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Judicial Independence in the United States



En este artículo, el autor examina las presiones, formales e informales, que afrontan los jueces en los Estados Unidos, en sus carreras y en su trabajo diario. Estas abarcan desde la posibilidad de ser sancionados o removidos, la necesidad de atenerse a la jurisprudencia, el deseo para ser promovido, hasta presiones por parte de otros poderes del Estado, la sociedad y el público. En contraparte, los jueces estadounidenses disfrutan de un cierto número de beneficios: cargos vitalicios o de términos prolongados, estabilidad en sus retribuciones, prestigio, y la oportunidad de hacer avanzar las fronteras del derecho. El autor concluye que mientras los jueces en los Estados Unidos disfrutan de flexibilidad para ser innovadores, también están presionados a obrar de modo circunspecto. A su vez, la ciudadanía juega un papel importante en el proceso judicial. Por ello, según el autor, antes de adoptar prácticas de la cultura judicial estadounidense, sería pertinente preguntar si es posible o deseable para otros países adoptar dicha cultura.

Judges Play a Central Role

In the United States, it is the duty of the Judiciary to say what the law is,¹ and judges have always enjoyed a central role in the workings of the nation. The drafters of the United States Constitution believed an independent judiciary was essential in safeguarding the rights of the people from the excesses of the legislative branch. As Hamilton noted, the judiciary “not only serves to

moderate the immediate mischiefs of those [laws] which may have been passed, but it operates as a check upon the legislative body,” which, realizing their laws will be subject to the scrutiny of the courts, will moderate themselves in enacting laws.² This approach of judge as constitutional guardian and interpreter of laws stands in contrast to civil law societies, where laws are exhaustively codified by the legislature, and judges are traditionally weaker, as “the mouths that speak the law.”³

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¹ *Marbury v. Madison*, 5 U.S. 137 (1803).

² Alexander Hamilton, *Federalist No. 78*.

³ Montesquieu. Today, some civil law jurisdictions, for example, in Europe, do weigh precedent, so this is more of a historical observation.

In discussing the work of judges in the United States, this paper will make a number of generalizations about common law and civil law systems. The author is aware that there are civil law systems that are similar to the common law, and some readers will be inclined to point this out. However, at the extremes, the two systems can be different, and hopefully emphasizing those differences will shed light on the U.S. system. For purposes of this paper, then, the contrasts will be depicted more roughly than they occur in real life.

One important aspect of the U.S. system is its ability to handle innovation. Judges in the United States have the flexibility to handle new situations that were not contemplated by the legislative branch, particularly useful during periods of great technological change. For example, in drafting the copyright laws, the Congress may not have contemplated software that allows computer users to share music, and a court can be creative in addressing such a situation. Judges in the civil law are not bound by precedent, and at first glance might be thought to have more leeway to be creative with new situations than their colleagues in the common law. However, decisions in the civil law are binding only on specific litigants, and do not change the law for future litigants, eroding the power of a judge to interpret and strike down laws⁴, and shape new precedent, as well as to create continuity, certainty, and faith in the judicial process. By contrast, judges in the common law can be said to innovate and create new “law” because their decisions shape future decisions. On the federal level, differences (splits) between circuits can be resolved by the Supreme Court, placing a premium on scholarship of circuit court judges in deciding “issues of first impression.”

Judges in civil law jurisdictions may also be less willing to innovate (even though they can) because

under the civil law, every situation is supposed to be anticipated by the legislative branch, so there is not a culture of the judiciary fashioning a remedy. Lastly, civil law judges’ selection and promotion may reflect conservatism and longevity on the bench, rather than scholarship and individualism, causing them to shy from innovation.

However, the common law also places judges at risk, as there is a constant tension between innovation and adherence to precedent. Occasionally, judges face censure for their opinions, as judicial philosophy clashes with higher courts, disciplinary bodies, the legislative branch, or the electorate.

Discipline and Removal

Under the United States Constitution, Federal judges enjoy a large degree of independence, “hold[ing] their Offices during good Behavior,”⁵ subject to removal only through the impeachment process,⁶ and their remuneration may not be reduced while they are in office.⁷

The drafters of the Constitution believed that judicial tenure is essential as a check on the legislative power and as a guarantee of impartiality. As Hamilton noted, it is “one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”⁸ However, only about three percent of U.S. Judges enjoy lifetime tenure: approximately 900 U.S. Supreme Court justices, court of appeals, and district court judges, and the judges of the state of Rhode Island.⁹

⁴ The author is aware that there are constitutional courts in some civil law systems that can invalidate laws, and therefore the above statement is a generalization.

⁵ United States Constitution, Article 3.

⁶ United States Constitution, Article 2, Section 4 (removal for “high crimes and misdemeanors”); Article 1, Section 2, Clause 5 (impeachment by the House); Article 1, Section 3, Clause 6 (trying of impeachment cases by the Senate).

⁷ United States Constitution, Article 3.

⁸ Federalist No. 78.

⁹ USAID, Office of Democracy and Governance, “Guidance for Promoting Judicial Independence and Impartiality, Judicial Independence in the United States,” January, 2002, at page 135, available at: <http://www.usaid.gov/democracy/pdfs/pnacm007.pdf> (hereafter cited as USAID).

The question of what is an impeachable offense is largely a political determination for the Congress. The Constitution provides for impeachment of judges and other civil officers of the United States “for, and conviction of, treason, bribery, or other high crimes and misdemeanors.”¹⁰ The standard is largely undefined. Members of Congress have occasionally threatened judges with impeachment for issuing politically unpopular decisions, but such threats have seldom been serious, and in fact, only ten federal judges have been impeached by the House since 1787.¹¹ On the state level, the manner in which judges are removed is set forth in each state’s constitution. A study by the American Judicature Society (AJS) found that removal often involves the state’s highest court and judicial conduct organization; other methods include impeachment and recall election, but impeachment is rarely used.¹²

The Need to Adhere to Precedent

The drafters of the Constitution believed it expressed the will of the people, delegating powers to the legislative branch, as servant of the people, but in no case should the legislative branch be able to usurp that power. As Hamilton wrote, “No legislative act... contrary to the Constitution can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves...”¹³ The roots of judicial review in the United States can be found in this view that courts must protect the will of the people, as expressed in the Constitution. “Whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.”¹⁴

However, judges may not act capriciously; they must act from principles of law and not whim: “...the courts...[may not] substitute their own pleasure to the constitutional intentions of the legislature...The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence

would equally be the substitution of their pleasure to that of the legislative body.”¹⁵ This is where the importance of precedent emerges: because judges are constrained to explain their decisions in light of past decisions, and lower courts are bound by the precedent of higher courts, judges do not have unlimited discretion to say what the law is. The law is something that evolves gradually, as new situations emerge, and judges distinguish prior factual situations from current ones, applying nuance, subtlety, and artistry in shaping their decisions. But judges cannot act with fiat, ignoring the flow of precedent. In the common law tradition of the United States, rebellion against precedent and higher courts is uncommon, and it can lead to judicial discipline. But the line can be a fine one.

For example, in a case watched closely in California, Justice Anthony Kline of the California State Court of Appeals faced a disciplinary proceeding (ultimately dismissed) for writing a dissent in which he refused to follow an applicable precedent of the California Supreme Court, unless directly ordered to do so, because he believed the precedent was “analytically flawed and empirically unjustified,” and “destructive of judicial institutions.”¹⁶ In declining to discipline Justice Kline, the state Commission on Judicial Performance opined that while his arguments were “debatable,” there was not “clear and convincing evidence that his decision to file a dissent was legal error and that the decision was made in bad faith or for some improper motive.”¹⁷ The Commission noted “it is fundamental to our system of jurisprudence that [judges] feel free to break new ground, challenge existing assumptions, present novel legal reasoning and experiment with different approaches...free from fear of discipline for the expression of their ideas. Disagreements over interpretations of law are the essence of the work of appellate judges. Appellate judges often write strong -even passionate- decisions on arcane matters of jurisprudence [including] whether they have the authority to take certain actions...To discipline a judge solely for the expression of ideas about legal questions is contrary to these principles.”¹⁸

¹⁰ United States Constitution, Article 2, Section 4.

¹¹ “Constitutional Grounds for Federal Impeachment” Report by the Staff of the Impeachment Inquiry, U.S. Government Printing Office, 1974, available at: <http://www.house.gov/lofgren/rpt7.html>

¹² American Judicature Society (AJS), “Judicial Conduct and Ethics, Methods of Removing State Judges,” available at: <http://www.ajs.org/impeachment.html>.

¹³ Federalist No. 78.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ State of California Before the Commission on Judicial Performance, Inquiry Concerning Justice J. Anthony Kline, No. 151, Decision and Order of Dismissal. (1999). Available at http://cjp.ca.gov/DismissRTFKlineDis_08-19-99.rtf

¹⁷ *Id.*

¹⁸ *Id.*

Justice Kline’s critics alleged he had violated California’s Code of Judicial Ethics, which provides that “a judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law.”¹⁹ The Code was adopted by the Supreme Court of California, following a measure approved by the voters²⁰ to establish standards of conduct for judges on the bench and during elections. The Kline matter shows the difficulty of knowing when judges have violated such standards, particularly when they are simultaneously admonished to be free from public pressures and to be a servant to the law, under peril of discipline.

Judicial Selection

Under the U.S. Constitution, the president nominates federal judges with the advice and consent of the Senate.²¹ A report by USAID notes that political parties play a significant role in how judges are selected in the United States. In filing a vacant judgeship, the President receives suggestions from leaders of his party (mainly U.S. Senators) in the region of the vacancy (and nationally for Supreme Court) justices. Most nominees are members of his political party.²² This suggests that judges are at least somewhat reflective of the ideology of those who nominate them, although once on the court, it is hard to predict how they will act.

The confirmation process for judges can be very contentious, creating a potential disincentive for judges to take controversial or non-main stream positions in their scholarly writings or decisions. For example, in 1987, Robert Bork, nominated by President Reagan for the Supreme Court, was rejected on a vote of 58-42 by the Senate after four months of acrimonious hearings, in which the nominee was portrayed by critics as a conservative extremist. In 1991, Supreme Court nominee Clarence Thomas was confirmed on a vote of 52-48 by Senate, following a battle in which charges were made that

he had sexually harassed a former employee, allegations he denied and which he alleged were politically motivated.²³

The main feature of the U.S. political system is its inherent conservatism in responding to political pressure. Organizations fight for judges and other nominees who embrace certain characteristics as party affiliation, views, diversity, scholarship, or other qualities, and the executive branch tries to nominate those who are the least objectionable but share its ideology. Nominees face intense scrutiny: ratings by bar associations and interest groups, background checks. Congressional hearings on C-Span, analysis by the media, and other attention. This explains why politicians hesitate to expend political capital supporting nominees who are indefensible. The costs are too great, the humiliation too public. When nominees become too controversial, they are dropped from consideration, for example, Zoe Baird and Kimba Wood, both whom were nominated for Attorney General, but who were abandoned by the President when embarrassed by allegations they had hired undocumented foreign domestic help.²⁴ This may explain why judges and other nominees in the United States are competent. But this also may create a degree of uniformity, a tendency toward the path of least resistance, as those who pass the gauntlet may be decent and unobjectionable, if occasionally not exceptional.

On the state level, the majority of judges must face election, either to obtain their position or to retain it.²⁵ For example, in California, most judges for municipal or superior court, which are the trial courts, are appointed by the governor to fill a vacancy, and then they run for reelection for six year terms. The governor appoints Supreme Court and Court of Appeal Justices (12 year terms), with the approval of the Commission on Judicial Appointments, composed of the Chief Justice of the Supreme Court, the Attorney General, and the senior presiding judge on the court of Appeals, following public hearings.²⁶

¹⁹ California Code of Judicial Ethics, canon 3B(2), adopted by the California Supreme Court, Effective January 15, 1996, available at <http://www.lectlaw.com/files/jud32.htm>

²⁰ California Proposition 190, 1996.

²¹ United States Constitution, Article 2, Section 2.

²² USAID, 139.

²³ Peter Dizikes, “Confirmation Controversies: an Overview, a Look at 12 Contentious Presidential Nominations,” ABC News.Com, available at <http://abcnews.go.com/sections/politics/DailyNews/confirmationcontroversies.html>

²⁴ *Id.*

²⁵ USAID, 141.

²⁶ The League of Women Voters of California, Voters Guide to Judicial Elections, available at: <http://ca.lwv.org/lwvc.files/judic/#select>

Because judges must face reelection, they are subject to political pressures from the voters and interest groups, who can take into consideration their past decisions and political views. In fact, voters in California have removed judges with which they disagreed, including a Chief Justice of the Supreme Court, Rose Bird, who faced the wrath of the electorate over her position on the death penalty. Commentators have observed that the judiciary in California has become increasingly political, noting trends such as increasing use of campaign mailers, phone banks, and other political machinery, a rise in contested elections for trial court offices, and large increases in the cost of running a judicial election campaign.²⁷

The American Judicature Society, an organization which advocates for judicial independence, cites other examples nationwide of judges who have faced political pressure, including: a U.S. District Court judge in Alabama who was the subject of a petition drive because of his decision banning school-sponsored prayer; a Superior court judge in Alaska criticized for striking down a law banning same-sex marriage; a U.S. District Court judge in California criticized by the House Republican Whip (calling for his impeachment) after he temporarily blocked an anti-affirmative action measure favored by conservatives; a Superior Court judge in California criticized by women's groups for decisions that allegedly did not protect the rights of women; a Nebraska Supreme Court Justice who was ousted by voters in a retention election based on decisions on term limits and murder laws; a campaign for impeachment of a District Court Judge in New York after he suppressed evidence in a drug case; a U.S. district court judge who faced delays in consideration for elevation to the U.S. Circuit Court of appeals, because of his concurring decision in a murder case; a Tennessee Supreme Court Justice who was removed from the bench following a campaign led by the governor and a grass roots organization based on a decision on the death penalty; and a battle against the Chief Judge of the U.S. District Court, Southern District of West Virginia over his decision to stop the issuance of a coal mining permit.²⁸

Even if one deplores the degree to which these pressures manifest themselves, it is clear that without them, judges and those who nominate them would be much more insulated from the people. What is also clear is that these constraints on judges require a political culture in which the people are active in politics, either through individual participation, trade associations, interest groups, corporations, political parties or other means. The hallmark of the American political system is the fealty of politicians to political pressure, and the willingness of organizations to reward and punish them. Alexis de Tocqueville remarked that a unique feature of the American landscape is Americans' penchant for forming associations,²⁹ and the same is true today. Ratings of interest groups can be crucial in securing political endorsements, election funds, and campaign workers to get out the vote on election day. Some issues like "law and order" can make or break a political career. District Attorneys' associations and law enforcement unions can have a strong voice. Religious groups, business groups, and conservative and liberal advocacy organizations all can exhort their members to support or oppose a candidate. It is no wonder that those who nominate and confirm judges keep a well-tuned ear to the electorate.

Amplifying all of these pressures is the voice of popular culture: the radio and television talk shows, C-Span, CNN, televised trials such as that of OJ Simpson, reality TV, the evening news, television programs such as "Larry King Live," dramas such as "Law and Order," the Sunday morning political commentators, the newspapers, newsmagazines, Congressional hearings, press conferences, public demonstrations, and the Internet. This creates a culture of law in the public psyche, and public confidence that leaders will be respond to concerns about the justice system. Paradoxically, while Hamilton envisioned judges as protecting the will of the people against the tyranny of the legislative branch, the will of the people often has found its expression in electoral politics, and the national discourse as embodied in the legislative branch.

²⁷ "What To Do About Judicial Elections," by J. Clark Kelso, Director, Institute for Legislative Practice, University of the Pacific, McGeorge School of Law, Testimony for Senate Judiciary Committee Hearing on Judicial Independence and Accountability, March 2, 1999 (California Legislature).

²⁸ American Judicature Society, http://www.ajs.org/cji/cji_fire.asp

²⁹ Alexis de Tocqueville, *Democracy in America*.

This suggests that simply grafting the judicial institutions of the United States onto some other country would not necessarily replicate the U.S. experience. If the hallmark of the U.S. system is its cacophony of voices and responsiveness to public pressure, U.S. culture may need to accompany U.S.-style legal reforms. One must ask if this is too high a price to pay culturally in other societies, or even if it is possible.

Pressures from Other Branches

As the Chief Justice of the United States Supreme Court has observed, while Federal judges have tenure during good behavior, and their compensation may not be diminished, the Congress decides the composition and number of federal judgeships, the kinds of cases federal courts should hear, procedures they should follow, and the amount of money to be appropriated for the judiciary's budget and cost of living increases for federal judges.³⁰ This, of course, has the potential to compromise judicial autonomy. In some cases, the courts have been able to gain a measure of independence over their funding. For example, in California, the Judicial Council, a unit of the courts which administers the state court system, was able to secure enactment of the Trial Court Funding Act of 1997, which provides courts in California with a stable source of funding, reducing their dependence on the annual budget process of the Legislature.³¹

The legislative branch has also sought to work its will on the judiciary by imposing sentencing guidelines on judges, for example, for crimes involving drugs and guns. Congress has generally federalized such crimes as a reaction to its perception that state penal systems were too lenient in paroling serious offenders after having served only a fraction of time to which they were sentenced.³² This legislative trend is also true on the state level. For example, in 1994, in response to public concern about crime, and a threatened public ballot measure, the California Legislature enacted a law known as

“Three Strikes,” which required third-time felons to be locked up for 25 years to life. The first two felonies needed to be serious (typically violent crime), but the third could be any felony. An analysis of the law showed that while it would be effective in reducing crime, it would often result in mandatory sentences for minor felonies, such as motor vehicle theft, rather than for violent crimes.³³ While supporters and opponents might debate the law's virtues, no one can doubt that it proscribed the autonomy of judges to sentence felons.

The Congress has also enacted laws to promote confidence in the judiciary and reduce the possibility of corruption, including limits on gifts and outside earnings, bans on honoraria, financial disclosure requirements, and prohibitions on conflicts of interest.³⁴ While such laws can promote the public good, they subject judges to additional public scrutiny and pressures, and represent an assertion of legislative prerogative in certain judicial affairs.

While legislative bodies can restrict judges, they occasionally benefit them by relieving pressure on them to resolve acrimonious disputes in the courts. In the United States, if one does not like a law, one need not always file a lawsuit: one can lobby the Congress or state legislatures to get it amended or repealed. In 2001, over 200 companies and associations each spent over US \$1 million on lobbying the United States Congress.³⁵ This is in addition to lobbying at the state level, for example, in California, where \$344.3 million was spent to lobby state government during the two-year legislative session beginning January 1, 1999 and ending December 31, 2000.

Judicial Independence and Justice Reform

While the common law is a salient feature of the United States judiciary, the United States has also embraced certain judicial elements reminiscent of the civil law system. For example, a number of statutes, such as the National Labor Relations Act

³⁰ “1996 Year-End Report on the Federal Judiciary,” Chief Justice William H. Rehnquist, available at <http://www.uscourts.gov/cj96.htm>

³¹ Fact Sheet, The Judicial Council of California, July 2002, available at: <http://www.courtinfo.ca.gov/reference/documents/profilejc.pdf>

³² Chief Justice William Rehnquist, keynote address at a plenary session on the Future of the Federal Courts at the American University, Washington College of Law, May, 1996. <http://www.uscourts.gov/ttb/may96/indep.htm>

³³ “California's New Three Strikes Law: Benefits, Costs, and Alternatives,” the RAND corporation, 1994, available at <http://www.rand.org/publications/RB/RB4009/RB4009.word.html>

³⁴ USAID 137-8

³⁵ United States Senate lobbying expenditure reports, available at <http://sopr.senate.gov/>

(NLRA)³⁶, are enforced by administrative law judges (ALJs), who can only be removed for reasons of bad behavior by an independent civil service board. ALJs have the power to take testimony, make factual determinations, and render a decision. There is no jury. NLRA cases are prosecuted by the Office of the General Counsel of the National Labor Relations Board (NLRB), who brings cases before the ALJ. The NLRA contains civil penalties and enforcement powers that are not trivial. While decisions of ALJs are appealable to boards and ultimately the courts, appeals are based on the factual records established by the ALJs, which in many cases turn upon their unique facts, so ALJs enjoy a large degree of independence, although they must explain in their written decisions how their decisions are consistent with past Board precedent. ALJ models may be useful to adapt to other countries, because of their relative efficiency, as well as the greater degree of autonomy they afford judges. In seeking to reform judiciaries in other countries, one might consider whether, at least in a non-criminal context, the ALJ model offers advantages over traditional systems, which can be complex. One stated goal of reform of the judicial system is modernizing judicial systems for the global marketplace³⁷, but one must make sure reforms are appropriate, cost-effective, and not too complex.³⁸ Perhaps this is the answer to the problem alluded to above, the danger of simply grafting legal institutions onto other countries. The United States can offer good reforms to other countries, but we must look deep within our institutions to see what might work best. ☺



³⁶ National Labor Relations Act, 29 U.S.C. §§ 151–169. See the web site of the NLRB, at <http://www.nlr.gov/>

³⁷ The World Bank, "Building Institutions for Markets, World Development Report, 2002," page 131.

³⁸ Id. "Complicated procedures are especially problematic in poorer countries, where they may facilitate corruption or be unsuitable given existing levels of administrative capacity. Also, they frequently serve as barriers to entry for poor people." (Page 123); see also Figure 6.1(a) procedural complexity of litigation reduces efficiency (page 122); and figure 6.2, excessive written procedures limit access to justice (page 124).