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## Judicial Independence: Origins and Contemporary Challenges

David J. Barron

*Circuit Judge, United States Court of Appeals for the First Circuit*

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## Articles

### **Judicial Independence: Origins and Contemporary Challenges\***

**David J. Barron\*\***

I want to thank Chief Judge Smith and Judge McConnell for inviting me to speak to you at this conference. The theme that you have chosen—judicial independence and the courts—is always an attractive one for a judge to talk about. For one thing, there are not many judges who have to think very hard about whether they are for it. For another, there are not that many topics that such judges can talk about publicly, and this is one of them. It is hard to go wrong—especially if you defend judicial independence, which I plan to do. But, beyond self-interest, judicial independence is an important topic in its own right, and now more than ever. And so, I am pleased to offer some reflections about the origins of this idea in our constitutional system and some of the contemporary challenges to it.

The challenges to judicial independence at present are, as you all know, quite real. At certain moments, concerns about judicial independence do become more salient than in others—not only here in our country but also globally. And it is quite evident that this issue has become salient in constitutional democracies the world over. The salience of this issue may be attributed at present to the

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\*\* Circuit Judge, United States Court of Appeals for the First Circuit.

increasing political and cultural divisions within Western democracies—for a polarized politics is sure to put pressure on the independence of a court system. The contentious nature of the questions that such a polarized politics is certain to bring to courts is one contributing factor. So, too, though, is the nature of political polarization itself.

Such polarization, once it takes root, feeds on, even as it generates, great suspicion (not always unjustified) of any institutions—whether they be scientific academies, university faculties, media outlets, or courts—that purport to stand outside the polarization and to be committed not to either side in the struggle of the moment but to something more timeless—call it the scientific method, academic values, journalistic obligations, or the demands of the law. For as critical as neutral institutions are to a free society, they are also—especially in a free society—sure to be objects of suspicion when that society finds itself sharply divided in its politics. And when the institution that claims to be guided by such above-the-fray neutrality is, by design, immunized from post-hoc electoral accountability, as federal judges uniquely are, then that suspicion, heightened by court rulings on contentious matters, will, unsurprisingly, take aim at more than the asserted illogic of this or that judicial ruling.

That suspicion will spark calls for more than the need to correct legislatively or by constitutional amendment the result of this or that ruling in a specific case. Instead, such outcome-fueled suspicion will inevitably take aim at the very independence of that unaccountable but self-professedly neutral institution, in gross. And when this happens, the problem comes to be seen not merely as one that concerns how an independent judiciary has chosen to decide a particular case. The problem comes to be seen as one that concerns whether the judiciary that was permitted to decide a case of that magnitude at all should be allowed to remain so independent or, relatedly, whether it is deciding things with the kind of independence of mind that should be expected of those given such unaccountable authority. There comes to be a loss of faith, in other words, that the decisions the judiciary produces are anything other than the expression of one side of the polarized debate that defines the nation's politics more broadly.

There is, we should take solace, nothing new in this dynamic. It was present soon after the founding in the transition from

President Adams to President Jefferson. It was true during the Reconstruction period when the size of the Supreme Court was adjusted time and again. It was true during the New Deal, with the failed effort at court-packing. And it was true during the height of the Warren Court, with the spate of efforts to strip the federal courts of jurisdiction over a host of matters and even to impeach certain justices, the chief justice among the targets. We are, it turns out, pretty good at forgetting unpleasant aspects of our history that might lead us to doubt just how strong our commitment to an ideal really is. And thus, despite this past, in which challenges to the independence of the federal courts have been more than occasional, there has not been a wholesale loss of appreciation of the ideal of judicial independence.

Judicial independence is an ideal that runs deep in the nation's understanding of itself, so much so that it is hard to think of our constitutional democracy without picturing judges—*independent* judges—as being just as foundational to it as members of Congress or presidents. It is, in other words, foundational to our own understanding of what our democracy is that there might be matters of great consequence—whether they concern racial justice, as in *Brown*,<sup>1</sup> or executive authority, as in the Nixon Tapes case<sup>2</sup> or the Steel Seizure case<sup>3</sup>—that properly will be decided in a forum that is removed from direct political control and that derives its legitimacy in resolving such questions in large part from the sense that its independence permits it to exhibit a degree of neutrality, expressed in the grammar of law, and subject to its demands, that the contentious politics of the moment cannot.

To make the point that the need for independence was anticipated from the very start, even though it was hardly a standard practice at the time, I thought I would begin with a story from Rhode Island. It is not a contemporary story. It is, though, an instructive one. I think it helps to remind us of just what the point of judicial independence is, how durable an idea it has proven to be, and what we might do, if we would wish for it to endure, to shore it up.

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
  2. *United States v. Nixon*, 418 U.S. 683 (1974).
  3. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

The story takes place in 1786. The Rhode Island General Assembly had just passed a series of laws that required merchants to accept paper money in the same manner that they would accept gold or silver.<sup>4</sup> These laws were harsh. They subjected merchants who failed to comply with them to criminal prosecution within three days in a special court in which there would be no right to a jury. These laws were also the product of a contentious political debate within the state and one that was playing out across the fledgling nation as a whole. These laws were part of what the Federalists—who, as you know, advocated strongly for the kind of independent federal judiciary codified in Article III of the Constitution—would soon be derisively calling the “rage for paper money.”<sup>5</sup> This “rage” reflected a desire on the part of the people themselves, as expressed through their state legislatures, to ease the burden on those lower down the economic chain. There was, after all, a reason why Rhode Island would not even send a delegate to the Constitutional Convention in Philadelphia. Its political representatives had a pretty good idea which direction that convention was likely to go when it came to concerns such as those that had animated the passage of these pro-paper-money measures.

The story picks up next in September of that year. At the time, a Rhode Islander named John Trevett attempted to purchase meat from John Weeden, who owned a butcher shop in Newport. Weeden, as it happened, refused Trevett’s paper money as payment for his order. In response, Trevett took out an information against Weeden for the crime of refusing that type of currency.<sup>6</sup> Weeden was represented in the case that followed by James Mitchell Varnum, who had served as a general in the Continental Army and who had attended the Continental Congress on behalf of Rhode Island. At the ensuing criminal trial, Varnum argued that the law authorizing the court to hear the case was unconstitutional, as he contended that it infringed on Weeden’s right to have his case heard in front of a jury. Rhode Island did not have a written constitution in 1786. But, Varnum dismissed this inconvenient fact, arguing,

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4. William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 476 (2005).

5. THE FEDERALIST NO. 10, at 64 (James Madison) (Henry Dawson ed., 1863).

6. Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 79 (2003).

“Constitution! We have none: Who dares to say that? None but a British emissary, or a traitor to his country.”<sup>7</sup> He thus argued that the right to trial by jury was fundamental, pointing to various sources, including natural law. This argument—it bears emphasizing—was being pressed more than a decade before *Marbury v. Madison*.<sup>8</sup> That was the case, of course, in which Chief Justice Marshall established judicial review by federal courts of the constitutionality of legislation.

But, Varnum was no legal slouch, and so he elegantly made the case for judicial review before Chief Justice Marshall had occasion to do so. He contended that “[t]he Judiciary have the sole power of judging of those laws [passed by the legislature], and are bound to execute them; but cannot admit any act of the Legislature as law, which is against the constitution.”<sup>9</sup> Indeed, so pleased was Varnum with his argument that, as Dean William Treanor from Georgetown notes, he published this early argument for judicial review in pamphlet form and even appeared at the Constitutional Convention in Philadelphia to offer it for sale. (Shouldn’t he have passed it out for free?) But, in making this case, Varnum realized it was also necessary to make the case for judicial independence—which he figured even then had more popular appeal than did judicial review itself. And so he argued that judicial review was necessary because judicial “[s]ervility” to the legislature “would render [the courts] totally subservient to the will of their masters, and the people must be enslaved or fly to arms.”<sup>10</sup> The next day, the court announced its decision, preventing the case against Weeden from proceeding. Three of the judges explained that the act requiring the jury-less criminal trial was “unconstitutional,” but only one provided an explanation, stating that it was unconstitutional to impose penalties without a jury trial. Another judge merely stated that he “voted against taking cognizance,” while the fifth judge offered no

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7. Treanor, *supra* note 4, at 477 (quoting James M. Varnum, *The Case, Trevett v. Weeden*, in BERNARD SCHWARTZ, 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 417, 421 (1971)).

8. 5 U.S. (1 Cranch) 137 (1803).

9. Treanor, *supra* note 4, at 477 (quoting Varnum, *supra* note 7, at 423).

10. B. Mitchell Simpson III, *The Case of Trevett v. Weeden*, R.I. B.J. May–June 2017, at 7 (quoting Varnum, *supra* note 7, at 422).

explanation at all.<sup>11</sup> And with that, one of the models for *Marbury* was in place.

But the Rhode Island General Assembly was hardly done with the matter. It quickly summoned the five judges on the court to appear before them to explain their decision. On two occasions that fall, three judges did appear before the General Assembly—at one appearance, represented by Varnum—to justify their actions. The judges did not provide significant additional explanation for their decision, however, and the General Assembly passed a resolution expressing its dissatisfaction with this lack of explanation. Nevertheless, the General Assembly determined that, because the judges had not committed a criminal offense, they could not be removed, and they were discharged from attending additional meetings of the General Assembly.

But lest it seem that judicial independence passed this early test—the story ends this way. In May of 1787, it turns out, just as the delegates were meeting in Philadelphia to begin drafting what would become the federal Constitution’s guarantee of judicial independence for the federal judiciary, the General Assembly had occasion to appoint judges for their annual terms—there being no life tenure in Rhode Island for judges at the time. And, as it happened, four out of the five judges who decided *Trevett v. Weeden* were not reappointed to their posts. I am guessing you have an idea about the one who was reappointed: he was the only one of the five who had not offered an explanation for his vote. Perhaps this was a coincidence. Perhaps not.

It is remarkable, then, that the federal Constitutional Convention—and eventually, the people of the various states through the ratification process—made Article III part of the Constitution, with the strong form of independence that it supplies. But, the delegates to the convention in Philadelphia—and eventually, the people then voting in ratifying constitutions—were of the view that Varnum basically had it right. Judges could not be made to be servile political actors. They needed to be able to act neutrally—and that meant both that they needed to be protected from direct political control, so long as they exhibited good behavior—and that they needed to be empowered to, in consequence of their independence, safeguard certain basic rights

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11. Treanor, *supra* note 4, at 478.

that politics might in the moment fail to respect. After all, the Declaration of Independence had asserted that one of the crimes of the King was precisely that he had not respected the independence of judges. The King “has made [j]udges dependent on his [w]ill alone, for the tenure of their offices, and the amount and payment of their salaries,” Jefferson wrote in that document.<sup>12</sup>

This brief story from our past is instructive along a number of dimensions. In particular, it helps us to see different components of judicial independence, each of which is critical. When we talk about judicial independence, after all, we could be talking about at least two different things. We could be talking, first, about what is sometimes called branch independence. Or we could be talking about what is sometimes called decisional independence. Let me start with the first idea of judicial independence before closing with some thoughts about the second kind.

With regard to branch independence, the focus is not on whether any particular decision was made independently. The focus is on whether the judiciary has been set up in a way that permits its decisions to be made independently. The fact that federal judges have life tenure during good behavior is one way that we have set up the federal judiciary to ensure that is the case. We are not at risk of losing our jobs merely because of the rulings that we issue. That was not true of the judges in *Trevett v. Weeden*. They were at such risk, precisely because they had only one-year appointments and thus were effectively subjected to annual performance reviews. The fact that federal judicial salaries may not be diminished—as Article III provides—is another way in which the independence of the branch is protected. Just as the prospect of being fired would infringe the independent decision-making capacity, so too would the prospect of a pay cut.

But there are other features of judicial independence that are perhaps less front and center. The separation of powers, whereby the judicial power is made distinct from the legislature and the executive power, is itself a means of securing the independence of the judicial branch. It is the means by which federal judges may ensure that the core of their work is not simply transferred to a separate set of decision makers less independent from political controls so that those actors, rather than independent judges, may

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12. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).



decide them. It is also a means by which judges may insulate themselves from being drawn into political controversies unnecessarily. By giving federal judges the power to hear only cases or controversies, they may not be made to render opinions on the contentious matters of the day outside the context of actual disputes.

But, of course, insofar as the separation of powers is itself in this way a means of securing judicial independence, judicial review—which is not expressly provided for in the Constitution—becomes a critical means by which this aspect of judicial independence is protected. Through judicial review, the federal judiciary gets to determine whether an effort to move a case to administrative judges, not protected by life tenure, is permissible under the Constitution. Similarly, more targeted legislative or executive efforts to strip federal judges of their jurisdiction to decide certain classes of cases—whether concerning busing or school prayer or the death penalty—must be reviewed by the federal judges themselves to ensure that they comply with the constitutional presuppositions about the kind of work that federal judges protected by Article III must decide. Nor, for that matter, may judicial judgments be reopened without federal judges—by virtue of their power of judicial review—first having a chance to pass on whether such reopening would comport with the separation of powers. In this respect, then, Varnum was onto something very powerful in linking judicial review and judicial independence. The way that the branch has been set up ensures that it is not “servile” to political actors. But, to ensure that it remains that way—and thus that such paper protections on independence are respected—federal judges themselves are, through judicial review, enabled to enforce those protections of their own independence.

Of course, to describe these features of the independence of the judicial branch is to acknowledge how much it still depends on norms and customs, more than parchment barriers. There is an established sense about the wrongfulness of using the impeachment clause as an end run around the good behavior protection set forth in Article III. There is a recognition of the legitimacy of judicial review that commands compliance by executive branch actors, even though judges have no real practical means of ensuring such compliance.

At the present time, as best I can tell, the challenge to judicial independence does not take the form of a challenge to these key attributes of the independence of the branch. There are the occasional academic challenges to judicial review, but the fights at the moment concern much more how such review should be exercised rather than whether it should be. Similarly, although there are questions about whether federal judges should be able to retain their jobs for life, there is no real suggestion that I have seen that they should not be permitted to serve during their tenures so long as they exhibit good behavior. Nor thankfully, has there been a push to diminish judicial salaries—not that there has been much of an effort to raise them. I observe as well that the jurisdiction-stripping efforts that were so present in the 1960s and '70s—and that now and again reappear—also have been few and far between of late. In these respects, there would seem to be a strong case for concluding that the independence of the branch is strong. And yet, there are reasons not to be too confident even when it comes to the independence of the branch itself.

There have been proposals to increase the size of the federal judiciary—both in the courts of appeal and at the Supreme Court—that some have seen as, in effect, efforts to make an end run around Article III's guarantees of branch independence. For, while such proposals would not seek the removal of judges due to disagreement with their rulings, they are—sometimes expressly—aimed at effectively replacing them due to disagreement with their rulings. It is as if in *Trevett v. Weeden*, rather than declining to reappoint the four judges who dared to explain their reasons for ruling as they did in that case, the legislature instead chose to reappoint the same five judges but then to also add six new judges who it was confident would vote to overrule that prior decision the first chance that they had.

There are other, more subtle, ways in which the independence of the branch might be thought to be under pressure. There were times—in the not too distant past—when the process for selecting federal judges appeared to reflect what we might think of as a much greater faith in the ideal of judicial independence. The notion that litmus tests were not proper in deciding whom should be appointed was a reflection of that notion. The regularity with which appointments could be made unanimously or with near unanimity was a reflection of that popular faith as well. But the norms

underlying the notion that litmus tests are improper, that there is such a thing as “qualifications” that could be neutrally considered, are ones that, any fair observer would have to acknowledge, are up for debate in ways that were not always the case. For if there were always exceptions to the norm that eschewed litmus tests or that took the notion that qualifications could be divorced from political allegiance at face value, one wonders if the exceptions are becoming the rule.

There is, however, another sense of judicial independence that we might have in mind. Here, the focus is less on the independence of the branch than on the decisional independence of the judges. The notion here is that each judge must decide a case impartially and, as Archibald Cox once put it, “according to law” and not on the basis of political allegiances.<sup>13</sup> Branch independence certainly is a key means by which this is ensured. That federal judges may not be removed for how they rule—and only for serious misconduct—is a critical means of ensuring that each judge will decide a case impartially. But those protections only provide space to exercise independent judgment. They cannot themselves guarantee that the judges themselves will exhibit it. That is up to the judges.

As is often the case in periods of intense political polarization, it must be admitted that the belief that, in consequence of this structural independence, judges do in fact decide cases independently is being daily challenged. The sense that federal judges are not deciding cases, to repeat Cox’s phrase, “according to law”—that their decisions are instead reflective of something more like, if not partisan politics, than at least political ideology—has taken hold of late. It is reflected in the nature of the challenges to the legitimacy of judicial decisions in contentious cases that are being rendered. That the Chief Justice of the United States recently weighed in to assure the public that the federal judiciary does not understand itself to be comprised of Obama judges or Trump judges<sup>14</sup> is an indication of the concern that such challenges to the belief that judges are in fact deciding cases independently were gaining some traction. Or, at least, it is an indication that the

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13. ARCHIBALD COX, *THE WARREN COURT* 6 (1968).

14. Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap over Judges*, AP NEWS (Nov. 21, 2018), <https://apnews.com/c4b34f9639e141069c08cf1e3deb6b84> [<https://perma.cc/K5B2-9NSN>].

legitimacy of the federal judiciary depends on the public believing that what federal judges do is distinct from what the other branches do and that this is not a moment to be complacent about whether the public will continue to believe as much.

I think this sense of judicial independence—that judges are actually deciding cases independently, in the strongest sense of that word—is the one that is under the greatest pressure at the moment. And the question thus becomes, what is to be done about it? The most obvious thing that judges can do is to make sure that they are in fact living up to that ideal in the way they approach their cases and decide them. And the most obvious way to communicate to the public that they are doing just that is through the opinions that they issue—in their tone and substance, in the quality of their reasoning and their fair treatment of competing arguments, in their accounting for precedent and the record. Are the decisions exhibiting the qualities that a system that guarantees independence presupposes? These are questions judges must ask themselves. For, unlike in the day of *Trevett v. Weeden*, judges need not say nothing to ensure that they may keep their job. Rather, it is through the quality of what they do say in explaining the results they reach that they can best ensure that the independence that they have been given will endure.

But, as my presence here today reflects, judges do not communicate with the public solely through their opinions. And so, it is well to consider: how else may judges address the challenges to judicial independence that are evident? One forum is near and dear to me, as someone who taught law for such a long time and who still does, and it is law schools. The concern is that shifts in the political culture are conveying messages to students in law school that may have quite unfortunate impacts on the broader legal culture. The concern is that a message is being conveyed that, in law, there are sides that loosely mirror the political sides, and that you better choose up early to have a legal career in government. I know many judges and academics share this concern—that students, at an age when they should be developing their own independent voice when it comes to law and deciding for themselves the mix of positions that gives them confidence in the integrity of a legal position, may feel pressure to espouse a script, developed by others, for what “their” side believes about law and how to talk about it. The judiciary, in response to this concern, has attempted to account for it. The

committee on judicial conduct recently offered guidance about the types of groups that federal judges may speak to and the conferences that they should attend.

I know I have myself struggled with this issue. I think it is an affirmatively good thing for students in law school to be so engaged with law and legal ideas that they choose to convene in groups like the American Constitution Society and the Federalist Society. Insofar as there are organizations that provide fora for engaging and learning and exploring ideas, they are wonderful institutions. Both before becoming a judge, and after, I have learned from events hosted by such groups, and I have seen them as affording important chances for me to help make the federal judiciary more visible and more knowable to those who care about it. But insofar as students come to think of such organizations as professional markers of belief systems, and as places for learning scripts that they must become adept at reciting in order to advance professionally, then they are serving neither the purposes of legal education nor the cause of judicial independence. And the worry is, for a host of reasons I will not attempt to catalog today, that too many students are coming to think of these organizations in this latter way. For that reason, I have come to think that it is important that judges, when visiting law schools, do their best to encourage students in these groups to meet together rather than separately and to use the occasion to meet with them to express these concerns about the importance of students deciding things for themselves, on the merits so to speak.

But, aside from that particular concern, there is also the broader one of how, more generally, to talk to the public about the challenge to judicial independence that one hears coming from many quarters. There is no simple answer to that question from my perspective. Federal judges, after all, are not always very well suited to press the case for their own neutrality. There is the familiar concern about the effectiveness of protesting too much. There is also the concern that the defense of the independent-mindedness of the judiciary will itself draw the judiciary into the political back and forth, thereby subtly eroding the sense of removal that is important for judges to maintain if they are to decide cases impartially. But, as reflected in the Chief Justice's recent public statement, silence has its risks, too. The repeated assertion in public that decisions are not being made according to law—that

they are simply a reflection of the legal positions favored by either the party in power or the one out of it—can have its own effect in eroding the notion that judges decide their cases independently. Judges do not understand themselves to be deciding cases in the crude manner in which those decisions are sometimes assumed to have been decided. They have an obligation to educate the public about that reality. Is there an audience for that message? I ask that in all sincerity. I trust that you are such an audience, and that if you believe it, you will do your part to convey it.

But, since I have you, let me close by just offering my own account of what, having now been a judge for five years, it feels like to be deciding independently in the hopes that it might give you some confidence that judicial independence is still an ideal worth aspiring to achieve. I should confess that I certainly am in no position to suggest that it is inherently persuasive for judges to insist that they decide cases “according to law.” Before becoming a judge, I taught law for nearly fifteen years. As a law professor, I did not teach my students that there was nothing more to judicial decision making than figuring out the answer “according to law.” I often categorized judges as liberal or conservative. I emphasized the open-ended nature of so many controversies that judges are called upon to decide. I might even have remarked upon the president who had appointed a given judge or made a prediction about how a court might rule based on such a fact. Nor is it plausible to think of the mind of a judge as if it were a *tabula rasa*. No mind is. We all come to the decisions that we have to make already prejudiced in a sense by the limits or breadth of our own experiences. We are who we are. But, I think, precisely for that reason, the way that judging looks to me now from the inside might give you some confidence that you are right to think judicial independence is important, that you are right to want to protect the independence of the judicial branch, and that you are right to expect that those people who have been appointed as federal judges will in fact decide their cases independently in the fullest sense of that word.

So, to that end, I want to close by saying something about the transition from academic to judge that is a bit more personal and psychological—something, in other words, about what it feels like to be a judge and how it feels so different from being an academic. Academics have a lot of responsibility. What they write can matter

a lot. Sometimes more, in the long run, than what a court of appeals judge decides. The impact a teacher can have on a student is also profound. There are few endeavors that can rival teaching in the life-shaping impact that your own personal engagement with another human being might end up having. But as a judge, you are immediately hit by the expectations that we invest in the role of the judge. It is easy to lose sight of that in teaching.

Much of teaching and academic writing, and law student discussion, is about demystifying the role of the judge, treating them as individuals, with biases, and ideologies, and goals, rather than as those who inhabit a role that long preceded them and that will long outlast them. But, however much as an academic I might have written about judging in the former mode, when you become a judge, it is striking how quickly you become introduced to the still powerful hold that the idea of the judge as a very stable role, with a very stable set of expectations, still has in our society and our culture. It is easy to mock the confirmation process for the rote answers it seems to generate from nominees about their commitment to decide cases on the facts and the law and not on the basis of their own views. But if you ever have the experience of going through that process, I think you will find that there is a power in it. I did.

I think anyone who becomes a judge has to step back and think about the following question. If I were in a dispute and the judge was going to decide whether the outcome of that dispute would be freedom or confinement, a vindication of a transfer of property or a denial of it, a recognition of a right or a rejection of it, and I did not know up front whether I would be hoping the decision would be for the judge to rule in favor of liberty or confinement, for the property transfer or not, for the right's rejection or its embrace, what would I want that judge to be like? I think you could not do much better than to fall back on some notion that you would want the person deciding your fate in that instance to be as open-minded as possible to the most persuasive arguments that could be brought to bear on the basis of all the materials that you—you!—would have a fair shot at presenting. In other words, you would want that judge to be deciding that case on what we call the facts and the law: how else would you have a passing chance at being persuasive to that person?

For me, the confirmation process was in that regard a very powerful reconfirmation of something fundamental in the culture that is aspirational about who judges are and what they do, even if academics, quite understandably, are constantly pointing out all the ways it does not capture what judges actually do. I don't mean by saying this that judges are robots or computers or that they are all the same. We know that is not true. I do mean, though, that a judge is always both a person and a role. No judge, I think, does the job without asking him or herself what another judge once asked me: do you ever wonder whether it matters that you are a judge as opposed to whether there is a judge? And yet, I think, no judge ever does—or should—think about the job as if the role is one that is defined by the person who inhabits the role (temporarily) of judge.

The goal is to be faithful to that title, one that you did not invent and that was not created for you, any more than the role of teacher was invented by those who play that role. Academics, like judges, are inheritors. They are temporary custodians of a tradition. They have no choice but to make that tradition their own, even as they honor it. But the tradition is accorded respect and an important measure of autonomy whether we call it academic freedom and tenure or judicial independence and service during good behavior—because it is aiming at the expression of something free from the scripts of the moment that politics produces. That is the job. And it is one I am honored to have.