



Judicial Independence: *Woe to the Generation That Judges the Judges*

By David J. Beck

The framers of our Constitution strongly believed in three separate — and independent — branches of government. A serious weakening of any one of those branches can erode the fundamental underpinnings of our democratic form of government and pose a serious threat to democracy itself. Unfortunately, today there are major changes threatening the independence and effectiveness of our judiciary, but there is little public awareness of what is happening.¹

The late Chief Justice William Rehnquist called judicial independence “one of the crown jewels of our system of government.”² Justice Anthony Kennedy explained the importance of judicial independence in terms of its effect on society: “The law makes a promise — neutrality. If the promise gets broken, the law as we know it ceases to exist. All that’s left is the dictate of a tyrant, or perhaps a mob.”³

What does the term “judicial independence” mean? Simply stated, it means that judges are free to decide cases fairly and impartially, relying only on the facts and the law. It means that judges are protected from political pressure, legislative pressure, special interest pressure, media pressure, public pressure, financial pressure, and even personal pressure.

The founders established an independent judiciary not for the sake of the judges, but for our nation. They knew that a fair and impartial court system was necessary to protect our rights and to uphold the rule of law.

And yet, the founders provided the third branch of our government with considerably fewer protections than the legislative or executive. Alexander Hamilton wrote in the *Federalist Papers* that “the Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”⁴

Because the judiciary is the weakest of the three branches of government, it has the greatest need to be defended. How does the Constitution protect the judiciary? It does so by providing for life tenure for federal judges and prohibiting a decrease in

their pay. Moreover, in 1872, the Supreme Court itself established the principle of judicial immunity, a rare act of self-preservation.⁵ But the protections afforded by the Constitution and the doctrine of judicial immunity are insufficient. Because their needs are at times antagonistic, the judiciary cannot always depend on the legislature and executive to defend it. Consequently, it is the people who must take up this defense. As a practical matter, lawyers, both individually and through the organized bar, must take the lead in that defense.

Threats to Our Third Branch

Where do the threats to the independence of our judicial branch come from? They come from a variety of sources.

Liberals decry judicial decisions they perceive to be too conservative, and they complain of “judicial activism.” On the other hand, conservatives decry judicial decisions they perceive to be too liberal, and they too complain of “activist” judges.

Some criticisms are perfectly legal and appropriate, while other actions are improper and even unconstitutional. The public’s right to disagree with particular decisions and to vocalize their dissent is a fundamental principle of our republic. But we must be aware of other challenges to judicial autonomy, both overt and subtle, and shine a bright light on those that threaten the integrity of our system of government.

Public Incursions

Public dissent from judicial decisions is not new. In 1832, President Andrew Jackson publicly approved of Georgia’s defiance of the Supreme Court’s ruling in *Worcester v. Georgia*,⁶ proclaiming “John Marshall has made his decree, now let him enforce it.” Widespread defiance followed the Court’s decision in 1954 to integrate public schools in *Brown v. Board of Education*.⁷ But not since the Court created the doctrine of judicial immunity in 1872 has there been a threat to the integrity of the judiciary of the sort that exists today.

Former Supreme Court Justice Sandra Day O’Connor said “[T]he breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history.”⁸ Justice Samuel Alito has also warned against threats to judicial independence. He told the Nassau County Bar Association in New York: “[I] think this is one of the times in our history when there are some real threats to the federal and state judiciary, and I don’t think I’m being too much of an alarmist to say that we could be not too far from the tipping point when an accumulation of things does real damage to these vital institutions.”⁹ He said that judges who commit misconduct should be disciplined, but added that “to use unfounded ethical charges, which a member of the judiciary is in a poor position to answer, as a weapon to defeat a nominee or to designate a sitting judge is a tactic that ought to be condemned.”¹⁰

What are some of these public threats? In South Dakota, a constitutional amendment, “JAIL 4 Judges,” sought to eliminate judicial immunity. Other states have pursued efforts to

rein in judges who have purportedly “run amok,” and Congress has sought to encroach on judicial independence by limiting judges’ rights to cite foreign law, proposing the creation of an inspector general to police the judiciary, and passing legislation to strip the courts of jurisdiction.

The JAIL 4 Judges movement successfully obtained 40,000 petition signatures to get its initiative on the November 2006 ballot in South Dakota. The proposed amendment to the state’s constitution would have eliminated all immunity for state judges arising from “deliberate violations of law, fraud, or conspiracy; intentional violations of due process; deliberate disregard of material facts; judicial acts without jurisdiction; blocking of a lawful conclusion of a case; or any deliberate violation of the Constitutions of South Dakota or the United States.” The initiative would have subjected South Dakota’s judiciary to civil damages and criminal penalties for their decisions.

The initiative would have created a 13-member Special Grand Jury made up of citizens from across the state — *excepting* from service elected and appointed officials, members of the State Bar, judges, and prosecutorial and law enforcement personnel. The Special Grand Jury would have been tasked with determining both law and fact, whether judicial immunity should apply, and whether “probable cause of criminal con-

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duct by the judge” exists. The vote of only seven jurors would have been needed to determine an outcome.

The sweeping effect of this initiative would have turned judicial independence on its head. Judges would have been aware that being affirmed on appeal was only one goal; they also would have had to predict how the Special Grand Jury might respond to a situation. Even in a world where there was a “right” answer to every legal question, judges still would have been subject to the whims of the Special Grand Jury. The good news is that initiative was handily defeated in the November 2006 election; 90 percent of voters disapproved.¹¹

Legislative Incursions

The legislature, at times, also threatens the independence of our judiciary. The line between constitutionally permissible actions and unconstitutional overreaching by Congress can be difficult to draw. Take, for instance, situations when Congress attempts to remove certain types of cases from the federal courts’ review, so-called “jurisdiction stripping.” The constitutionality of that is the subject of a heated debate among scholars. Support for Congress’ ability to limit the jurisdiction of federal courts comes from the Court itself. In 1850, the Court decided *Sheldon v. Sill*,¹² upholding the Judiciary Act’s restriction on diversity jurisdiction created by assigning a debt. *Sheldon* stands as strong precedent for the proposition that because Congress may create lower federal courts, it may also determine their jurisdiction.

Other scholars argue that the framers intended that a federal court would be available to hear virtually every constitutional claim. Dean Lawrence Sager of the University of Texas School of Law stated that the essential function of the federal judiciary is the “supervision of state conduct to ensure general compliance with the Constitution,” requiring the existence of lower federal courts.¹³ Sager argues that state courts cannot be fully trusted to hear disputes seeking state compliance with the Constitution because they lack the assurance of life tenure and salary protections accorded the federal judiciary.

A sensible approach is that Congress has discretion *both* to create lower federal courts *and* to determine their jurisdiction,

but that Congress may *not* restrict the jurisdiction in a manner that violates other constitutional provisions.¹⁴ For example, Congress cannot restrict jurisdiction in a manner that would deny due process of law, such as where federal statutes appear to preclude all judicial review of administrative actions. In *INS v. St. Cyr*, the Court interpreted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.¹⁵ The Act limited federal court jurisdiction over challenges to deportation. The Court held that the Act’s preclusion of judicial review did not bar a challenge being brought through a writ of habeas corpus. Justice John Paul Stevens, writing for the Court, emphasized “the strong presumption in favor of judicial review of administrative action.”¹⁶

No consensus has formed regarding whether attempts to strip federal courts of cases traditionally heard by such courts would violate the Constitution. These issues do arise, however, and it is imperative that the bar remain vigilant and take part in the debate.

In response to complaints of unethical behavior among the bench and inadequate response to those complaints, Chief Justice Rehnquist created a committee chaired by Justice Stephen Breyer, the Judicial Conduct and Disability Act Study Committee. The committee, charged with determining whether the judiciary had properly policed itself under the Act, issued its findings in September 2006.¹⁷ The committee found that, on average, 700 complaints against federal judges are filed each year and that the Act was properly implemented 97 percent to 98 percent of the time. The committee found that only 17 high-visibility cases, those that received national or regional press coverage, existed over a five-year period. But as to those 17, the committee found that five of them were handled inappropriately — a 30 percent error rate.

Financial Incursions

In his 2006 year-end report on the federal judiciary, Chief Justice John G. Roberts, Jr. discussed what he termed “a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary.”¹⁸ That crisis is Congress’ failure to raise judicial pay. The Chief Justice stated that nearly 40 years ago, federal district judges made 21 percent more than the deans of top law schools and 43 percent more than senior law professors. Today, federal district judges are paid only half what the deans and senior law professors are paid. Moreover, adjusted for inflation, the average U.S. worker’s wages have risen 17 percent in real terms since 1969, while federal judicial pay has declined 24 percent.

The effects of this documented loss in pay are apparent when looking at the demographics of where our federal judges come from. In 1953, roughly 53 percent came from the practicing bar, while 35 percent came from the public sector. Today, those numbers have almost reversed — approximately 60 percent come from the public sector and less than 40 percent are from private practice.¹⁹ That is not to say that today’s

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federal judges are not competent and hard working. These numbers do suggest, however, that there are fewer *types* of individuals willing to make the sacrifices required of a lifetime appointment on the bench. Our judiciary is dangerously close to being filled with people so wealthy that they can afford to be indifferent to the level of judicial compensation or with people for whom the judicial salary represents a pay increase. It is not that these two categories are devoid of talented people, but a lack of diversity on the bench can only serve to raise serious questions about the impartiality of our judiciary and that, in turn, can eventually undermine the rule of law.

Also, judicial attrition is becoming much more common. More and more judges with lifetime appointments are leaving the bench early due to the opportunities for greater financial wealth in the private sector and elsewhere. From 1958 to 1969, only three federal judges gave up their lifetime posts. In the past seven years, 51 judges have left the federal bench, and 17 others are projected to leave through 2009.

Because judicial salaries are not subject to routine cost of living adjustments, they are particularly vulnerable to the effects of inflation. Federal judicial salaries are statutorily tied to congressional salaries; that is, only when Congress approves a pay increase for itself does the judiciary receive an increase.²⁰

Congress has failed to make funding of the federal judiciary a top priority. Our federal courts are forced to work with skeletal budgets, resulting in hiring freezes, furloughs, and the threat of limiting civil jury trials.²¹ In 2006, the federal judicial budget made up only approximately two-tenths of 1 percent of the total federal government's budget.²² Ten of the last 11 fiscal years began with no appropriations bill passed for the judiciary.

To some degree, Congress is listening. Senate and House bills have been introduced to increase the federal judiciary's salaries, but these are not enough. Judicial salaries need to be separated from those of Congress. Judges ought to be given automatic annual cost of living adjustments rather than the sporadic increases they currently receive.

Judging is a difficult job. Our judiciary struggles to avoid any appearance of impropriety, while attacks on their autonomy are launched from various fronts. It appears, for now, that common sense and reason are winning. Voters in South Dakota rejected the proposal to allow litigants to sue judges, and Congress is considering bills that will provide additional funds for judicial security and increase judicial compensation.

But there is work to be done. The judiciary does not have a natural constituency to argue on its behalf. Judges often have to render unpopular decisions. That is the nature of their job. To preserve the integrity of our independent judiciary, we must ensure that they are given the tools to do their job. We owe it to our judiciary and the many men and women who have made a financial sacrifice to serve, to preserve for future generations a system in which judges decide cases *free* of bias or intimidation. That has been the hallmark of American government for more than 200 years. Let's ensure that it continues.

Notes

1. This article is condensed from a paper presented to the Tarrant County Bar Association as part of the 4th annual Judge Eldon B. Mahon Lecture Series.
2. Linda Greenhouse, "Rehnquist Joins Fray on Rulings, Defending Judicial Independence," *New York Times*, Apr. 20, 1996.
3. Hon. Anthony M. Kennedy, Address to American Bar Association Symposium, "Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice," Dec. 4-5, 1998, Philadelphia, Pa.
4. Federalist No. 78 at 465-66 (Alexander Hamilton), Clinton Rossiter, ed., 1961.
5. American College of Trial Lawyers, *Judicial Independence: A Cornerstone of Democracy Which Must Be Defended*, available at <http://www.actl.com>.
6. 31 U.S. (6 Pet.) 515 (1832).
7. 347 U.S. 483 (1954).
8. Sandra Day O'Connor, "The Threat to Judicial Independence," *The Wall Street Journal*, Sept. 27, 2006.
9. Michael Scholl, "Alito Says Level of Attacks on Judges Hit Historic High," *New York Law Journal*, Oct. 2, 2006.
10. *Id.*
11. Peter Lattman, "South Dakota's 'J.A.I.L. 4 Judges' Measure Fails," *Wall Street Journal* Lawblog, Nov. 8, 2006, <http://blogs.wsj.com/law/2006/11/08/south-dakota-jail-4-judges-measure-fails-2/>.
12. 49 U.S. 441 (1850).
13. Lawrence Gene Sager, "Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts," 95 Harv. L. Rev. 17, 45 (1981).
14. See Erwin Chemerinsky, *Federal Jurisdiction* 200 (4th ed. 2003).
15. 533 U.S. 289 (2001).
16. *Id.* at 298.
17. Judicial Conduct and Disability Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice*, Sept. 2006.
18. U.S. Supreme Court Justice John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary* at 1 (Jan. 1, 2007).
19. *Id.*
20. See the Ethics Reform Act of 1989, Pub. L. No. 101-194.
21. Administrative Office of the U.S. Courts, "News Release: Judiciary Asks Congress to Ease Financial Hardships of Courts," Apr. 12, 2005, http://www.uscourts.gov/Press_Releases/fy06budget.pdf.
22. U.S. Office of Management and Budget, *Budget of the United States for Fiscal Year 2006*, <http://www.whitehouse.gov/omb/budget/fy2006/tables.html>.

DAVID J. BECK

is a co-founder of Beck, Redden & Secrest, L.L.P. in Houston. He is a former president of the State Bar of Texas and the American College of Trial Lawyers.

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