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“Judicial Independence and Protection of Individual Rights - Current Challenges”

Presented by  
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and  
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Seminar: Judges for Chile Initiative

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Facultad de Derecho  
Pontificia Universidad Catolica de Chile  
Santiago, Chile

It is a distinct honor for me to be invited to participate in the launch of the “Juezes para Chile” initiative instituted by the Facultad de Derecho of the Pontificia Universidad Catolica de Chile to inspire law students to consider entering the judiciary and, in the process, training them on the high standards that we expect the judiciary to observe and to promote. My remarks today are my own and do not necessarily reflect the views of my federal judicial colleagues or of the United States Court of Appeals for the Ninth Circuit.

I join you today in my capacity as Chairman of the Judicial Council of the International Association of Law Schools, of which Association your own Dean will become Global President next year. The Association is primarily represented by its Law School Deans, but some years ago it created a Judicial Council to bring judiciaries and law schools closer together. In due course, the Association adopted the “Judicial Standards of a Legal Education” at the Council’s recommendation. The Council currently consists of judges from twelve different countries, including Chile, and our purpose is to encourage discussions about what we judges need from law schools *and* how judges can, in turn, support the law schools.

I am happy to learn that your law school is taking a bold step in supporting and enhancing the role of the judiciary by launching its “Juezes para Chile” Initiative. I believe that this unique plan will have international impact leading the way for top-level law schools throughout the world. On behalf of the International Association of Law Schools and its Judicial Council, I commend Dean Bocksang and this fine law school for undertaking such an important effort.

## I

While I am excited to learn about this Initiative, my task today is to speak to you on the subject of “Current Challenges to Judicial Independence and Protection of Individual Rights.” In my research for this talk I found very encouraging reports. First, the Republic of Chile currently has a fine reputation around the world for its strong judicial system and respect for judicial independence, a value that must be preserved and nurtured. The *Freedom House*, which is a well-regarded research institute that evaluates judicial independence throughout the world, has rated Chile’s judicial system highly. Additionally, this fine law school is alert to the issues of judicial independence; I came across an excellent work by a member of this faculty, whom I have just met, Professor Christian Vialonga Torrijo, who has published an article on judicial independence and accountability.

## A

And now for our topic today, what are some of the challenges to judicial independence and the protection of individual rights, and what is the role of legal education in meeting them.

I believe that there are three essential elements of judicial independence:

First, the Judiciary must be free of political influence beyond the established procedures for making appointments to the bench.

Second, decisions must be rendered based on the Rule of Law, and not on personal or ideological preferences of judges.

Third, members of the judiciary must be subject to strict ethical principles which are known and visible to the public. While federal judges in the United States are appointed for life, I do not suggest that this is a required element in any judicial system. What is important however, is that the members of the court should be guaranteed a sufficient term of office and sufficient compensation to minimize any outside pressure.

## B

Judicial independence, once firmly established as a cornerstone of a healthy democracy, cannot be taken for granted, but must be protected from unwarranted challenges.

Indeed, there has been an unfortunate rise in *heated political rhetoric* questioning my own Supreme Court's decisions and integrity, often labeling split rulings as politically motivated rather than based on legal principles. Although such speech is protected as free speech, this type of rhetoric undermines public trust in the judiciary and can lead to perceptions that the Court is a partisan entity. The portrayal of the United States Supreme Court in the media often exaggerates the Court's divided decisions, which can exacerbate public skepticism, notwithstanding that the majority of the Court's decisions are unanimous. Sensationalized reporting may lead to a perception that the Court is out of touch with the values and needs of the populace.

Recent controversial court rulings, particularly those related to issues such as abortion, gun rights, and Presidential immunity have sparked rallies, protests, and

personal attacks on judges. This public outcry, while a sign of democratic engagement, can also contribute to an environment where the Court's legitimacy is continually questioned. For example, last year our Supreme Court issued a controversial opinion in *Dobbs v. Jackson Women's Health Organization* holding that abortion is not a right preserved by the United States Constitution, but is instead an issue of local concern properly resolved in states and localities by the people through their legislative bodies. The *Dobbs* decision triggered widespread protests and intense attacks by disappointed activists on several individual judges, going so far as some frightening personal threats at their private homes.

Judicial independence is also undermined by various *legislative proposals*, which have been unsuccessful so far. Lawmakers have proposed expanding the number of justices on our Supreme Court to counteract perceived ideological imbalances, with the new judicial appointments to be made by a President at the time that the new law is enacted. While advocates argue this could restore fairness, critics warn that such actions are a blatant strategy to pack the court with ideologues and set a dangerous precedent for future administrations.

These attacks on the legitimacy of judges and the Court not only threaten its judicial authority but also risk undermining the foundational principles of our democracy. It is crucial for citizens, lawmakers, and legal professionals alike to engage in constructive dialogue about the role of the judiciary and to advocate in support of its independence.

## II

Attacks on the independence of the judiciary also are troublesome because they implicate the viability of the Rule of Law, which at its core is respect for properly enacted law as the supreme authority in society. As the British political theorist John Locke acknowledged, “proper law is the indispensable ingredient for civil society.” Law guarantees peace, liberty and property by “setting up a known authority to which everyone in society may appeal and which everyone in society ought to obey.” It is a foundational precept of popular government that no person shall be above the law. As the second president of the United States, John Adams, famously stated” “Ours is a government of laws, not of men.”

## A

At its core, the Rule of Law is, in Justice Scalia's famous phrase, “a Law of Rules.” And Rules must be *written rules*, which have three important foundations:

First, Rules must be written *in advance*, and not changed retroactively or at the discretion of prosecutors, government agencies, or even judges. In other words, when we follow the rule of law, we don't change the rules in the middle of the game.

Second, Rules must be *universally applied*, with evenhanded enforcement by prosecutors, and evenhanded interpretation by government agencies and judges. In other words, no one should ignore the written rules of law to favor their friends and to wield power against their enemies. Judges must be free and independent to apply the written rules of law in good faith with the purpose and intent of the people at the time the rules were written.

Third, Rules must be *clearly and specifically written* so that judges may fairly and objectively apply the rules. When a written rule allows vast room for interpretation, then the Rule of Law is in jeopardy, and the Rule of Judges takes over. Judges must be free to criticize a poorly drafted law. Judicial criticism can often lead to legislative correction which benefits citizens and judges alike.

## B

These same principles for protection of judicial independence also apply to the protection of individual rights. Traditionally one would look first to the provisions of an existing Constitution to evaluate the protection of individual rights. I am well-aware that in the last few years there have been two separate efforts to adopt a new Constitution for Chile but, as an outsider, I will refrain from offering any comments with respect to either effort.

Yet, in many countries, individual rights are indeed spelled out in their constitutions. In others, individual rights are established through the legislative process which, while convenient, are not necessarily enduring, given the political process in which legislatures can be affected by political changes. And let us not forget that some individual rights come neither from the Constitution nor the legislature but through Natural Law. It was our Declaration of Independence, adopted in 1776, not our Constitution of 1787, that recognized that the rights to "life, liberty and the pursuit of happiness" come from the Creator and cannot be abrogated in a free society.

In a democracy, each actor has a role to play in protecting individual rights. The people are the ultimate civil authority, and they authorize a government through a constitution. Similarly, the people influence the making and enforcing

of laws through electing their representatives and their executives. This leaves judges and the judiciary with a vital, but nevertheless *limited* role in the protection of individual rights. Judges must never depart from their sworn duty to enforce individual rights in cases properly brought before them.

## C

Alexander Hamilton, who was one of the founders of the United States, explained that judges serve as an intermediary between the people and the legislature. Judges ensure that the legislators comply with the restrictions adopted by the people in the Constitution and statutes. Judges are not policymakers or politicians. In my country, federal judges are appointed for life as a device to protect our independent legal judgment. But that legal judgment is the full extent of our power. Quoting Hamilton again, Judges have “neither force nor will, but merely judgment.”

So judges do not create individual rights; rather, judges interpret the written law, either as set out by the people in the Constitution, or as enacted by their representatives in the legislatures. Nonetheless, some cases are difficult and controversial, and some are said to “change the Constitution.” But judges’ decisions cannot amend or change the Constitution, only the people can, through their elected representatives. Judges, though, may reconsider their interpretations of the Constitution. For example, over 70 years ago, judges interpreted 19<sup>th</sup> century laws in the United States that upheld the “separate but equal” racial doctrine for schools and other public accommodations. Then, in the landmark case, *Brown v. Board of Education*, the Supreme Court overturned its own precedent and held that the doctrine of “separate but equal” violated the Equal Protection provision of our Constitution. The Court did not amend the Constitution and create a new individual right; instead, the judges exercised their authority and independence to interpret a legal provision within the Constitution.

So individual rights and judicial independence are equally fundamental to a strong democracy. And individual rights are also vulnerable to undue influence and unwarranted attacks. More specifically, in our current era where discourse is often polarized and dissent is often met with hostility, it is imperative that we uphold the freedom of speech and confront challenges to this bedrock individual right.

Free speech is under siege from multiple fronts. In America, particularly during the recent Covid pandemic, we witnessed growing instances of censorship,

both from the government and from private parties. Opinions were stifled and dissenting voices silenced. Whether controversial viewpoints are suppressed by governmental measures aimed at limiting dissenting views, or by private social media platforms, the threats to individual freedoms of speech and expression are real and pervasive.

Moreover, the rise of the so-called “cancel culture” of social pressures can create an environment where individuals, and particularly students, feel hesitant or unsafe in expressing their beliefs. This negative social pressure is not simply a concern for the protection of unpopular opinions; it affects the collective discussion of truth and undermines the foundation of an open and democratic society.

### III

In closing, I suggest that the law schools have a vital role in educating students about the importance of judicial independence and individual rights, and the complexities and challenges facing these basic democratic principles. Once again, I commend Dean Bocksang and his colleagues for their welcome academic focus on the Chilean judiciary and I thank him for the chance to be with you today.

Muchas Gracias.