Covenant on Civil and Political Rights art. 14, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (independent judiciary); *id.* art. 19 (free expression through media).

ied forms. The freedom to speak and write on matters of importance about society, government and public officials is thus an inescapable necessity of democracy.

An independent judiciary is necessary to ensure that the rights and protections afforded to all persons, as provided in the Constitution, are respected by the government, regardless of their majority or minority status in the democracy. These rights and protections must be interpreted, applied and ensured by a judiciary sufficiently independent of the other branches of government that might be inclined to chip away at them. An independent judiciary is a judiciary that is prepared to say “no” to the Governor, or to the Legislature, or to the President, to acts that are contrary to the rights and protections set forth in the Constitution. In other words, we rely on courts to enforce what the Constitution promises.³

The degree to which we can rely on the Judiciary to perform this function, however, ultimately depends not on the words of the Constitution, because words, after all, are only words, but on the authority the Judiciary derives from the respect and the support of the people it serves. This respect and support is in turn nourished by an information flow about, and an understanding of, the role of courts in a constitutional democracy. It also, of course, depends on a track record of the courts acting impartially and fairly over time.

Although the importance of these two institutions, a Free Press and the Independent Judiciary, seems broadly understood, their interdependency seems counterintuitive to many at first blush. After all, the actions of the Judiciary often come under scrutiny and criticism by the press. Doesn't negative reporting about judges or judicial decisions in fact undermine the very public trust and confidence that the authority of the Judiciary depends upon? A closer examination of the institutions and their respective roles and responsibilities may get us beyond that initial reaction.

Both of these institutions stand in stark opposition to the interests and inclination of those with power from time to time, who may regard the courts and the press as interfering with the exercise of their powers. There is nothing that gets under the skin of government officials quite as deeply as when the freedom of the press becomes a license to criticize and expose their actions, inactions, misadventures, corruption and incompetence. One example from our

³ For example:

A key historical lesson of the Holocaust is that the people, through their representatives, can destroy democracy and human rights The protection of human rights . . . cannot be left only in the hands of the legislature and the executive, which, by their nature, reflect majority opinion. Consequently, the question of the role of the judicial branch in a democracy arises.

more recent history arose near the end of the War in Vietnam, when the Executive branch of our government attempted to conceal the full history of the origins and conduct of war from the American public, by suppressing the publishing of what was called the “Pentagon Papers,” a collection of internal communications documenting that history in a very unflattering manner.

When the freedom of journalists to speak and write is challenged through prosecution or harassment by government officials determined to silence their voices—the courts are their principal refuge. That is exactly what happened in the Pentagon Papers case. The courts upheld the right of the *New York Times* to publish the Pentagon Papers.⁴

When the Judiciary is under siege by the other branches of government or political partisans for performing its constitutional function in what they view as an inconvenient way, the Judiciary is particularly reliant on the press to communicate its plight to the people, and on the people to respond to that plight. It is not surprising that once a free press is hobbled or dismantled, the independence of a country’s Judiciary will surely suffer as intrusions on its independence and impartiality are buried deep with no discerning public eye. Similarly, stripping the Judiciary of its independence, by government intimidation or by “law,” inevitably leads to the shutdown of media organizations and often the arrest (or worse) of journalists critical of the government. This has surely been the case in Turkey and Russia, and is increasingly the strategy of “democratically elected” leaders attempting to expand and consolidate their powers in countries such as Hungary and Poland.⁵

⁴ *N. Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). More recently, a federal judge granted an emergency motion restoring White House Press credentials for a CNN reporter, concluding that its revocation was likely a violation of the reporter’s Fifth Amendment rights. Brian Stelter et al., *Judge Orders White House to Return Jim Acosta’s Press Pass*, CNN (Nov. 16, 2018, 4:29 PM), <https://www.cnn.com/2018/11/16/media/cnn-trump-lawsuit-hearing/index.html> [https://perma.cc/569J-R43M]. See generally Complaint, *CNN v. Trump*, No. 1:18-cv-02610-TJK (D.D.C. Nov. 13, 2018) (alleging violations of the First and Fifth Amendments); Plaintiff’s Motion for a Temporary Restraining Order, *CNN v. Trump*, No. 1:18-cv-02610-TJK (D.D.C. Nov. 13, 2018) (arguing for restoration of the reporter’s credentials based on plaintiffs’ likelihood of success on their First and Fifth Amendment claims).

⁵ The situation in Cambodia may even be worse. Although the words of its constitution provide for an independent judiciary, the judiciary has no power to declare or strike laws or executive acts violative of the constitution, and has become a tool of the executive branch, and an arm of the Cambodian People’s Party (CPP), the ruling party. As a consequence, after the opposing political party finished nearly even with the CPP in local elections held in June 2017, the government shutdown thirty radio stations which had been critical of the ruling party, and forced one of the two leading independent newspapers to shut down and the other to be sold to a businessman with direct ties to the Prime Minister. See Ananth Baliga et al., *RFA Shuts Down Cambodia Operations Amid Media Crackdown*, PHNOM PENH POST (Sept. 12, 2017, 10:15 PM), <https://www.phnompenhpost.com/national/rfa-shuts-down-cambodia-operations-amid-media-crackdown> [https://perma.cc/A3TG-FDQ8] (stating that “more than [thirty] radio frequencies” had closed); Kate Lamb, *Cambodia ‘Fake News’ Crackdown Prompts Fears Over Press Freedom*, THE GUARDIAN (July 6, 2018, 1:29 AM), <https://www.theguardian.com/world/2018/jul/06/cambodia-fake-news-crackdown-prompts-fears-over-press>

Many others have recognized and described this phenomenon—an independent Judiciary and a free press working in tandem to promote and protect a free society where the rule of law is paramount. It was succinctly put this way by United States Supreme Court Justice Felix Frankfurter seven decades ago:

A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.⁶

More recently, Warren Burger, a former Chief Justice of the United States Supreme Court, noted that “[j]ournalistic independence and judicial independence have now, for two centuries, served to maintain the unique American system of ordered liberty.”⁷ They provide a sort of “lateral support” for each other, so that “any force that can destroy the one can probably destroy the other.”⁸

freedom [<https://perma.cc/7NSF-2W4U>] (reporting the closure of *Cambodia Daily* and sale of *Phnom Penh Post* “to a Malaysian investor who is the chief executive of a PR firm that has worked on behalf of Prime Minister Hun Sen”); Prak Chan Thul, *Cambodian Opposition Makes Gains in Local Elections*, REUTERS (June 3, 2017, 9:21 PM), <https://www.reuters.com/article/us-cambodia-election/cambodian-opposition-makes-gains-in-local-elections-idUSKBN18V02J> [<https://perma.cc/EK7W-L3S2>] (describing the opposition’s success in local elections in 2017). Prime Minister Hun Sen justified the decision to shut down the radio stations and limit the press by referring to President Trump’s criticism of “fake news” in the United States. See Lamb, *supra* (reporting that Pos Sovann, an official from Cambodia’s information ministry stated, “Fake news is not good for a real democracy, we want good news for our people”). Thereafter, in February 2018, the government enacted a law forbidding insulting the royal family, and began arresting persons who made derogatory comments about the monarchy’s actions on Facebook. *Cambodia Makes First Arrest Using New Royal Insult Law*, REUTERS (May 13, 2018, 1:02 AM), <https://www.reuters.com/article/us-cambodia-king/cambodia-makes-first-arrest-using-new-royal-insult-law-idUSKCN1IE05S> [<https://perma.cc/6KPS-PW78>].

In Nicaragua, the government accuses journalists and media outlets who criticize or oppose its agenda as “terrorists,” a strategy also used to prosecute journalists in Turkey. Carlotta Gall, *Turkish Court Convicts 13 from Cumhuriyet Newspaper on Terrorism Charges*, N.Y. TIMES (Apr. 25, 2018), <https://www.nytimes.com/2018/04/25/world/europe/turkey-journalists-trial-cumhuriyet.html> [<https://perma.cc/PFZ6-ZU8V>]; Carrie Kahn, *Nicaragua’s Embattled Government Tries to Silence Independent Media*, NATIONAL PUBLIC RADIO (Aug. 30, 2018, 4:30 PM), <https://www.npr.org/2018/08/30/642976177/nicaraguas-embattled-government-tries-to-silence-independent-media> [<https://perma.cc/R3EZ-QSQ6>]. The judiciary in Nicaragua is closely aligned with, and dependent upon, the Sandinista National Liberation Front and its President Daniel Ortega, to the extent, for example, of barring Ortega’s opposition candidate from standing for election in 2016. Jonathan Watts, *Nicaragua President Re-Elected in Landslide Amid Claims of Rigged Vote*, THE GUARDIAN (Nov. 7, 2016, 11:52 AM), <https://www.theguardian.com/world/2016/nov/07/nicaragua-president-daniel-ortega-reelected-landslide-vote-rigging> [<https://perma.cc/5Z6H-PNPA>].

⁶ *Pennekamp v. Florida*, 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring).

⁷ Warren E. Burger, *The Interdependence of Judicial and Journalistic Independence*, 63 GEO. L. J. 1195, 1201 (1975).

⁸ *Id.* at 1197.

And even more recently, current United States Supreme Court Justice Stephen Breyer eloquently expressed it this way:

A free press is necessary to narrate to the public what is being done by those in power, to provide them in a more general way with the information necessary to vote and to make other political decisions in an intelligent way. An independent judicial power is necessary to guarantee the continuing existence of the conditions precedent necessary for democracy, such as a free press; and, to ensure that those in power cannot, in practice, strip the citizens of the freedoms that, in principle, are guaranteed by a Constitution.⁹

So what happens when the free press turns its sights on the courts? Scrutinizing, sensationalizing and exposing the frailties of the Judiciary and questioning its ethical standards and performances?

I confess that American courts were late to recognize that they too needed to be the willing subjects of media criticism. Although American court proceedings and records have been presumptively public for their entire history, journalistic comments overly critical of judicial performance in pending cases, deemed disrespectful, were, at times, viewed as punishable in court by contempt penalties.

That sensitivity disappeared after the United States Supreme Court, in 1941, in *Bridges v. California*, reversed such a contempt penalty imposed on a newspaper, and declared that “it is a prized American privilege to speak one’s mind, although not always with perfect good taste, [about] all public institutions,” and that an “enforced silence” about the courts “engender[s] resentment, suspicion, and contempt much more than it [] enhance[s] respect.”¹⁰ I agree.

The power of the courts depends on the confidence and trust of the people. People can—they do, and they will—disagree with a judge’s decision, any judge’s decision. In our system, uniquely, the people, the press, can and do speak loudly, even before the judge makes their decision. And the press and the public often disagree with the way a case is handled, or with the outcome, particularly in disputes in settled areas of law. Regardless of how complex or difficult the issues, judges will make decisions. They must. And they will be criticized, and the press will print that criticism—because our Constitution says it may. Judges will also be able to withstand any criticism if their procedures are seen to be fair, and if the public understands the ways in which the judiciary is

⁹ Stephen Breyer, *Communication Media and Its Relationship with Supreme Courts*, 42 ST. LOUIS U. L.J. 1083, 1085 (1998).

¹⁰ *Bridges v. California*, 314 U.S. 252, 270, 271 (1941).

accountable through the transparency with which judicial proceedings take place and how those decisions are explained.

Judges, for their part, often complain that “public ignorance of the real workings of [the] courts [is] due to ignorant and sensational reports in the press.”¹¹ In our local and national media, individual judges are often the focus of less than flattering commentary. But, for good or ill, the media remain the primary source of public information about the judicial branch of government. And while many decry the press’s role in sensationalizing coverage of trials, I want to underscore a point about the public scrutiny of judges. I celebrate—genuinely celebrate—that we have a free press. Although press criticism can be harsh, uncomfortable, ill-informed, the public and press are welcomed in our courtrooms. The common-law tradition of public access to court proceedings is one important way courts and judges are made accountable and the legitimacy of the judiciary is preserved.¹² The right of the media to publish freely what they think of our actions is an important corollary to that tradition.

That right—that people may freely criticize what judges are doing—I believe has helped to make America the freest country in the world. The criticism may be unfair in particular instances, but the airing of diverse viewpoints has made our nation what we are. Although it is frequently easier to attempt to silence a critic than to answer him, we have chosen a different system of government.

To be sure, there is an important distinction between criticism of judges and criticism of other public officials. Judges cannot talk back. There is little they can do when their decisions are criticized. Canons of judicial ethics prevent them from commenting on cases before them, even to rebut distortions of their actions. No press conferences, no television interviews, no letters to the editor. Nor do judges have the kind of leverage against harsh criticism that other government officials have. A President’s National Security Adviser can negotiate with television networks for a certain kind of news coverage, because she can offer access in return for cooperation. No judge, no court, can do that, even assuming they would want to.

¹¹ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, REP. OF THE TWENTY-NINTH ANN. MEETING OF THE A.B.A., pt. 1, 1906, at 395, 415.

¹² One of America’s most renowned Supreme Court justices—Justice Oliver Wendell Holmes—articulated the vital importance of transparency in the following words when he was the Chief Justice of the Massachusetts Supreme Judicial Court:

It is desirable that the trial of causes should take place under the public eye . . . because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Cowley v. Pulsifer, 137 Mass. 392, 394 (1884).

Instead, when the actions of judges are unfairly attacked, they must rely on others—other judges, bar associations, lawyers, the informed media—to speak when they cannot. When these groups do not step forward to answer irresponsible criticism, judges are particularly at the mercy of demagogues. Unanswered, the steady drip, drip, drip of irresponsible criticism can poison the very roots of judicial independence: public trust in the courts. So judicial independence uniquely depends on many allies. Not least of these is a media knowledgeable about the judge’s role in our democracy and willing to spend time examining that role. This is the “lateral support” so crucial to maintaining both a free press and an independent judiciary.

How do we, as judges, lawyers, educators and journalists ensure that the public is well informed about the courts and the pivotal role that an independent judiciary plays in a constitutional democracy? How do we build that foundation of public respect which enables us to do our jobs without fear or favor? Justice Stephen Breyer got it exactly right when he said that “[j]udicial independence . . . is ultimately a question of helping the public to understand.”¹³ In the United States, with its constitutional guarantees that assure controversy, helping people to understand means that judges must write opinions and judgments that can be understood not only by themselves and the bar but also by the public and journalists. Judges must also explain the importance of independent courts. For me, personally, it means speaking to students, to teachers, to community and business groups to communicate that law and the courts are not, fundamentally, about the random sensational trial but about soberly thinking through the delicate balance between freedom and order. People gain a new respect for the judiciary, a new concern to protect it, when they are helped to make the connection between an independent judiciary and the freedoms we so often take for granted.

The need for public understanding of the role of our courts puts an obligation on the two institutions. The courts and the press. Judges must be more communicative about their role. Journalists must probe beyond the sensational trials to understand, and help others to understand, the central role of judicial independence in our constitutional democracy. Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised. Our society depends heavily on the press for that enlightenment. Judicial independence uniquely relies on many allies. Not least of these is a media knowledgeable about the judge’s role in our democracy, willing to spend time examining and explaining that role, and willing to expose unfair attacks against judges and judicial independence to the clear light of reason.

¹³ Stephen G. Breyer, *Liberty, Prosperity, and a Strong Judicial Institution*, 61 LAW & CONTEMP. PROBS. 3, 5 (1998).