Why Should We Care About Independent And Accountable Judges?

by Bruce Fein and Burt Neuborne

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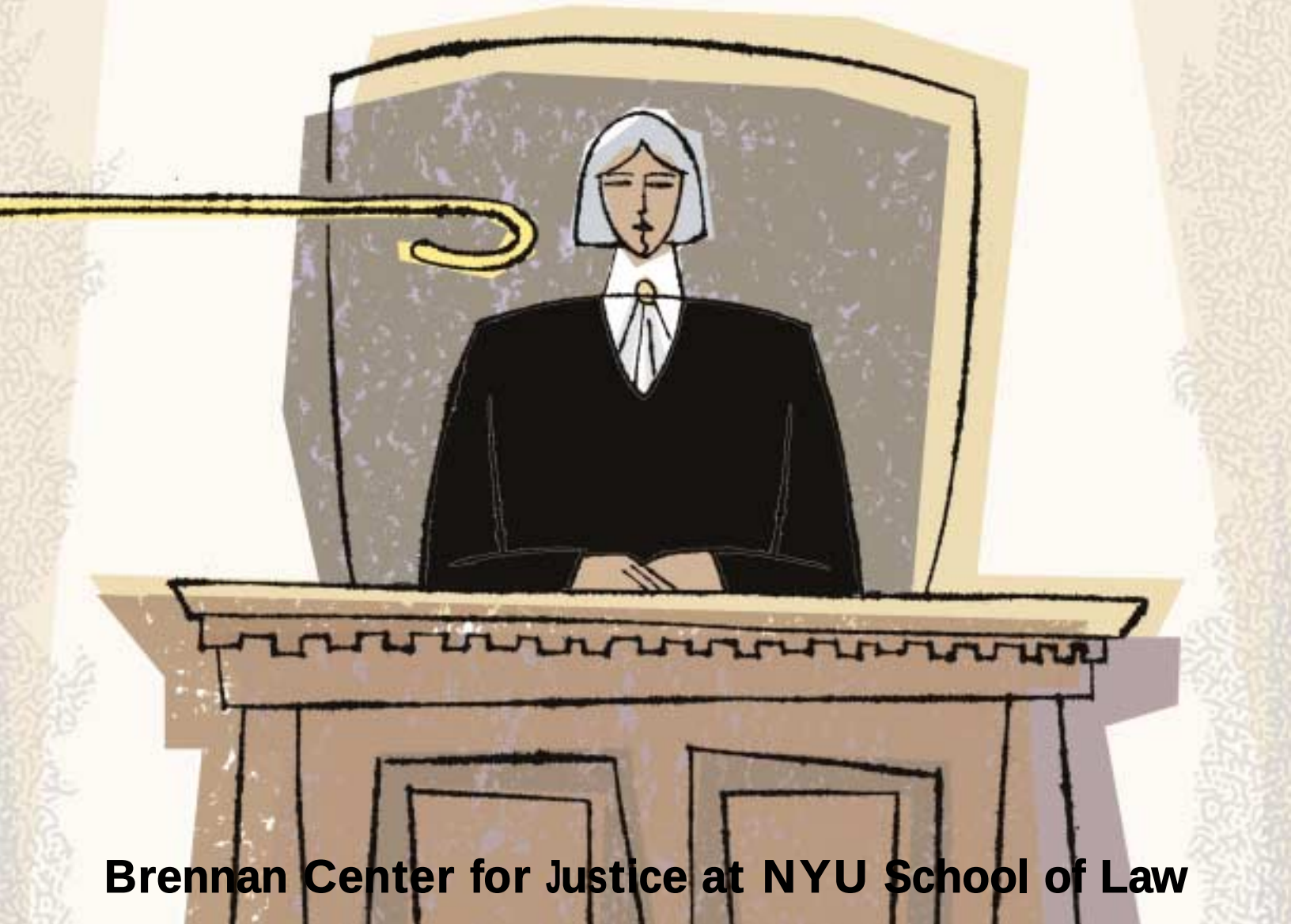

Brennan Center for Justice at NYU School of Law

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The Brennan Center's Judicial Independence Project combats threats to the independence of the judiciary, the ultimate guarantor of liberty in a democratic society. The project focuses on protecting judges from politically motivated attacks on their rulings, safeguarding the judicial selection process (including elections in certain states), and fighting improper efforts to constrict judicial jurisdiction and power.

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About the Authors

Bruce Fein has labored and written for more than 25 years to promote a judicial philosophy of modesty: namely, adhering reasonably closely to the language and purpose of constitutional and statutory provisions in deciding cases. He entertains a strong presumption against creative or inventive interpretations under the aegis of a "Living Constitution" that gives birth daily to new meaning. Mr. Fein has forcefully championed his philosophy as Associate Deputy Attorney General and General Counsel to the Federal Communications Commission under the Reagan administration, Visiting Fellow for Constitutional Studies at the Heritage Foundation, Adjunct Scholar at the American Enterprise Institute, weekly columnist for *The Washington Times*, and as a witness before numerous congressional committees.

Mr. Fein is equally fervent in the belief that competing philosophies of judging are constitutionally legitimate, and that they should do battle before independent courts during the course of litigation without outside political forces placing thumbs on a particular outcome. Better that the judiciary be independent, according to Fein, than that it decide all cases the way he would prefer by enlisting a political sledgehammer.

Burt Neuborne has spent the last 35 years attempting to persuade judges to view the Constitution as a living document that must be reinterpreted in each generation to meet "the felt necessities of an age." He has argued that a Constitution, to survive over time, must be drafted in broad terms, which cannot be read literally, because majestic generalities like "the equal protection of the laws" do not have a literal meaning. In his view, the beginning of any effort to read the Constitution is the text, but the text rarely provides more than general guidance. Judges must go beneath the text to the ideals that the text was intended to preserve, and ask, in each case, how those ideals can best be preserved in the modern world. Constitutional judging is, in Prof. Neuborne's view, a creative act, and judges are full partners in the constitutional enterprise.

Prof. Neuborne has passionately defended his view as Legal Director of the Brennan Center for Justice and John Norton Pomeroy Professor of Law at NYU School of Law, Legal Director of the American Civil Liberties Union, and member of the New York City Human Rights Commission. But he advocates with equal zeal the importance of independent judges, even if those judges adhere to philosophies at odds with his own.

Foreword

Bruce Fein and Burt Neuborne occupy different ends of the political spectrum. Fein's conservative perspective has been evident in his *Washington Times* columns and government service under the Reagan administration. Neuborne's progressive vision has long infused his scholarly writings and drives the litigation he undertakes at the Brennan Center for Justice at NYU School of Law. On issues from voting rights to the use of public funds for religious schools, from the right to privacy to the exclusionary rule, Fein and Neuborne are in diametrically opposing camps.

But on one issue–an issue central to the functioning of our constitutional system –Fein and Neuborne see eye to eye. When it comes to the value of judicial independence, they can set aside their differences and speak with one voice. This jointly authored essay, *Why Should We Care About Independent and Accountable Judges?*, explains how partisans on both sides of the aisle can care deeply about politics and yet strive to prevent it from influencing judging. Fein's friends on the right and Neuborne's friends on the left should listen to what the authors say.

Why Should We Care About Independent and Accountable Judges?

Judicial independence in the U.S. has proved superior to any alternative form of discharging the judicial function. It would be folly to squander this priceless constitutional gift to placate political partisans.

by Bruce Fein and Burt Neuborne

The rule of law depends on judges. Judges ensure that neither partisan majorities, nor overzealous officials violate our constitutional rights. Judges give concrete meaning to statutes and regulations whose texts are frequently ambiguous. State judges make "common law" that, unless modified by statute, governs enormously important day-to-day issues like legal responsibility for harms associated with guns, tobacco, or alcohol.

The difficult legal problems that judges confront often do not yield a single correct answer. No consensus has emerged among judges, scholars, or the broader legal community about the best way to interpret ambiguous language in the Constitution, statutes, and administrative regulations, or how exuberantly judges should employ their common law powers to create judge-made law.

When interpreting the Constitution or a statute, some champion a theory of "original meaning or intent." Others argue in favor of reading ambiguous text in harmony with evolving standards of decency or morality. Yet others insist on an interventionist approach when addressing individual rights implicating civil liberties, but urge extreme deference in economic matters. In sum, a Babel of interpretive theories that will affect the outcome of many controversial cases are available to American judges, lawyers, and law professors.

That is why politicians and interest groups care so deeply about who gets to be a judge, and about how judges perform in office. Interest groups lobby vigorously for the selection of judges they believe will vote to decide cases favorable to their cause, whether the cause is pro-life, pro-choice, pro-labor, pro-affirmative action, pro-federalism, pro-property rights, pro-business, pro-law enforcement, pro-environment, pro-free speech, or pro-capital punishment. They excoriate judicial opinions they dislike, without paying much attention to a judge's reasoning.

There is, of course, nothing wrong with caring about who gets to be a judge, and criticizing a judge's behavior in office. Both activities are protected by the First Amendment. Criticism of judges is pivotal to saving them–and us–from the delusion that judges are infallible. But everything in civilized life is a matter of degree. Allowing for both the accounta-

bility of judges to popular opinion in discharging their crucial tasks, and judicial independence from politics, is no exception.

It is troublesome that a growing array of voices seem to measure judicial appointments and performance by applying outcome-determinative litmus tests. Judges who decide (or who would decide) cases one way receive high marks. Everyone else receives failing grades. Whether a judge has interpreted, or will interpret, the law in a legitimate, responsible, and reasonable manner is irrelevant. Law, for such strident voices, is simply partisan politics by other means. Some even argue that a litmus test on outcomes should be used when the President selects federal judges, including members of the Supreme Court. Presidential candidates have promised to reject any prospective nominee that refuses to promise to overrule *Roe v. Wade* (1973), the landmark abortion decision. Pro-choice interest groups insist that no one can be a judge unless he or she pledges allegiance to *Roe v. Wade*.

In the years since the contentious confirmation hearings that resulted in the rejection of Judge Robert H. Bork, it has become common practice for Senators to seek to extract commitments from nominees to the federal bench about how they would vote on particular issues. Forcing a prospective judge to pre-commit to a particular outcome in a future case is destructive of judicial independence. It strips the judicial process of its most important attribute–a neutral arbiter willing and able to listen to arguments from both sides before making a decision. Once a judicial nominee has been forced, under oath, to voice an opinion regarding the correctness of a Supreme Court precedent on national television, both the appearance and reality of judicial independence has been compromised.

Recently, some Members of Congress have gone far beyond healthy and informed criticism of court rulings to demand impeachment of federal judges whose decisions they dislike, more often because of political calculation than because of deficient reasoning. Nothing could be more damaging to the rule of law than for judges to fear that if they rule against the prevailing political winds, they may be removed from office. The Founders provided for a written Constitution, a Bill of Rights, and federal judges with life tenure to safeguard against majoritarian tyranny. Allowing politicians to threaten to remove federal judges whose rulings displease them strikes directly at the Founders' efforts.

The meaning of independence

Judicial independence does not mean rule by Platonic guardians who presume omniscience in fashioning enlightened government. It assumes an important element of accountability. Since vigorous disputes exist over which theory of interpretation is best, a judge is often free to choose among several generally accepted alternatives. A judge is not free, however, to invent an idiosyncratic theory of interpretation with no roots in our judicial traditions or to decide cases according to personal whim.

In fact, American judges have almost never adopted untenable theories of interpretation to advance personal agendas. During recent congressional hearings on alleged "activist" jurists, harsh critics were unable to cite a single judicial decision over several decades out of the hundreds of thousands delivered annually that adopted a theory of interpretation that fell outside the bounds of general acceptance.

Thus, judicial independence emphatically does not mean capricious rule by judges. Rather, it means promoting a judicial culture and cast of mind that approaches the interpretive task as guided by principles that rise above personal or partisan likes or dislikes, and are anchored to one of a number of theories that the American people have come to accept as a legitimate part of judging.

Are current attacks novel?

Judicial independence has been under attack from the inception of the Constitution. Thomas Jefferson sought to impeach and remove Justice Samuel Chase because of Chase's enthusiasm for enforcing the Sedition Act. Congress even suspended the 1802 Term of the Supreme Court, hoping to foil the Court's ruling in *Marbury v. Madison*, the first case in which the Court comprehensively explained the parameters of its power of judicial review. The Civil War Congress manipulated the size of the Supreme Court to ensure a favorable ruling on wartime Legal Tender legislation, and took away the Court's jurisdiction in a pending case after the war to avoid a constitutional challenge to Reconstruction legislation.

More recently, "Progressives" argued for a popular veto of court rulings, and for super-majorities on the Supreme Court to invalidate statutes. President Franklin D. Roosevelt tried to increase the size of the Supreme Court so that he could "pack" the Court with hand-picked appointees to prevent decisions hostile to the New Deal. The unpopularity of many of the Warren Court's civil rights and criminal justice decrees sparked rancorous demands for the impeachment and removal of Chief Justice Earl Warren.

Yet, previous attacks on judicial independence have failed. Most Americans respect the courts and the rule of law, in large part because they believe in judicial independence. Deeply controversial decisions in highly polarizing areas like abortion, prayer in school, affirmative action, and the death penalty are widely obeyed because the outcomes are not "rigged," but are the result of a principled process in which independent judges do their best to interpret the law in accordance with their understanding of the correct interpretive philosophy.

So, why worry about this generation's attack on judicial independence? Won't it fail, as have the earlier efforts to undermine the courts? Complacency would be dangerous, however. What is new to this generation of court-bashers is an increasingly widespread willingness to treat judges as if they were merely politicians in black robes who do not deserve to be independent. As Edmund Burke taught, all that is necessary for the triumph of evil is for good men to do nothing. Judicial independence is too important to the welfare of the nation and the rule of law to leave to happenstance.

Interpreting or making law?

Do judges make more law than they interpret? Emphatically "No." Most legal issues that arise in daily life do not raise difficult questions of interpretation. In many settings, the law is so clear that a consensus exists about what a judge would say the law is, whatever the prevailing judicial philosophy. Such "easy" legal questions never enter the courthouse because they fall within that broad universe of judicial consensus about cornerstone canons of construction that substantially limit latitude in deciding concrete cases: precedent

should not be lightly overruled; the language and purpose of a law should be honored; deference should be given to longstanding administrative interpretations or practices; and, the essence of judging is like interior decoration of a house that the Constitution or legislatures have built, not remodeling. Even in the Supreme Court which reviews only the most vexing legal issues, typically 50 percent or more of the cases are decided unanimously by nine Justices sporting varied philosophies of interpretation.

It would be wrong, however, to suggest that judges do not also make law occasionally, even highly important and controversial law, especially in matters of constitutional interpretation where proper rules of interpretation have been hotly disputed from the outset. The ambiguous constitutional text seldom offers definitive answers. For example, the enumerated powers of Congress include the creation of an army or navy, but not an air force. Charles Lindbergh was not within the realm of prophecy in 1787. Does that mean that an air force is unconstitutional? Certainly not, since Congress also enjoys powers "necessary and proper" to promote its enumerated powers, and few if any would dispute that an air force complements the defense mission of the army and navy.

Other constitutional ambiguities are much more difficult. The Fourth Amendment prohibits unreasonable searches and seizures. Does the unreasonableness standard apply to wiretapping or electronic bugging that captures conversations? The language is not conclusive, and the Supreme Court has changed its mind on whether to treat wiretapping as a "search." The First Amendment precludes Congress from enacting laws that abridge the freedom of speech. Does that mean laws punishing incitements to riot, or conspiracies to violate the antitrust laws are unconstitutional just because speech is involved? Of course not. The First Amendment cannot be read literally. But that means that judges must decide what fits into "the freedom of speech" without clear guidance from the constitutional text.

In sum, to believe that judges can interpret the Constitution or laws without at times resorting to values and policy preferences is to indulge in delusion. In hard cases, a degree of judicial "law making" is inevitable because there is no universal consensus about how to resolve textual ambiguities among judges, lawyers, professors, scholars, or politicians. Several approaches command legitimacy in our legal culture and traditions.

One interpretive theory, championed by Justice Antonin Scalia gives pivotal importance to the "original meaning" of the framers of the Constitution or the statute in question. In other words, the judge should interpret the text according to the meaning it held for its originators.

A competing theory gives substantial weight to the underlying purpose of the constitutional provision at issue in giving contemporary meaning to ambiguous language in the Constitution. Former Supreme Court Justice William Brennan was the foremost champion of the purposive theory of interpretation, and it retains a substantial block of adherents.

Some theories insist on a preferred constitutional position for First Amendment rights and special protection for politically weak, discrete and insular minorities, while relegating property rights to the caboose on a constitutional locomotive. Others view property rights as the cornerstone of a system of ordered liberty.

Since predictability in the law is valuable, universal agreement on a judicial theory of interpretation would be desirable. Uncertainty and litigation would be reduced (although not eliminated because every theory requires some judgement in application); and, litigants would not be treated differently depending on the luck of the judicial draw. But there is no likelihood that interpretive unanimity, or even close to unanimity, will ever be achieved. No commanding consensus dictates that one interpretive theory is unarguably superior to all others. Rankings turn largely on personal values, a judge's world-view, and beliefs regarding the proper role of the judiciary in policing, complementing, and confining majoritarian politics.

American political and legal culture has come to accept disputes between and among judges about which interpretive theory is best without attempting to enshrine one particular theory as the only acceptable approach. It is not thought unjudicial or heretical for a judge to choose among the dominant theories, like voting Republican rather than Democratic, or vice versa. They are all sufficiently similar as practiced to yield a jurisprudence with a tolerable level of uncertainty and coherence.

Popular control?

If judges make law, at least in some cases, shouldn't they be subject to popular control just like other political actors? The answer seems a categorical "No!" A central point of our Constitution is to limit the power of the political branches of government by deputing independent judges to decide on the constitutionality of laws or executive action in concrete cases. In other words, the Founders did not always desire popular majorities to prevail, recognizing that tyranny by the majority is tyranny nonetheless. If federal judges were mere mouthpieces of popular sentiment, cherished constitutional limitations would largely vanish.

Self-interested majorities are not likely to believe their actions unconstitutional. They are driven overwhelmingly by partisan, parochial, and short-term visions that could destroy ordered liberty both for the living and for those yet to be born. Think of Robespierre, Danton, and the Jacobins of the French Revolution and their oppressive popular tribunals. Remember also the Federalist Party in the United States Congress, which both applauded the First Amendment and soon undermined freedom of speech in the Sedition Act of 1798 to muzzle their Republican rivals.

In sum, everything we know about human nature and political ambition discredits the idea that Congress or the Presidency could responsibly be entrusted with adjudicating the constitutionality of their own action or that of the rival branch. Does anyone seriously believe that Congress would have decided the landmark 1974 "Nixon tapes" case fairly, or resolved the parade of cases stemming from the Independent Counsel's investigation of President Clinton evenhandedly?

Judges in the United States, in stark contrast to Members of Congress and the Executive Branch, live in a culture that treasures intellectual honesty and principles that rise above the political moment. That culture is not ordained by law, but it is a critical fact nonetheless. It is what largely inspires the public to comply voluntarily with the countless judicial decisions rendered daily. The judicial process is fair and evenhanded in most cases. Decisions are usually recognized as non-partisan. The past political party attachments of judges are generally recognized by lawyers as marginal to the outcome of most litigation. What is

vastly more significant is judicial philosophy, which transcends party lines. Justice John Paul Stevens, thought by many to be a "liberal" judge was appointed by a Republican President, Gerald Ford; many Republicans, however, regularly disagree with his votes and opinions.

Like judicial decrees, laws enacted by Congress and Executive Orders of the President also command general obedience. But judicial decrees tend to be accepted ungrudgingly as legitimate and fair because of the openness and impartiality of the judicial process and because of the reasoned analyses that are the signature of judicial opinion. By contrast, when Congress holds hearings in anticipation of laws, witness lists are customarily stacked to favor one outcome over another, legislative compromises are regularly brokered in the dark, justifications for the law are often thin and counterfactual, and votes are characteristically cast for partisan rather than principled reasons. In spite of the less than ideal character of the workings of the legislative process, however, laws are obeyed by the American people because Congress itself is established by the Constitution. (Indeed, as the subject of Article I of the Constitution, it is given pride of place.) But the obedience often comes at the price of individual resentment or bitterness that may ultimately find expression in anti-social behavior or political extremism.

In other political and judicial cultures, these observations may not obtain. In Great Britain, for instance, it is arguable that laws enacted by Parliament may be received with greater popular legitimacy than judicial rulings. In other words, judicial independence in the United States may be more compelling than elsewhere. There is nothing inherent in judging, per se, that makes the process superior on the legitimacy scale than legislation.

How accountable are judges?

Judges are subject to much more popular accountability than is customarily recognized by critics. The constitutional rulings of the Supreme Court can be overridden by constitutional amendment, which explains the Eleventh, Fourteenth, Sixteenth, Nineteenth, and Twenty-Sixth Amendments relating to federal jurisdiction, citizenship, income taxation, and the suffrage, respectively.

Statutory and common law rulings can be overcome by simple legislation. The Supreme Court's "political question" doctrine leaves the majority of foreign policy and national security decisions of the Congress and the President beyond judicial review, like the constitutionality of wars or legislative involvement in the revocation of treaties. During wartime, the High Court has uniformly bowed to the political branches in the choice of measures needed to promote victory, including the dubious Sedition Act prosecutions in World War I and the disgraceful relocation and incarceration of Japanese-American citizens in World War II.

The Constitution, furthermore, excludes the judiciary from interfering in highly charged political issues. Thus, Congress is entrusted with judging the elections, returns, and qualifications of its own members under Article I, section 5. And issues relating to impeachment and the trial of impeachments are reserved for the House and Senate. In 1876, when disputes arose over 20 electoral votes for the President, Congress decided the questions by creating a 15-member Commission to investigate and decide subject to overruling if both the House and Senate disagreed.

Even more important than these formal restraints on the power of judges to defy

popular sentiments are mortality and the influence of orthodoxy. Life tenure for federal judges does not confer immortality. All die, and most retire. Their replacements are appointed by a popularly elected President and confirmed by popularly elected Senators. Their judicial philosophies will ordinarily echo that of their political benefactors. This constant replenishment of "new blood" on the judiciary insures against decisions that substantially deviate from popular sentiments. That is not academic theorizing; it is the actual experience of the United States, whether in areas of crime, church-state relations, civil rights, abortion, obscenity, privacy, or states' rights.

The United States Supreme Court and lower federal and state judges have never for long blocked policies coveted by the majority, including President Franklin D. Roosevelt's controversial "New Deal." He was able to refashion the High Court without his ill-conceived "court packing" legislation through vacancies created by customary retirements. His New Deal policies ultimately passed muster and grew from an acorn to a giant oak tree in the United States Code.

Intellectual orthodoxy is as potent as the appointment process in keeping judicial decisions within the political mainstream. Justice Benjamin Cardozo described the phenomenon this way in *The Nature of the Judicial Process*: "The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by." In other words, the majority of judges, despite their life tenures, are influenced in their decisions by prevailing intellectual fashions. Thus, during the heyday of laissez-faire capitalism from the Gilded Age to the Great Depression, the High Court regularly invalidated legislative manipulations of free market forces. When that thinking became discredited and was displaced by "Keynesian" economics in the 1930s, the most drastic government marketplace interventions were sustained, including federal regulation of the home consumption of wheat! And the dramatic change in judicial attitude came before President Roosevelt made his first Supreme Court appointment.

In addition, one constant in American culture is a deep devotion to majority rule. It is daily indoctrinated, either expressly or tacitly, in group decisions, whether in the family, in the classroom, or in social or other clubs. The majority view is customarily accepted as the right standard. That idea is contained in the strong egalitarian strain in American life deftly portrayed by Alexis de Tocqueville in *Democracy in America*: every person ought to count equally in matters of importance since the law recognizes only first-class citizenship.

Judges do not shed these egalitarian doctrines when they put on robes. Most are instinctively reluctant to challenge popular will, even though that is a staple of constitutional litigation. Even the staunchly independent Justice Oliver Wendell Holmes trumpeted that "the legislatures are ultimate guardians of the liberties and welfare of the people in quite as great degree as the courts."

Finally, direct and informed criticism of judicial decisions also strengthens popular accountability. Chief Justice William Howard Taft lectured:

> Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism.…In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance, because it is the only practical and available instrument in the hands of a free people to keep such judges alive to the reasonable demands of those they serve.

While Taft's general point is valid, he neglects constitutional and statutory amendments and the appointment process as equally if not more pivotal than criticism in preventing a life-tenured judiciary from morphing into Platonic guardians. Associate Justice Felix Frankfurter in a letter to a former law clerk also underscored the influence of court criticism:

> I can assure you that explicit analysis and criticism of the way the Court is doing its business really gets under their skin, just as the praise of their constituencies, the so-called liberal journals and well-known liberal approvers, only fortifies them in their present result-oriented jurisprudence.

All of these varied elements of judicial accountability fully substantiate Alexander Hamilton's characterization of the judicial branch as "the least dangerous to the political rights of the Constitution." The idea that judges are running the country is a figment of vivid imaginations, although many of their decisions are justifiably vulnerable to informed and trenchant criticism, which should be encouraged. That is how judicial errors can be corrected without undermining judicial independence.

The current dangers

The inestimable value of judicial independence is its centrality to the rule of law, that is, a set of rules that govern private behavior and the exercise of government power and whose application in litigation is predictable and evenhanded no matter what the popular politics of the case. Judicial independence also promotes domestic tranquility and harmony by ensuring disputants of a fair day in court and reasoned and careful responses to their claims, a form of catharses when passions are aroused. Losers who feel they received a fair procedural deal will not ordinarily leave the courthouse embittered or angered.

It would be unsustainable to assert, however, that all our cherished freedom and liberties would crumble by even the slightest inroad on judicial independence. A deep and nationwide consensus that has emerged over two centuries would keep a large portion undisturbed even without any institutionalized judicial check on Congress or the President. Judge Learned Hand in "The Contribution of an Independent Judiciary to Civilization" warned against exaggerating the importance of the judicial branch in these words:

> This much I think I do know that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

But even small increments of liberty and justice are hard to come by, and thus judicial independence should be jealously guarded against either witting or unwitting subversion. In the contemporary political climate, that means vocal denunciation of the idea of impeaching and removing federal judges for making decisions that are disliked. Such a political Sword of Damocles would create at least the appearance that federal judges are more beholden to political patrons than the law, and thus undermine the popular legitimacy of the judicial branch. Further, most judges are not second editions of Sir Thomas More (who was executed for his fidelity to the law) and might compromise their intellectual integrity to remain in office.

Case-specific litmus tests for Supreme Court and subordinate federal court appointments should be likewise assailed. Whether the test is applied by the President in searching for a nominee or by Senators in the confirmation process, it is a dagger at judicial independence. Supreme Court candidates of ordinary

ambition will shade their views in order to pass political muster, and become intellectually "locked in" on a battery of controversial issues before they arise in actual cases and controversies where all sides are heard and debate ensues among the nine Justices.

In sum, case-specific questioning of would-be or actual nominees is tantamount to political arm twisting to dictate the outcome of constitutional questions by the judicial branch. Thus, the President should issue an order to the Attorney General prohibiting any such interrogation of potential judicial nominees, and the Senate Judiciary Committee should adopt a companion rule to govern its members during confirmation hearings or face-to-face meetings with nominees.

Questions about judicial philosophy, unlike case-specific litmus tests, have a legitimate place in presidential or senatorial inquiries. Philosophy may give a hint as to how an appointee would decide a particular case, but it is a very inexact proxy. As Justice Holmes quipped, general principles do not decide concrete cases. Associate Justices David Souter and Clarence Thomas were both appointed by President George Bush, but regularly vote diametrically opposite in major constitutional cases. A nominee's philosophy can therefore be scrutinized closely without fostering the damaging appearance that politics, rather than legal reasoning, determines judicial decisions. As long as varied judicial philosophies are accepted as constitutionally legitimate, there is nothing wrong or worrisome to an independent judiciary about a president endorsing one over another in making appointments.

Equally ill-conceived as case-specific intellectual extortion are legislative initiatives to manipulate the jurisdiction of the federal courts in order to circumvent interpretations some politicians disdain. One example are bills that would absolutely prohibit judges from ordering local or state governments to levy taxes even in the absence of less drastic alternatives for remedying a constitutional violation, such as closing all public schools to preserve segregated education via private schooling. The legitimate way for Congress directly to overcome what it believes are Supreme Court constitutional errors is through proposing amendments by two-thirds majorities as stipulated in Article 5 of the Constitution. It speaks volumes about an alleged rogue judiciary that Congress has never sent proposed amendments to the States for ratification that concern abortion, prayer in school, affirmative action, political reapportionment, or flag burning. Such complacency does not mean that the Supreme Court has never erred in these divisive areas of constitutional law; it does mean that whatever errors have been committed have been within a broad mainstream of popular thinking or sentiments and thus at worst only modestly counter-majoritarian.

Conclusion

Judicial independence in the United States strengthens ordered liberty, domestic tranquility, the rule of law, and democratic ideals. At least in our political culture, it has proved superior to any alternative form of discharging the judicial function that has ever been tried or conceived. It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans.

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