Independence Corrupted: How America's Judges *Really* Make Their Decisions

Judge Charles Benjamin Schudson (Ret.)
Wisconsin

Presenter Biography:

Charles B. Schudson is a Wisconsin Reserve Judge Emeritus, an Adjunct Professor of Law, and President of KeynoteSeminars, LLC. www.keynoteseminars.net

Judge Schudson graduated from Dartmouth College (Phi Beta Kappa), where he was a Senior Fellow, and from the Wisconsin Law School (Law Review). He served as a state and federal prosecutor (1975-82), a Wisconsin Circuit Court Judge (1982-92), a Wisconsin Court of Appeals Judge (1992-2004), Senior Counsel at von Briesen & Roper, s.c. (2004-06), and General Counsel of La Causa, Inc. (2006-09).

Judge Schudson's honors include the U.S. Justice Department's Award for Superior Performance, the Wisconsin Child Abuse Prevention Certificate of Special Achievement, Wisconsin Judge of the Year, the 1998 National Human Rights Leadership Award, the 2000 Foundation for Improvement of Justice Award, and the 2004 National Exchange Club Book of Golden Deeds Award.

Judge Schudson has authored hundreds of published appellate opinions and other works including: On Trial: America's Courts and Their Treatment of Sexually Abused Children (Beacon Press: 1989; 2d ed., 1991); and Independence Corrupted / How America's Judges Make Their Decisions (University of Wisconsin Press: 2018).

Judge Schudson has keynoted conferences throughout the world, and testified before congressional committees on battered women, the impact of unemployment on children and families, and child sexual abuse. He has been a featured guest on NPR's All Things Considered, the PBS McNeil-Lehrer Report, and Oprah.

Judge Schudson has served on the faculties of the National Council of Juvenile and Family Court Judges, the National Judicial College, the Chautauqua Institution, and Lawrence University's Björklunden Seminars. In 2007, he was Lawrence's Law and Literature Scholar in Residence. He taught Trial Advocacy at the Wisconsin Law School, 1999-2009, and "Preparing Lawyers for Life," a course he created, at both Wisconsin and the Marquette University Law School, 2007-09. A member of the National Association of State Judicial Educators, he specializes in law and literature seminars for judges.

In 2006, he served as an international observer for the Venezuelan presidential election. In 2009, he received a Fulbright Fellowship under which he taught law school courses in Germany, 2011, and Peru, 2014. Presenting in both English and Spanish, he also has lectured at law schools in Bolivia, Chile, and Mexico.

Judge Schudson is a certified mediator and a litigation/appellate consultant. He is married to Karen Schudson, a psychotherapist, mediator, and executive coach. Together at conferences nationwide, they have presented "Healing the Healers," a program they designed to help professionals cope with the secondary trauma resulting from their work with the victims of child sexual abuse. Charlie and Karen have two children and three amazing (of course) grandchildren.

New Mexico Judicial Conclave

June 6, 2019

Independence Corrupted
How America's Judges (Really) Make Their Decisions

Hon. Charles Benjamin Schudson

plenary address (8:15 – 9:15)
discussion / reception (5:30 – 7:00)

"The government may be administered with indiscretion … offices may be bestowed exclusively upon those who have no other merit than that of carrying votes at elections; the commerce of our country may be depressed by nonsensical theories … but as long as we may have an independent judiciary, the great interests of the people will be safe."

Congressman John Rutledge, Jr., 1802

"… the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent judiciary."

Chief Justice John Marshall, 1829

The Death of Judicial Independence

Hon. Charles B. Schudson

"Under some [state] constitutions the judges are elected and subject to frequent reelection. I venture to predict that sooner or later these innovations will have dire results and that one day it will be seen that by dismantling the magistrates' independence, not judicial power only but the democratic republic itself has been attacked."

Alexis de Tocqueville, 1835, *Democracy in America*

America's judicial independence is dying, but not due to Donald Trump. Most court watchers just don't get it. Focusing on the nominations of Gorsuch and Kavanaugh and other *federal* judges these last two years, they have failed to see the much bigger picture – the transformation of America's *state* judges, who decide 98.6% of America's cases.[i]

Their independence is dying. The reasons are complicated but culminate in *Republican Party of Minn. v. White*, the Supreme Court's 2002 decision striking down the "announce clause" of the Minnesota Code of Judicial Conduct. What's an announce clause, what did the Supreme Court decide, and why is its decision fatal to America's judicial independence?

Like all states, Minnesota has an ethics code for its judges. While differing in details, such codes, until 2002, prohibited judges and judicial candidates from "announcing" their positions on legal/political issues during their campaigns – campaigns for election in thirty-nine states, and for appointments in all fifty. Why did these codes bar such statements?

History explains. Declaring America's independence in 1776, Jefferson wrote that revolution was required, in part, because King George had "made Judges dependent on his Will alone" for "the establishment of an absolute Tyranny." Thus, explicitly, America declared *independence* to gain *judicial independence*.

Judges, said Jefferson and the founding fathers, must be impartial, untethered from a king or president or anyone who might try to control them. Judges also must preserve what ethics codes call "the appearance of fairness." They must not pre-judge. They must never declare

pre-conceived opinions that could compromise or appear to compromise their judgments. Thus, until hearing all parties in open court, judges must never "announce" their beliefs.

We judges complied. So, for example, seeking a gubernatorial appointment and later campaigning for election, as both a trial and appellate judge, I could not offer my opinion on any issue likely to come before me. If I did, I could be disciplined. Thus, although I campaigned at churches, labor halls, county fairs, and even partisan meetings, I said nothing about abortion, gun control, same-sex marriage, and other hot-button issues.

Voters understood. Civically schooled to expect judicial candidates to deflect political questions, voters had come to trust that campaign silence helped prepare judges to base their decisions on the merits, not campaign promises.

But things changed. A few judicial candidates balked. Driven by personal beliefs and political ambitions, they campaigned on controversial issues; they offered opinions and forecast decisions. Soon they found themselves in court, fighting disciplinary prosecutions.

One of them, a Minnesota attorney, who had run for the state supreme court criticizing its abortion rulings, tried to enjoin the ethics board from disciplining him for "announc[ing] his … views on disputed legal or political issues." The Minnesota Republican Party joined his cause; together they argued that the ethics rule breached the First Amendment by denying the candidate's free speech and depriving voters of information they needed.

Five-four, the Supreme Court agreed. Therefore, *since 2002, state judges and judicial candidates have been free to declare their positions on any issue*.

Although ethics codes never had *guaranteed* the integrity of every judge in every case, the "announce" prohibitions had fortified fairness and the appearance of fairness. Now, however, voters and interest groups may ask, "How would you rule …?" Now, judicial candidates can answer, calibrating opinion polls, endorsements and dollars.

Thus, state judicial elections have morphed from low-financed yawners to high-financed screamers. In countless campaigns, false advertising is grotesque; pandering candidates win.

State judges always had touched almost every aspect of our lives – abortion to child custody to commerce, medical malpractice to multi-million dollar disputes, drunk driving to homicide. Now, more than ever before, they are touched by political influence.

The Supreme Court's 2002 decision wasn't easy; the five-four split reflected the Court's difficult dilemma. And no one suggests that the majority intended to destroy judicial independence. But even in states where positive peer pressure and best practices support judicial integrity, unprincipled candidates challenge incumbents whose constitutionally correct rulings upset powerful donors.

In the federal courts, "Trump judges," *appointed for life*, will evolve; most will find their foundations in the Constitution, not the president. Federal judicial independence will survive. But state judicial independence will not. It's now on life support. Absent legislative reform or Supreme Court reconsideration of its decision, state judicial independence will not survive.

Today, from China to Hungary to Russia to Venezuela, despots attack independent judiciaries. In America, a president, perhaps uninformed of America's revolutionary commitment to judicial independence, condemns federal judges and distracts us from the withering independence of their state counterparts.

History is emphatic – without fiercely independent judges, nature is plundered; tribes are marched away, peoples are enslaved, interned, exterminated. Democratic republics die.

In 1829, Chief Justice Marshall declared, "the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was … a dependent judiciary."[ii] In 2015, deciding whether state judicial candidates could solicit campaign donations, Chief Justice John Roberts and Justice Ruth Bader Ginsburg both declared, "Judges are not politicians."[iii] If only that still were so.

---

[i] According to the National Center for State Courts, the latest data sources for state and federal courts show a total combined caseload of 85,387,854. Of those, 1,187.854 cases were handled in federal courts; the balance, approximately 98.6%, in state courts. *NCSC Connected Community* (December 6, 2018).

[ii] Addressing Virginia's constitutional convention in 1829, and opposing "a proposal that would have permitted Virginia's legislature … to repeal a law establishing the superior courts and to thus end the tenure of those holding judicial office," Marshall expressed his belief "in the absolute necessity of maintaining a judiciary not vulnerable to inappropriate influences." California Chief Justice Ronald M. George, "John Marshall Award Acceptance Speech," American Bar Association John Marshall Award, San Francisco, August 22, 2017.

[iii] *Williams-Yulee v. Fla. Bar,* 135 S.Ct. 1656, 1662; and 1673 (Ginsburg, J., *concurring*) (2015).

Charles B. Schudson is a Wisconsin Reserve Judge Emeritus and an adjunct/visiting professor of law. He served as a state and federal prosecutor, a trial and appellate judge, and a Fulbright Fellow at law schools abroad. He is the author of ***Independence Corrupted / How America's Judges Make Their Decisions*** **(University of Wisconsin Press, 2018)**.