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JUDICIAL INDEPENDENCE

Long recognized as one of the hallmarks of American constitutionalism, judicial independence takes several different forms, each of which is essential to good judging, but none of which is absolute.

One form—"party detachment"—concerns the relationship between the judge and the parties before the court and is rooted in the aspiration for impartiality. It requires that the judge not be related to these parties nor be in any way under their control or influence. Such a requirement guards against gross threats to impartiality, such as bribery and close kinship ties between judges and litigants, but many less blatant violations, such as cultural ties and ideological sympathy, cannot realistically be prevented. Judicial independence with respect to litigating parties is therefore an ideal that can be achieved only imperfectly.

A second form of judicial independence—"individual autonomy"—concerns the relationship between individual judges and other members of the judiciary. It demands that the judge be unconstrained by collegial and institutional pressures when deciding questions of fact and law. According to this rule, judicial decisions are matters of individual conscience and responsibility.

This aspect of judicial independence has its roots in broad cultural norms, largely of an individualist character, and is reinforced by the American practice of recruiting judges after they have had successful careers in practice or in politics. It is also reinforced by, and reflected in, the practice of having judges sign their own rulings and opinions. This practice requires judges to assume individual responsibility for legal decisions and thus fosters judicial accountability.

Like party detachment, individual autonomy is an ideal that is only partially realized. All judges are expected to adhere to the prior decisions of other judges through the doctrine of STARE DECISIS. Lower court judges are even more constrained: They are subject to appellate review and, more recently, bureaucratic control. For example, the Judicial Councils Reform Act of 1980 allows groups of federal circuit judges to bypass ordinary appellate procedures and form committees to investigate and impose sanctions on individual district court judges.

A third form of judicial independence—"political insularity"—is perhaps the most complex. It requires the judiciary to be independent from popularly controlled governmental institutions, in particular the executive and legislative branches. This form of independence overlaps with party detachment whenever one of the political branches is itself a party before the court, but it is a distinct requirement that encompasses a variety of other circumstances as well. Even when the parties before the court are purely private, the judge is expected to remain free from the influence or control of the political branches of government.

Political insularity is essential for the pursuit of justice, which requires courts to do what is right, not what is popular. This form of independence is also in keeping with SEPARATION OF POWERS doctrine, for it enables the judiciary to act as a countervailing force within the government, checking abuses of power by the legislature and the executive.

One important source of political insularity is Article III. It provides federal judges with life tenure and protection against diminution of pay. Another arises from the limits on the power of the legislature to overrule the courts. Because the federal judiciary is the authoritative interpreter of the Constitution, only an amendment can override a CONSTITUTIONAL INTERPRETATION, and the AMENDMENT PROCESS is a cumbersome one, requiring special majorities in each house of Congress and approval by three-fourths of the states.

Despite its importance, political insularity poses a certain dilemma for democratic theory: The more insulated the judiciary is from the popularly controlled governmental institutions, the more it is able to interfere with their policies and thereby frustrate the popular will. Accordingly, the demand for political insularity, perhaps even more so than party detachment and individual autonomy, is a qualified one. Indeed, the federal judiciary, long taken as one of the most independent of all judicial systems in the world, is best understood not as a fully insulated branch of government, but as one unit of an interdependent political system.

One of the primary constraints on the judiciary's political independence is the appointment process. In some countries, the judiciary is given authority to select its own members as a way of enhancing its political insularity. In the United States, the power to appoint federal judges is vested in the President, and this arrangement necessarily introduces an element of political control over the judiciary's composition. Presidents naturally will try to select judges whose concept of justice approximates their own and who are likely to further the policies of their administrations. The President is constrained by public expectations as to the qualifications of nominees, but even the

most insistent demand for excellence still allows the President wide latitude. The need to obtain SENATE approval also qualifies the prerogatives of the President, yet this hardly depoliticizes the appointment process, as the Senate is a political institution driven by its own agenda.

Even after a judge takes the oath of office, the President's control over the promotion process may serve as a continuing source of influence. Those who desire a higher position in the judicial hierarchy, or perhaps another government post altogether, may avoid decisions that would put them in disfavor with the President or pose an obstacle to their CONFIRMATION. In addition, every judge is likely to feel a special debt toward the President responsible for his or her appointment. This sense of gratitude may produce a judicial bias in favor of the administration, though this risk is likely to wane over time as the judge comes to confront the policies of a President with whom he or she has no prior relationship. On a number of notable occasions, one involving Justice LOUIS D. BRANDEIS and President FRANKLIN D. ROOSEVELT, sitting Justices have acted as informal advisors to Presidents, compromising their insularity most egregiously.

Another important source of political influence over the judiciary is the IMPEACHMENT process. Article II provides for the impeachment of all civil officers for "Treason, Bribery, or other high Crimes and Misdemeanors." However, Article III uses more general language, stating that judges "shall hold their Offices during good Behaviour." Indeed, in the nineteenth century, Congress invoked its impeachment power simply because it disapproved of certain judicial decisions, the most notable example being the impeachment of Justice SAMUEL J. CHASE. In fact, none of these particular proceedings resulted in the removal of the judge, and a general understanding has evolved that a judge may be impeached only for violation of the most elemental duties of office, say chronic drunkenness, corruption, or conviction of a crime. Still, the threat of impeachment, often voiced by ideologues who have no hope of ultimate success, may have an inhibiting influence.

Aside from the political elements introduced by the appointment and impeachment processes, and by the judge's own desire for higher office, economic imperatives may also compromise the judiciary's independence. Although the Constitution provides a guarantee against pay diminution, it is now settled law in the United States that Congress is not obliged to raise federal judicial salaries to keep pace with inflation. Judges seeking to protect the real value of their compensation might therefore tailor their actions so as not to offend the political branches. A judge's attachment to certain incidental benefits of office, such as secretaries, law clerks, and chauffeurs, can produce a similar effect, for these too are within the control of Congress and the President. In these matters, the political branches cannot target individual judges but must establish rules applicable to all federal judges, or at least to specific categories (e.g., the Supreme Court, the lower courts). This limitation blunts the usefulness of this method of control as a sanction, unless, of course, the situation has so deteriorated as to warrant a blanket assault.

A more precise form of control may come in through the exercise of Congress's lawmaking power. Although a judicial decision interpreting the Constitution may be overridden only by recourse to the constitutional amending process, Congress may reverse a STATUTORY INTERPRETATION with a simple legislative enactment. This power has been exercised countless times, though it is subject to a rule that denies Congress the power to prescribe or alter the rule of decision in a case that is already pending.

Congress may also intervene by limiting the JURISDICTION of the federal courts and thereby remitting the claimants to state courts or to other federal agencies (for example, ADMINISTRATIVE AGENCIES, bankruptcy judges, or magistrates, none of whom are as insulated from the political branches as Article III judges). The most notable so-called jurisdiction-stripping measure is the 1932 NORRIS–LAGUARDIA ACT, which denied federal courts jurisdiction over "labor disputes." As with efforts to prescribe the rule of decision, congressional power to withdraw jurisdiction is limited by a rule that denies it this power in pending cases. Although the Supreme Court, in EX PARTE MCCARDLE (1869), upheld a statute that withdrew its jurisdiction over a pending case that challenged various RECONSTRUCTION statutes, the continuing validity of that PRECEDENT is in doubt. Jurisdiction-stripping measures have also been resisted on the theory that a federal right necessarily implies a federal remedy.

In more recent years, Congress has occasionally sought to exercise control over the adjudication of constitutional claims by placing limitations on judicial remedies as opposed to stripping the federal courts of jurisdiction over those claims. With educational SEGREGATION, for example, Congress has limited the conditions under which SCHOOL BUSING may be ordered. Congress recently employed a similar strategy to affect federal court litigation aimed at reforming prison conditions, though the validity of this act is now being tested in the courts.

The political branches can also influence the course of decision through their control over the number of judgeships. Although the Constitution establishes the Supreme Court, it does not prescribe the number of Justices, nor does it set down any rule as to the number of lower court judges. Because the power of appointment lies with the President, subject of course to confirmation by the Senate, Congress may endow a President whose policies or stance

toward the judiciary it supports with new judgeships to fill. Conversely, Congress may try to freeze or shrink the number available to a President with whom it disagrees.

In the nineteenth century, Congress occasionally manipulated the number of Justices on the Court as a way of influencing the course of judicial decisions. However, ever since President Franklin Roosevelt's unsuccessful attempt to pack the Court in the 1930s—a scheme that envisioned adding a new Justice for every one who had turned seventy as a way of undermining decisions striking down NEW DEAL programs—an informal norm has emerged in the United disfavors such manipulation. Yet there are many reasons, including population growth and caseload volume, for altering the size of the judiciary, and Congress may appeal to any or all of them to mask manipulative motivations. Furthermore, because maintaining the status quo is less likely to be perceived as a manipulative act, Congress may exert pressure on federal judges by failing to increase their number in response to increases in the number of cases. These exercises in legislative control are all the more feasible when it comes to the lower federal courts, because no general norms have evolved as to the number of lower court judges (whereas the popular imagination seems to have fixed on the number nine for the Supreme Court), and the lower courts are rarely a subject of widespread public attention.

Finally, the judiciary is dependent on the other branches to enforce its decrees. President ANDREW JACKSON once responded to a Supreme Court decision upholding the Cherokee Nation's claim to federal protection against the state of Georgia in rather sharp terms: "JOHN MARSHALL has made his decision, now let him enforce it." In the modern period, the President has been more cooperative and in fact called out the troops during the CIVIL RIGHTS era to enforce decrees requiring the DESEGREGATION of the Little Rock schools and the University of Mississippi. Such measures were welcomed by the judiciary, but they also underscored the judiciary's dependency and its inability to enforce policies strongly and persistently opposed by the other branches. Judges are possessed with CONTEMPT POWER, but contempt orders are not self-enforcing and may themselves require the assistance of the other branches.

Thus, the much-celebrated independence of the federal judiciary is in many ways limited. Federal judges enjoy a substantial amount of independence with respect to litigating parties and other members of the judiciary, but this independence is far from absolute. It is also true that federal judges are insulated from the political branches of government because they have life tenure, are assured that their pay cannot be diminished by legislative fiat, and, thanks to an evolving public understanding, cannot be removed simply because of disagreement with their decisions. Yet they are by no means fully independent of the political branches. Because the Constitution grants the executive and the legislature the power to make appointments, to decide whether salaries should be adjusted for inflation, and to define the judiciary's jurisdiction and structure, and because the courts often need the political branches to implement their decisions, these branches are able to exercise significant influence over the courts. Judges are independent, but not too independent, as is indeed appropriate in a democracy.

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JUDICIAL LEGISLATION

The term "judicial legislation" appears to be something of an oxymoron, as the Constitution clearly assigns the principal task of LEGISLATION to the Congress. The Constitution does, of course, give the President a role in the legislative process through the VETO POWER and through his power to recommend legislation to Congress that "he shall judge necessary and expedient." The Framers explicitly rejected, however, a similar role for the judiciary. Several attempts to create a council of revision, composed of the executive and members of the Supreme Court, to review the constitutionality of proposed legislation, were defeated in the CONSTITUTIONAL CONVENTION. The most effective arguments against including the Court in a council of revision were derived from considerations of the SEPARATION OF POWERS. Elbridge Gerry, for example, remarked