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Dinner Speech

**Universities and the Federal Judiciary—the Price of Freedom**

Chancellor Nancy Cantor

I'd like to take a few minutes to reflect with you this evening on parallels between universities and the judiciary that are important because they allow both institutions to be institutions of democratic culture slightly to the side of “normal society,” with its marketplace pressures and the competing voices of stakeholders for their own agendas.

Universities have tenure. The Federal judiciary has lifetime appointments. Universities' academic freedom is predicated on self-governance through peer review, though many in the public and Congress question our ability to exercise sound judgment. Judicial independence is predicated on a similar self-determination, though Representative Sensenbrenner recently questioned whether it was time for an inspector general with oversight powers.

These traditional arrangements allow both scholars and judges to entertain issues that are highly charged and fraught with controversy in a civil context of dialogue and to make reasoned conclusions or decisions that may not be popular with everyone.

Each institution is called upon to protect minority voices and positions, sometimes against the tyranny of public pressure---as in the battle going on over evolutionary biology versus intelligent design---or in the controversial area of taking international law as precedent in a legal decision.

We entrust the judiciary with preserving democracy through the rule of law, and we entrust universities with educating a democratic citizenry in the habits of civil discourse. We ask both types of institutions to take on issues and cases for dialogue and deliberation that public debate and politics cannot easily resolve, matters that are often extremely complex and require extensive—and expensive---investigation. We give these institutions a context of freedom within which to do this exchange of ideas and deliberation.

As Jonathan Cole, the former Provost of Columbia University, has said about universities and academic freedom: “two essential components—tolerance for unsettling ideas and insistence on rigorous skepticism about all ideas---create an essential tension at the heart of the American research university.”<sup>1</sup> This is true for the judiciary as well. It tackles vexing issues of great moment – from school prayer to the right to die – but it decides them through the carefully reasoned application of legal precedent and analysis.

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<sup>1</sup> Jonathan R. Cole, *Academic Freedom Under Fire*, *Daedulus*, Spring, 2005, p. 13.

Universities need to self-regulate so that civil discourse continues, multiple perspectives get aired, and individual opinions are respected, even as faculty members are given the reign over what is fact and what is fiction in their classrooms.

Quoting Cole again: “We expect professors, not students, to offer their own best judgment on competing truth claims. A student may argue for creationism or intelligent design; but that does not oblige his or her professor to take his or her views seriously as a rival to the evolutionary accounts favored by virtually all contemporary biologists..... Of course, one can question the competence of a professor—that happens routinely in a good university. But the evaluation of that competence must be left to the professor’s peers—not to students and surely not to trustees, regents, members of congress, advocacy groups, or members of the press.”<sup>2</sup>

And that too is what we ask of judges, and how we expect to treat them.

However, to the extent that universities and the courts exercise their freedoms (such as self-determination in class content or in judicial review) in the controversial domains of public life---as they have both been asked to do, for example, in the context of the aptly-named Solomon Amendment ---there is always a risk of being perceived as too elite, too disconnected from the public, of being seen as too self-serving and insular.

Current complaints against the courts, such as that of Senator John Cornyn of Texas, that judges are not “high priests able to discern great truths that you and I are unable to figure out”<sup>3</sup> are reminiscent of Vice President Spiro T. Agnew’s vilification of the “effete corps of impudent snobs who characterize themselves as intellectuals,”<sup>4</sup> and his characterization of the national media as “a tiny and closed fraternity of privileged men, elected by no one, and enjoying a monopoly sanctioned and licensed by government.”<sup>5</sup>

In such an atmosphere, universities and judges feel a fierce push back from the right *and* the left to limit their freedoms. We have seen such efforts in arguments for the retraction of tenure or the impeachment of judges, calls for expanding export controls in university research or limiting judicial review, threats to cut budgets for universities and for the already under-funded Federal courts when policies or decisions are unpopular, and efforts to impose external regulation through an Intellectual Bill of Rights for universities and an independent oversight mechanism for the judiciary.

As Philip Kennicott, writing in *The Washington Post* last May suggested, there is a strong family resemblance in the reactions of some of the public (though decidedly not all) and some in Congress to some of what is presumed to go on in universities and in the

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<sup>2</sup> Jonathan R. Cole, Academic Freedom Under Fire, *Daedalus*, Spring, 2005, p.15-16.

<sup>3</sup> See Philip Kennicott, Judge not; In the Court of Public Opinion, the Bench is in the Hot Seat, *The Washington Post*, May 17, 2005.

<sup>4</sup> Speech at a Republican fund-raising dinner, New Orleans, Louisiana, October 19, 1969. From *Collected Speeches of Spiro Agnew* (1971), 55.

<sup>5</sup> Speech “On the National Media” delivered at Des Moines, Iowa, November 13, 1969.

courts. He says: “Academia, which is also an institution set apart from the mainstream of American life, given to unpopular pronouncements and governed by rules that elevate and protect for life the tenure of arrogant individuals, has already found itself under legislative attack. The leveling power of untrammelled democracy has a voracious appetite – which is one of the arguments for creating separate spheres that are protected from its power.”<sup>6</sup>

### *Grounding Our Freedoms*

While such efforts to erode this separation by restraining dialogue, discourse, and discovery, on the one hand, and the independent rule of expertise and law on the other, are misguided, I believe there is a very good lesson to learn in them. Along with our freedom to stand apart comes an imperative to stay connected, grounded, open, and not insular—engaged with the world and the many voices pushing many concerns.

In other words, both institutions must be seen as doing the public’s bidding in the public’s interest without giving in to special interest politics. And that is hard.

Consider universities – the public doesn’t understand well, for example, how universities use their dollars and how we self-govern. We haven’t made ourselves very transparent, very open to examination. And yet this openness is critical to maintaining the public’s trust that our freedoms are well exercised.

The academy has justified its freedoms, in part, by saying that they permit us to create the kind of environment in which we air ideas for the purposes of examining them, testing them. Do we do that? How? Can we demonstrate that we are preserving the line in our classrooms between reasoned advocacy open to examination and coercion or intimidation by orthodoxy?

What about judges – is there a way for them to transparently engage the public without giving up the independence that is central to the rule of law?

In an age of celebrity, as Jeffrey Rosen has written, judges personalize themselves at their peril, opening themselves up for citizens and politicians alike to respond to them in personal terms.<sup>7</sup> But while they do not have to bare their emotions and personalities in interviews, memoirs, or talk shows, they should not cut themselves off entirely from public scrutiny.

Consider the following comment from Judge Gerald Tjoflat, of the 11<sup>th</sup> Circuit Court of Appeals, again referenced by Kennicott in *The Washington Post*: “Sometimes

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<sup>6</sup> Philip Kennicott, Judge Not; In the Court of Public Opinion, the Bench is in the Hot Seat, *Washington Post*, May 17, 2005.

<sup>7</sup> Jeffrey Rosen, It’s The Law, not the Judge; But these Days the Bench is the Hot Seat, *Washington Post*, March 27, 2005.

judges are their own worst enemies,” he says, “You don’t have to be condescending, but it takes skill.”<sup>8</sup> Much of it, he argues is in the language of public communications.

At the core of the academy—and the courts—is the notion of a special, disciplinary professional expertise, and so the question is: How can we maintain the integrity of our expertise (such as the rule of law) and still be seen as responsive, open, transparent, and willing to examine our own stance—especially when we tread in the terrain of issues that are easily seen as “political”?

How can universities and the judiciary do this balancing act--- standing apart with freewheeling discourse and the rule of expertise in the academy and the rule of law and precedents in the courts---and still retain the public’s trust? How can they remain grounded as institutions central to the public good and forestall over-reaching by special interests and politicians?

We might take note of what happened in the debate surrounding the affirmative action cases. When higher education—and I include the University of Michigan, where I was provost and was deeply involved myself--- argued our freedom, our right to determine with our own expertise, the composition of the class we would admit, we were vilified in the press as self-serving and detached from the feelings and opinions of the public.

When, by contrast, the corporate and the military briefs made their arguments about the benefits of diversity for *all* students, then the argument that diversity was a compelling public interest took off, and Justice O’Connor had a grounded opinion to take in favor of affirmative action.

In other words, when a supposed “elite” acts like an elite, our positions may well not fly. But when the so-called “elite” ground an argument in the collective interest and the public good---in spite of the individual rights pushback---it can fly. The affirmative action cases certainly provided a lesson on how important it is to ground one’s institutional independence in the public good.

### *Media and Public Opinion Surveys*

In this light, perhaps this is where a thoughtful, expert media can help and where public opinion survey work and public affairs analysis---that is, academics grounded in the public sphere (or, as we call it at Syracuse – scholarship in action)—can help ameliorate the tendency for freedom to mean detachment.

For that to work, of course, we need to have members of the media---the full range of the media, from the major newspapers and broadcasters to the members of the lively, self-appointed press corps that Professor Henry Farrell of George Washington

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<sup>8</sup> Philip Kennicott, Judge Not; In the Court of Public Opinion, the Bench is in the Hot Seat, *Washington Post*, May 17, 2005.

University has called “the blogosphere”<sup>9</sup>---who are well grounded in the worlds of academe and in the law.

And it’s well worth thinking what universities and the judiciary might do to encourage and inform that grounding on an ongoing basis.

That is why it may be very helpful to have an institute that brings together expertise in public affairs, politics, the law, and public communications.

Let me give you an example of a similar approach to *grounding* in another oft misunderstood domain – that of the arts. This year, Syracuse University launched an arts journalism program in which we are training artists in journalism and journalists in the arts, drawing on the expertise we can find in both areas in New York City, as well as on our campus in central New York State. We hope to produce art critics who can see art through the eyes of both the artist *and* the audience.

In a similar manner, it may be possible to educate and empower members of the media who are able to mediate between the judiciary, politics, and public opinion, while the rest of us work with them to craft a national shield law to protect the public’s right to know what is going on in government when public officials would prefer that they do not.

And by the same token, if we begin to robustly support and share social surveys of public opinion – such as the Maxwell Poll<sup>10</sup> discussed here – perhaps we can convince our public officials that there is not a clear majority on many issues of most import for our federal judiciary. It may be very eye-opening for us all to see and hear the public, but through the lens of carefully crafted surveys that bring an informed voice to the fore.

I realize I have not addressed the huge issue of our state and local courts, where judges have to run for election and can be tossed off the bench at the ballot box. I have not addressed the consequences of a society that is coming more and more to its courts to solve intractable issues that even a philosopher-king could not decide. And I readily confess that I have come to this conference without pat answers. I have come to raise questions in the hope that we might work together, first to see what the most important issues are in the collision of media, politics, public pressure, and an independent judiciary, and then to invite you to collaborate with us and with each other to address them.

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<sup>9</sup> Henry Farrell, “The Blogosphere as a Carnival of Ideas,” *The Chronicle of Higher Education*, Section B, October 7, 2005, B14.

<sup>10</sup> Maxwell Poll, Campbell Public Affairs Institute, The Maxwell School of Citizenship and Public Affairs, Syracuse University, 2005.