Judicial Independence

did not act in a judicial capacity when preparing a trial transcript, and in Cleavinger v. Saxner, 474 U.S. 193 (1985) the Court held that prison authorities did not act in a judicial capacity when they presided at disciplinary proceedings.

SEE ALSO Article III

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CASES


In re Neagle, 135 U.S. 1 (1890).


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JUDICIAL INDEPENDENCE

Judicial independence is the essential democratic principle that judicial decisions should be impartial and be based solely upon a judge’s interpretation of the evidence and applicable law. The judge must decide the case free from external economic, social, or political pressure, interference, or direction. In a 1789 speech to the first session of the U.S. House of Representatives, James Madison explained judicial independence as “an impenetrable bulwark against every assumption of power in the Legislative or Executive” (Licht 1992, p. 83). One year prior, in Federalist No. 78, Alexander Hamilton (c. 1755–1804) wrote “The complete independence of the courts of justice is peculiarly essential in a limited Constitution.” The American Bar Association articulated, “a truly independent judiciary is one that issues decisions and makes judgments which are respected and enforced by legislative and executive branches; receives an adequate appropriation from Congress; and is not compromised by politically inspired attempts to undermine its impartiality” (1997, pp. ii–iii).

Legal systems at the federal and state levels instruct judges to make their decisions based on the rule of law, not based on their own will or personal values. Judicial independence does not mean that judges or the judicial branch are free from accountability. Judges are subject to judicial ethical standards and must rely on the legislative branch for funding and on the executive branch for execution of judicial decisions. However, like other legal and policy concepts, the practical application of judicial independence has been subject to various interpretations throughout U.S. history.

CONSTITUTIONAL ORIGINS

The framers of the U.S. Constitution believed that judicial independence is central to the foundation and continuing evolution of American constitutional law because an impartial judiciary protects individual liberty and equality. Further, an independent judiciary preserves the Constitution’s requirement of separation of powers, acting as a check on legislative and executive power. However, judicial independence is a fluid and evolving concept, and political activists and Supreme Court decisions continue to shape the meaning and implementation of judicial independence.

Prior to the ratification of the Constitution, the founders emphasized the importance of judicial independence through the Declaration of Independence. Thomas Jefferson (1743–1826), intending to create a more democratic society, warned of the king of England’s practice of making judges dependent on his will alone to maintain their office and salary. Following Jefferson’s warning, the founders adopted the Articles of Confederation in 1781, the nation’s first attempt at a system of government for the United States.

The founders again heeded Jefferson’s warning in 1787 in adopting the U.S. Constitution, which created three coequal branches of government: the legislative, executive, and judicial branches. The Constitution was created with the intention that individual judges should be free to independently render impartial decisions, while the judiciary as a whole was independent as a separate branch of government. The founders envisioned that federal judges would maintain institutional and decisional independence by providing in Article III, Section 1 of the Constitution that federal judges “shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” Article III, Section 1 protects federal judges from salary reductions or removal from the bench due to rulings that are unpopular with the public, the media, or those in the other branches of government. Further, federal judges can interpret the law using the powers vested in them by the Constitution and federal statute. In addition, federal judges are not elected by the citizenry. Instead, they are selected by the president and confirmed by the U.S. Senate. In principle, this practice protects federal judges from being influenced by political trends and campaign contributions. It also protects judges when they take stands on controversial issues. With these powers and protections, judges are seemingly able to make unbiased, independent decisions.
JUDICIAL REVIEW

While the Constitution grants judges life tenure and a consistent salary, it did not initially grant federal judges the power to review the constitutionality of legislation, a practice known as judicial review. The Court established the principle of judicial review as a foundation for the rule of law in *Marbury v. Madison*, 5 U.S. 137 (1803). This case represents the judiciary’s first assertion of judicial independence.

Prior to *Marbury*, Thomas Jefferson, an Anti-Federalist, defeated John Adams (1735–1826), a Federalist, in the 1800 presidential election. The Judiciary Act of 1801 created courts for the District of Columbia. In an attempt to maintain Federalist influence, Adams packed the new District of Columbia court with Federalists. However, the commission for nominee William Marbury was not delivered before the end of Adams’s term, and James Madison, the new secretary of state, refused to deliver the commission. As a result, Marbury petitioned the Supreme Court, asking the Court to force Madison to deliver the commission. The Court refused to grant Marbury’s petition, holding that the statute upon which he based his claim was unconstitutional.

Chief Justice John Marshall (1755–1835) asserted the power of judicial review in this case by holding that the Constitution is supreme when inconsistent with the statute on point. Furthermore, as Marshall stated, “it is emphatically the province and duty of the judicial department to say what the law is” (Bruff 2006, p. 82). Judicial review is an essential component of judicial independence, because, as in *Marbury*, it gives the judiciary the power to review and void the unconstitutional acts of the other branches of government.

According to Barbara Perry (1999), the first challenge to the Supreme Court’s independence occurred with the 1805 impeachment trial of Justice Samuel Chase (1741–1811), an outspoken critic of the Jeffersonians. Chase had made frequent partisan attacks against the Jeffersonians, on and off the bench. Chase’s trial was worrisome because it indicated that a judge may be removed from the bench for deciding cases that were not consistent with the political beliefs of the executive and legislative branches. However, the Senate acquitted Chase because a judge may not be removed from the bench based on his judicial acts, preserving the notion of judicial independence.

While *Marbury v. Madison* served as the Court’s first assertion of judicial independence, decisions such as *Dred Scott v. Sandford*, 60 U.S. 393 (1857), to a certain extent, tarnished the Court’s image of judicial impartiality. The Court held in this case that Dred Scott, a slave, could not invoke the jurisdiction of the federal courts because slaves, freed or not, were not considered citizens of the United States. Further, the Court acknowledged the right to own slaves as property. This decision reflected the Court’s proslavery bias, and marked a clear departure from the practice of judges remaining silent on their political preferences.

PRESIDENT FRANKLIN D. ROOSEVELT AND JUDICIAL INDEPENDENCE

Attacks on the Supreme Court increased after Franklin D. Roosevelt took office in 1933. According to many observers, one of the most salient attacks on judicial independence in U.S. history came from Roosevelt’s 1937 Court-packing plan. After the Supreme Court consistently struck down New Deal legislation, Roosevelt devised a plan to pack the Court with his supporters. He proposed that whenever a federal judge remained on the bench past the age of seventy, the president would be authorized to make an additional appointment. Roosevelt’s plan drew a negative public outcry, congressional disapproval, and media opposition, because the proposed legislation clearly sought to undermine the Court’s ability to review and strike down partisan legislation.

LEGISLATIVE AND EXECUTIVE INFLUENCE ON THE JUDICIARY

Judicial appointments also reflect the influence of the federal and state legislative and executive branches as their members voice opinions regarding the judges that executives appoint and senators confirm. Conservatives consistently decry what they consider “activist judges,” and assert their desire for judges who interpret the Constitution in a more literal manner. Liberals complain about the politicization of the judiciary, particularly after *Bush v. Gore*, 531 U.S. 98 (2000), a Supreme Court decision that gave George W. Bush the White House. The nominations to the Supreme Court of Robert Bork and Clarence Thomas are prime examples of the contentious nature of Senate judicial confirmations and the attempts of political parties to control the judiciary.

Calls for impeachment of judges from special interest groups, members of Congress, and the media also pose a threat to judicial independence. Such calls are often used to influence pending or future decisions in particular types of cases. This occurred during the 1996 presidential race, after President Bill Clinton appointed Harold Baer to the U.S. district court. Baer’s pretrial ruling to exclude evidence in a criminal case generated calls for Baer’s impeachment by Clinton’s Republican opponent, Senator Robert Dole. Rather than defend the appointment, Clinton hinted that Baer should resign, and Baer subsequently reversed his decision.

Between 1789 and 2008, impeachment proceedings were initiated against only twelve judges (Constitution Project 2006, p. 27). While Congress has never removed a judge based on his or her issuing an unpopular decision, judicial decisions are frequently a matter of public
concern. Congress has attempted, for example, to investigate federal judges who departed from the federal sentencing guidelines. It was only after the Supreme Court questioned the constitutionality of the guidelines that complaints subsided. For example, in Blakely v. Washington, 542 U.S. 296 (2004), Blakely held that sentencing procedures used by the state of Washington deprived the petitioner of his constitutional right to a jury trial because the guidelines allowed the judge to impose an enhanced sentence based on facts that were neither found by a jury nor admitted by the defendant.

**POLITICALLY UNPOPULAR COURT DECISIONS**

Supreme Court decisions reflect the highest level of judicial independence. The issuing of politically unpopular decisions is an exercise in judicial independence because such decisions signify that judges are capable of being detached and neutral toward the parties before them, and of rendering decisions based solely on the law and the facts of the case. Some notable examples of the Supreme Court rendering unpopular, but independent, decisions are: Brown v. Board of Education, 347 U.S. 483 (1954), in which the Court overturned the “separate-but-equal” doctrine, ruling racial discrimination in public schools unconstitutional; Engel v. Vitale, 370 U.S. 421 (1962), prohibiting organized prayer in public schools; Loving v. Virginia, 388 U.S. 1 (1967), which nullified laws prohibiting interracial marriage; Roe v. Wade, 410 U.S. 113 (1973), establishing a woman’s right to privacy that includes the right to terminate a pregnancy; and Lawrence v. Texas, 539 U.S. 558 (2003), overturning state statutes banning same-sex sodomy (Constitution Project 2006, pp. 14–15).

**JUDICIAL INDEPENDENCE IN THE STATES**

In contrast to the federal judiciary, states are free to create their own processes for selecting state judges. Most states select or retain state judges through partisan or nonpartisan elections. When there is a vacancy in a judicial office, merit-selection commissions often interview judicial candidates and make recommendations to the governor. The nominee will then be subject to popular election, after serving for a period of time. Judicial campaigns in many states have become highly politicized and expensive, although most states use some type of hybrid system without partisan influence or conventional campaigning. However, the Supreme Court decision in Republican Party of Minnesota v. White, 536 U.S. 765 (2002) portends to significantly influence the state judge-section process. In this five-to-four decision, the Court ruled that banning partisan endorsements and overt campaigning violates a judicial candidate’s First Amendment rights to free speech.

Recent discussion of judicial independence focuses on how politics, the election of judges at the state and local level, and the media influence judicial independence. Concern over preserving judicial independence has become amplified in light of increasing public criticism from the media, Congress, the executive, and public interest groups after politically unpopular or controversial decisions. Furthermore, as judges are increasingly faced with contentious issues such as abortion, the death penalty, gun control, affirmative action, the rights and benefits of same-sex couples, and the rights of enemy combatants, it has become more difficult to issue independent decisions. It has become increasingly difficult for judges to act independently because, at both the state and federal levels, they often face public or political outcry, regardless of how they rule.

Aside from partisan attacks on judicial decisions, other perceived threats to judicial independence include party endorsements of judicial candidates, the increasing costs of judicial campaigns, special interest groups that spend millions of dollars to influence judicial decisions or to elect judges to serve narrow interests, the failure to raise judges’ pay, and the influence of a changing political culture, in particular the pressure put on judges to reach politically popular verdicts after the terrorist attacks of September 11, 2001.

Judicial elections and the preceding campaign process also raise concerns regarding judicial independence. In all states, canons of judicial conduct aim to, among other things, prevent candidates from offering promises about how they will decide issues. Judicial canons are intended to guarantee judicial independence and to protect the impartiality of judicial decisions. All elements of these canons, however, must abide by constitutional law, and in the case of conflicting interests, as in Republican Party of Minnesota v. White, judicial standards of conduct must be adjusted to comply with the Constitution regardless of the implications to judicial independence. The ruling of the Supreme Court concerning the “announce clause” of the Minnesota Code of Judicial Conduct raises an interesting question on whether such a restriction is detrimental or beneficial to judicial independence.

In White, the Court found that Minnesota’s announce clause, which provided that a “candidate for a judicial office, including an incumbent judge” shall not “announce his or her views on disputed legal or political issues,” violated the First Amendment of the Constitution. Gregory Wersal, a 1996 and 1998 candidate for the Minnesota Supreme Court, together with other plaintiffs associated with his campaign and the Minnesota Republican Party, filed a lawsuit in federal district court against the Minnesota Board of Judicial Standards and the Minnesota Lawyers Professional Responsibility Board, claiming that the announce clause violated their First Amendment rights. According to Wersal and the other petitioners, during the 1998 campaign he was obligated to
withhold his views on controversial issues, and fearful of running afoul of the announce clause, he refrained even from responding to inquiries put forward by the media and the public. The Minnesota Republican Party alleged that, given Wersal’s inability to communicate his views, they could not learn his views and decide whether or not to support his candidacy.

The district court rejected Wersal’s claim by granting respondent officials summary judgment, arguing that Minnesota’s announce clause survived First Amendment scrutiny. Wersal and the other plaintiffs appealed to the U.S. Court of Appeals for the Eighth Circuit, which relied on the Judicial Board’s opinion in upholding the announce clause. In Republican Party of Minnesota v. White, 247 F. 3d 854 (2001), the Eighth Circuit ruled against Wersal on grounds of a compelling state interest, namely, to protect judicial independence. The court of appeals “held that the state had compelling interest in protecting the independence and quality of its judiciary, and in preserving public confidence in the judiciary’s independence.”

The U.S. Supreme Court granted certiorari and reversed the grant of summary judgment. The Court declared Minnesota’s announce clause unconstitutional, for it both “prohibits speech on the basis of its content and burdens a category of speech that is at the core of our First Amendment freedoms—speech about the qualifications of candidates for public office.”

A negative implication of White might be that judicial candidates will be encouraged to discuss their views on disputed legal or political issues. Alternatively, potential judges may decline to comment on anything other than their qualifications for office to avoid indicating a prejudice in favor of a particular party that would undermine confidence that the judge’s decisions would be objectively based in law. The ramifications of White, particularly its impact on judicial independence, are yet to be felt. However, procedures for the selection and retention of state judges will be the subject of public policy and legislative discussion in many states.

CONCLUSION

Criticisms of the judicial branch are to be expected in the American system of government, but for the judicial branch to continue serving its constitutional function, an independent but accountable judiciary is essential for the protection of the governed. Further, the judiciary, as a coequal branch of government, must be free to make judicial decisions, notwithstanding the threat of partisan political assaults upon the decision maker or the institution. Yet, despite more than two hundred years of discussing and implementing various concepts of judicial independence, it ironically appears that the politics of judicial independence will continue as long as there are democratic debates about the powers of American government.

SEE ALSO Declaration of Independence; Good Behavior; Impeachment; Influence of Supreme Court Abroad; Judicial Supremacy; Separation of Powers

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JUDICIAL PAY

The salary paid to U.S. federal judges has caused controversy ever since the nation’s founding. Judicial salaries are, and have long been, significantly lower than judges could earn in the private sector. Because judicial salaries have not kept pace with inflation, judges have even suffered a relative decline in compensation. Some judges, including the current chief justice of the United States and his predecessor, have warned that this decline creates difficulty in recruiting and retaining the most qualified judges.

HISTORY OF THE PAY CONTROVERSY

The initial appropriation for judicial salaries in the United States led to the earliest complaints. As early as 1791, federal judges expressed dissatisfaction with their compensation relative to that of lawyers in the private sector, and by 1796 at least one judge had resigned from the judiciary because he found it difficult to raise a family and educate children on the salary provided (Frank 2003, p. 60).