‘Judicial independence’ or judicial tyranny?

Joe Biden’s response to progressives’ howls of indignation that followed the confirmation of Amy Coney Barrett to the Supreme Court, and their shrill demands that the court be expanded and packed till it tilts leftward, was to appoint a commission of academics to study the question. As was expected by many, the proverbial Aesopic mountain gave birth to a mere mouse – its 288-page report, according to the *New York Times*‘ Charles Savage, “did not offer specific recommendations;” expressing instead “‘profound disagreement’ among its members” over court-packing and “offered a critical appraisal of arguments for and against that and many other ideas for changes to the Supreme Court, including imposing 18-year term limits on justices and reducing their power to strike down acts of Congress.”

What I found fascinating in Mr. Savage’s otherwise unremarkable piece which duly reported that Biden’s commission successfully managed to navigate around sharp corners, producing a nebulously bland piece of academese that, in the comical admission of one of its authors “might be useful a

century from now," was the value assigned to the notion of "judicial independence" by those whom Mr. Savage interviewed. "David Levi, a former dean of Duke Law School and a former federal judge, said he was voting for the report as a fair assessment of the issues even though he strongly opposed proposals to change the court's composition or limit its jurisdiction. He warned that such ideas would curtail the judiciary's independence, undermining the rule of law, and reflected what autocrats abroad had done to eliminate challenges to their power. Another former federal judge, Nancy Gertner, who is now a Harvard Law School professor, also praised the report, even as she argued for expanding the number of justices. She said that the Supreme Court's legitimacy had been undermined by Republican efforts to "manipulate its membership," and that its majority was enabling rollbacks of voting rights that otherwise would lead the court's composition to evolve in response to the results of free and fair elections. "This is a uniquely perilous moment that requires a unique response," she said, adding, "Whatever the costs of expansion in the short term, I believe, will be more than counterbalanced by the real benefits to judicial independence and to our democracy."

So, two out of three people Mr. Savage interviewed (both of them former federal judges) stressed the ultimate value – and by extension, the ultimate virtue – of "judicial independence" which they somehow closely linked to "the rule of law" and to "our democracy" – implying in fact that it supports – if not actually causes – those.

But is such "independence" democratic – and for that matter, legal?

Independence, after all, simply means not being bound in one's actions by external limitations. Throughout history, the monarchs felt that, being God's anointed, they knew better what was right and what was wrong and didn't need to heed their subjects. Yet, time and again, their "independence" was

checked. The central problem of governance, as Machiavelli tersely observed, is that the rulers want to oppress those over whom they rule, while the subjects do not want to be oppressed. The subjects obey only when they feel that the ruler is legitimate, and that the oppression is reasonably justifiable and tolerable. Else, the powers that be may discover that, whether God-sanctioned or not, their power to act "independently" can hit a wall.

In 1215, the barons forced King John to agree to the Magna Carta that curtailed royal "independence." When King Charles I kept pushing his royal prerogative, bypassing the Parliament and triggering the civil war, his "independence" ended in 1649 in the trial for tyranny, and executioner's block. When King George III got too "independent" with American colonists, imposing his will on them over their objections, they enumerated their grievances in the Declaration of Independence, deciding to free themselves from the "independence" of "A Prince, whose Character is marked by every act which may define a Tyrant" – all because "In every stage of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury." George III was "independent" from the Americans, pushing them around a bit too hard – so they became independent from him.

Clearly, a government's "independence" is closely related to tyranny – in fact, too much "independence" *is* tyranny. Thomas Jefferson who, as the author of the Declaration of Independence knew tyranny when he saw it, wrote in 1820, "You seem … to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the DESPOTISM of an oligarchy." While Jefferson simply expressed his fear of unbalanced, "independent" power of a single branch of the government, sensing that having any unchecked branch of the government (in this instance, the judiciary) was tantamount to

giving it the royal prerogative, thus moving America back to square one of a rule by an unaccountable clique, the Constitution was designed to put a check on what judges could do even in a simplest of lawsuits, by providing the "due process" clause.

Needless to say, in its most basic definition a "process" is a sequence of steps that judges are obligated to follow, rather than being "independent" of law and of facts that are argued by the parties. The steps in that process are very simple, and akin to a boxing match – each party in the conflict gets a lawyer – a person who is familiar with the relevant law and can present the strongest aspect of his side's factual and legal argument – and the lawyers battle each other before the judge, rebutting each other's argument like the boxers in a ring trading blows, and deflecting them. Critically, a judge cannot participate in that fight – he is "impartial," which literally means that he is "not a party," that he is not in the fight, that he is outside of the ring, that he is not providing argument for either the plaintiff or the defendant, that he only "calls balls and strikes, but neither pitches nor bats" per Chief Justice Roberts' favorite comparison, that he is an "umpire" as Justice Kavanaugh put it. The Constitution, thus, bind judges' hands with parties' argument. A judge has no agency: under the Constitution, the outcome has to follow from parties' argument, irrespective of whether judge likes that outcome, or not.

We often hear, in the context of complaints about "activist judges" who "legislate from the bench" that judges should – but don't – adjudicate cases "according to the law." This evinces utter ignorance of the nature of "due process," implying that a judge is an expert in law, and that the process of adjudication consists of judge's unearthing of the proper law, and deciding the case accordingly. This picture confuses the roles of a judge and a lawyer. Per "due process," a judge cannot be a lawyer, he cannot reach out for the law

that should be applied in the case. That is lawyer's job – layers represent the best interest of the parties, and are tasked with putting forward the very best defense, factual and legal, of that interest. The judge's job is to merely evaluate lawyer's claims and counter-claims. The law controlling a judge being "due process of the law," the judge must rule not "according to the law," but "according to parties' argument" (which already contains all the relevant law) just as in a boxing match a referee must declare victory not according to "the rules of boxing" but according to the sum of boxers' blows – it being the business of the boxers to follow the rules of boxing.

Yet, judges don't do that. They prefer to be "independent" from "due process," they prefer to "pitch and bat," to be lawyers to the parties they favor to win, on top of deciding whose argument won. Invariably, under that system it is judges' argument that wins the case: "independent" judges insert into their decisions judges' own bogus argument that neither party alleged, so as to decide for the party they favor; or they remove from their decisions the argument of the party they disfavor, so as to make it lose (both situations happened to me). Judges made themselves able to decide cases the way they want to decide them by simply replacing parties' argument with their own argument, by being lawyers in addition to being judges, by adjudicating their own argument. That is the real meaning of "judicial independence."

And judges made this mode of judging strictly legal, too. Report judges' lawyering from the bench as judicial misconduct – and you will be told that only socially disapproved behavior like judges' drunkenness or drug use fall under "misconduct" – but not what a judge does, or does not do, on the bench. Sue judges for fraud (as I did) – and you will be told that, in *Pierson v Ray*, judges gave themselves the right to act from the bench "maliciously and corruptly." Rather disarmingly, *Pierson v Ray* states that its purpose is to make

sure that “the judges should be at liberty to exercise their functions with independence and without fear of consequences.” Apparently, judges shouldn’t “fear consequences” of their fraud; they shouldn’t “fear consequences” of their violation of “due process of the law.” Just as bizarrely, *Pierson v Ray* claims that this neat arrangement is “for the benefit of the public.” One has to wonder who this “public” is. King George III also thought that whatever he did, was for the benefit of his subjects, the American public including. King Charles I certainly thought so, too, as, likely, did King John. They all thought they were “independent” from the public – but the public, when it got really squeezed, had other ideas.

To ignore the law, as our “independent” judges do, is to abolish the law; and *Pierson v Ray’s* “corrupt and malicious” clause clearly annuls and abolishes “due process” clause of the Constitution. One of Declaration of Independence’s grievances was that George III was “abolishing our most valuable Laws” – how little had changed!.

The result is paradoxical: since *Pierson v Ray* has a status of a law, when judges’ violate a law that is “due process of the law” they at the same time uphold the law that is *Pierson v Ray*. In violating the law, judges follow the law. To a logician (or any normal person, for that matter), this is bonkers. But judges are neither logicians, nor are they normal persons. They are not after clarity and logic; they are after power; and nothing helps those in power to stay in power more than smoke and mirrors.

By definition, the power means being “independent” from restraints. The notion that judges must be “independent” from the restraints of “due process,” their decision-making being untethered from parties’ argument helps judges project arbitrary, tyrannical power – as does the bizarre ruling in *Pierson v Ray* which sanctifies arbitrary judging and allows judges to prove cover of legality to the actions of the clique

they favor. The “rule of law”? No, we live under the rule of judges!

No wonder the fight over who gets to wield the judges’ gavel is so vicious and intense. Judges’ tyrannical “independence” makes this fight worth it for the politicians, who thus gets a legal cover to exercise tyrannical power. As to the people who have to endure the tyranny – who cares? What tyrant ever thought of the people? Until it was too late, of course?

Lev Tsitrin is the founder of the Coalition Against Judicial Fraud, www.cajfr.org