

**F. Judicial Independence in the United States: Current Issues and Relevant Background Information**

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**I. Introduction**

Judicial independence has been a core political value in the United States since the founding of the republic. Alexander Hamilton, in urging ratification of the constitution of the United States, took as obvious the need for “a steady, upright, and impartial administration of the laws” by a judiciary of “firmness and independence.” Liberty, he said, “would have everything to fear from [the judiciary’s] union with” the legislature or the executive. (The Federalist: no 78)

“Judicial independence” means different things to different people. At the least it refers to the ability of judges to decide disputes impartially despite real, potential, or proffers of favor. It is perhaps most important in enabling judges to protect individual rights even in the face of popular opposition.

A belief in judicial independence, however, exists in the United States alongside an equally strong belief in democratic accountability. Government, James Madison wrote during the ratification debate, must derive “all its power directly or indirectly from the great body of the people.” (The Federalist: nos. 37, 39) “Accountability” with respect to judges also has different meanings. Some believe that judges’ decisions should reflect popular preferences.

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Others reject that proposition but still insist that judges’ administration of the courts and use of tax dollars must accommodate public needs and wishes. At its core, the idea that judges should be democratically accountable means the public, directly or representationally, has a legitimate say in how the courts should perform.

The United States is a laboratory of efforts to adjust judicial independence and accountability to one another, with its federal judiciary of roughly 900 life tenured judges and 800 term limited judges, and the 28,000 judges of the 50 states, the District of Columbia, and Puerto Rico.<sup>112</sup> These 53 jurisdictions are all largely free to structure their judiciaries as they wish. The lesson from the U.S. experience is that there is no single set of provisions guaranteed to achieve an independent judiciary. Judicial independence takes various forms, shaped by different legal provisions, political traditions, and cultural expectations that have evolved over time and continue to inspire debate and self-reflection.

The provisions in the United States to promote judicial independence on the one hand and to promote democratic control of the judiciary on the other may be arrayed on a continuum. This paper describes the mechanisms employed in the United States to protect and balance independence and accountability. It is critical to

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<sup>112</sup> To simplify somewhat, state court judges generally have plenary jurisdiction over all matters except those that Congress consigns solely to the federal courts. Federal judges have jurisdiction over federal crimes, cases to which the United States is a party, cases involving federal laws, and cases between citizens of different states. There is another category of federal judges whom we do not treat in this paper at all, due to space limitations. These are the judges of courts established within the executive branch agencies, such as the judicial system of the armed forces, the U.S. Tax Court, and numerous “administrative law judges.”

<b>JUDICIAL INDEPENDENCE</b>	<b>BOTH</b>	<b>ACCOUNTABILITY</b>
Served by secure tenure and salary and self-administration of the judicial branch	Served by prophylactic ethical and conflict-of-interest rules	Served by methods of judicial selection, discipline and removal, and legislative oversight

keep in mind that these mechanisms operate in an environment imbued with an underlying cultural presumption that public officials and private interests are not to tamper with judicial decision-making. This presumption, discussed in this article’s final section, draws strength from a basic popular respect for the role of a judge. Selection of a competent, honest, and diverse judiciary is essential, both for maintaining this public confidence and for sustaining the institutional legitimacy of the judiciary.

## 2. *Measures to Protect Judicial Independence*

### a. *Secure tenure and compensation*

The Declaration of Independence (1776) indicted King George III because he made colonial “judges dependent on his will alone, for the tenure of their offices and the amount and payment of their salaries.” Such a dependence, Blackstone taught, meant that, instead of deciding cases according to “fundamental principles,” judges would likely “pronounce....for law, which was most agreeable to the prince or his officers.” (Wheeler 1988: 8-9) Thus Article III of the U.S. Constitution (1787) vests the “judicial power of the United States” in federal judges, who “shall hold their offices during good behaviour,” and “shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.”

For federal judges, tenure during “good behavior” is essentially life tenure; Supreme Court justices, court of appeals judges, and

district judges may serve as long as they wish<sup>113</sup> (although a generous retirement system enables them to reduce their workload after 65 or 70 years of age<sup>114</sup>). Life tenure for federal judges has been regularly criticized but never seriously placed in jeopardy. Criticism came early in the century from those who believed federal judges too sympathetic to business interests and comes today from some who believe federal judges too sympathetic to minority interests and criminal suspects.

There have not been similar attacks on Article III’s ban on reducing federal judicial salaries. Judges, however, have argued throughout history that their salaries are insufficient (Posner 1996: 21-31). Although federal judicial salaries today are no doubt in the top percentile of all salaries in the United States,<sup>115</sup> in many parts of the

<sup>113</sup> It is not uncommon for federal judges to serve well past their 70’s. Three of the nine U.S. Supreme Court members are over 70 and one is over 80. Federal judges serving for “good behavior” may be removed from office by the legislative impeachment process, but that has occurred only seven times in the nation’s history.

<sup>114</sup> Judges over 65 whose age and years of service total 80 may retire from office but retain the salary of the office (including any increases) as long as they perform a specified amount of reduced service, and, if they elect to provide no judicial service, may retain the salary they were earning at retirement. See 28 U.S.C. §371.

<sup>115</sup> Annual, pretax salary of a federal district judge in 2000 is \$141,300. Court of appeals judges earn some \$149,900 and Supreme Court justices \$173,600. Magistrate and bankruptcy judges earn about 10 percent less than district judges. The average annual pay in the United States in 1999 was \$31,908 (Bureau of Labor Statistics 2000). Salaries for state court judges are somewhat lower than federal judicial salaries. Nevertheless, the salaries of higher ranking state court judges place them well above the national median income. For an analysis of state court judicial salaries, see Survey of Judicial Salaries (National Center for State Courts 1999: Vol.25, No.2 ).

country beginning lawyers, at least in commercial practice, sometimes earn more than federal judges. Judges do not contend that Congress refuses to raise their salaries in retaliation for their decisions. They note, though, that refusal to allow judicial salaries to keep pace with inflation may contain the seeds of threats to independent decision-making (Williams v. U.S. 1999).

Although secure tenure and compensation are often described as the hallmarks of an independent judiciary in the United States, life tenure and irreducible salaries are formally bestowed on only about three percent of U.S. judges: the roughly 900 U.S. Supreme Court justices, court of appeals, and district court judges; and the judges of the state of Rhode Island. (Judges in two other states are tenured until age 70.) (Rottman 1995: tables 4 and 6). The over 800 federal bankruptcy judges and magistrate judges, both exercising judicial power on delegation of life-tenured federal judges, serve for 14- and 8-year terms respectively (28 U.S.C. §§152(a)(1) & 631(a)). Life tenure for state judges, while provided in the 18<sup>th</sup> century, quickly gave way to limited terms in an effort to promote judicial responsiveness to popular preferences. Today almost all state judges serve for terms, which range from 4 to 15 years,<sup>116</sup> and most must stand for some kind of popular election to retain their posts.

As we discuss later, these limitations on state judges' tenure have allowed voters to remove judges for unpopular decisions, but the limitations have generally not posed pervasive institutional threats to state judges' independent decision-making. Similarly, although almost all

state judicial salaries are lower than those of corresponding federal judges—in some cases considerably so, we are unaware of the degree to which, if any, state or municipal legislatures have attempted to reduce the salaries of judges in retribution for decisions.<sup>117</sup>

The broader point is that, despite these differences in the federal and state systems, most judges in the United States are accorded significant professional respect and receive salaries higher than other public officials in their respective jurisdictions. Salary and professional status alone do not guarantee judicial independence, but, by enhancing the prestige of the judges, they make it easier for them to behave independently.

*b. Self-administration of the judicial branch*

It did not occur to those who established the federal and state governments in the late 18<sup>th</sup> century that separate and independent exercise of the judicial power needed anything more than separate and independent judges. The federal courts, from their creation in 1789 until 1939, were the administrative responsibility of, in turn, the Departments of State, Treasury, Interior, and Justice. State courts were the administrative responsibility of state executive agencies. Executive branch agencies, federal and state, developed annual legislative requests for funds to operate the courts and administered the funds granted, which, until the early 20<sup>th</sup> century, consisted of little more than paying judges and staff (when they were not paid directly by fees) and providing courtrooms and furniture.

As the size and complexity of the judicial operation increased, however, judges and others

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<sup>116</sup> Data computed from Rottman, 1995, tables 4 and 8. The modal term for state appellate judges is 8 years and the average is 7.8 years. For judges of the major trial courts, the mode is 6 and the average 7 years.

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<sup>117</sup> One scholar's review of empirical research on judicial independence suggests that the topic, at the least, has been little studied (Hensler 1999: 718).

argued that secure salary and tenure were no longer sufficient to enable the federal judiciary to defend itself from the other branches, and that state judiciaries, whose judges stood for re-election, were in even greater jeopardy. Federal judges complained both that the Justice Department was an indifferent administrator and that its control over judicial administration threatened the fact and appearance of judicial independence.

In 1939, Congress responded to these concerns by creating the Administrative Office of the U.S. Courts to assume from the Department of Justice responsibility for federal court budget and personnel administration and compiling statistical data on the business of the courts. More important, Congress directed that the Administrative Office be supervised by a council of federal appellate judges. [This organization, now the Judicial Conference of the United States, comprises 26 appellate and trial judges, with the chief justice as presiding officer (28 U.S.C. 331)].<sup>118</sup> State governments followed suit, starting in the 1940s, creating state court administrative offices, and generally providing for their supervision by the state supreme courts. Today, the importance of a separate judicial branch administrative entity to judicial independence is part of the conventional wisdom in the United States. Three areas illustrate why:

Court administration and jurisdiction. Before judicial branches had budget-preparation and administration responsibilities and administrative offices to execute them, executive

branch agencies assessed the courts' financial needs, submitted those needs to the legislature for decision, negotiated with the legislature, and administered the funds provided. Although they usually did so in consultation with judicial officials, there remained the potential to deny the courts generally, and specific judges in particular, financial support in retaliation for decisions contrary to the pleasure of the executive branch, a major litigator in the courts. Although instances of such executive branch retaliation were rare (Fish, 1973: 122-23; Baar 1975: ch. 2), there was "an anomalous situation to have the legal representative of the chief litigant in the federal courts in charge of disbursements of much importance to the judges before whom he had his subordinates constantly appear" (Shafroth 1939: 738).

Under the current regime, judicial branches develop their own estimates of need and present them either directly to the legislature or to the executive for the ministerial task of incorporation, without change, into a government-wide budget document. The judicial branch also defends the request before the legislature and administers the funds granted.

The current procedures for judicial budgeting, however, hardly free courts from oversight and even some control by the other branches. The executive branch, for example, can influence judicial funding levels by its recommendations to Congress on fiscal policy. And, of course, Congress still determines the level of judicial branch funding. Legislators can use their funding power to show their approval or disapproval of how judges administer the courts and, although it probably happens rarely, to show their approval or disapproval of judicial decisions. Congress has other means to control the effects of judicial decision-making and, perhaps by the threat of such action, influence future decisions. Congress, for example, can limit the jurisdiction of the federal courts, as it did in 1995 to make it more difficult for

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<sup>118</sup> The members are the chief judges of the 13 federal courts of appeals, a district judge from each of the 12 regional circuits, and the chief judge of the Court of International Trade. The conference makes policy for the administration of the federal courts, operating through a network of committees that examine such subjects as automation, criminal sentencing, and judicial salaries and benefits.

prisoners to obtain judicial orders directing changes in the administration of prisons or orders directing review of their convictions.<sup>119</sup>

**Discipline.** At the outset, federal and state governments had only one formal means of disciplining judges—legislative impeachment and removal. As the impracticality of that recourse became apparent, especially for resolving minor problems, and the threat grew that legislative or executive bodies would obtain broad authority to remove or otherwise discipline judges, judicial branches acquired, usually by statute, internal disciplinary mechanisms to deal with judicial unfitness. These means, along with impeachment, are discussed below. These disciplinary provisions reside within the judicial branch, providing for judicial control of discipline and protecting against legislative control over judges.

**Education.** Although most U.S. judges bring extensive legal experience to the bench, they do not receive formal judicial education before appointment; they learn on the job. When the judging was less complicated, judicial education could operate informally. Formal programs of judicial education within the judicial branch were created in the mid-20th century as judges faced more difficult case management problems and cases presenting complicated statutory schemes and complex scientific and economic evidence. Congress created the Federal Judicial Center in 1967 to provide orientation and continuing education for federal judges and the employees of the courts. Most state judiciaries also provide educational opportunities for judges and staff.

There has been controversy over whether some alternative, private judicial education programs,

offered by organizations that appear to have policy preferences in respect to commonly litigated matters, are a threat to independent judicial decision-making. Supporters of such programs defend them against charges of bias and note furthermore that judges are in the business of hearing and weighing many different points of view. Critics argue that judges' practiced ability to receive information with skepticism may not help them recognize skewed information in highly complex and esoteric fields, and contend that, regardless, the appearance of private judicial education compromises public faith in judicial independence.

### 3. *Measures to Prevent Conflicts of Interest and Promote Public Confidence*

There is an array of prophylactic statutes and rules designed to promote judicial independence by protecting judges from potentially compromising situations and to promote accountability by requiring judges to disclose personal information that may lead to conflicts of interest. For example, a 1989 law limits the gifts that judges and other high government officials may accept and imposes caps on outside earnings (typically from teaching and book royalties) to 15 percent of their government salary (5 U.S.C. §§501-505). Federal judges and other public officials may accept no honoraria for giving a speech or writing an article—endeavors likely to involve a minimal expenditure of time. Paying judges in such situations could trigger suspicions of ulterior motives. Another law requires judges and other high government officers to file annual reports of their (and some family members') financial holdings, mandating that the reports be available for public inspection. In the case of judges, the reports' public availability helps implement another law (28 U.S.C. §455), which directs federal judges to disqualify themselves from cases in which they

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<sup>119</sup> These statutes are codified at 28 U.S.C. §1915 and 2254.

have personal knowledge or a financial interest (defined as “ownership of a legal or equitable interest, however small,” 28 U.S.C. §§ 455(a)(4) & (d)(4) (i.e., one share of stock)).

In addition to these federal statutory provisions, and similar provisions in the states, federal and state judiciaries have adopted judicial codes of conduct. The federal code has seven canons and detailed sub-provisions advising judges about the propriety of serving on boards and committees, holding membership in private organizations that may practice invidious discrimination, public speaking, associating with political parties, and the like. A committee of the Judicial Conference issues advisory opinions to judges who seek guidance on how the code applies to specific situations. Although compliance with the code is not mandated by law, almost all federal judges seek to conform their behavior to it, and violation of its provisions may subject judges to discipline by the circuit councils.

#### **4. *Measures to Promote Public Accountability***

Provisions governing the judicial office that are most clearly intended to promote democratic accountability—concededly at some cost to judicial independence—are the methods by which judges obtain and retain office, and procedures for judicial discipline and removal. Legislative oversight also requires judges to justify some aspects of their behavior and caseload reporting requirements illuminate some aspects of judicial behavior.

Judicial selection. Some European and Latin American countries vest responsibility for judicial selection in councils of judges, executives and legislative officials, academics, and others. The goal is to limit the influence on the judiciary of the other branches of government. Judicial selection in the United States is making increasing use of commissions

that have some superficial similarity to councils in other countries. In the United States, these groups are largely advisory and have specific rather than plenary jurisdiction for administration of the judicial system and its personnel. They play basically an advisory role, retaining substantial opportunity for participation by the people or their representatives.

Presidential appointment of federal judges. The constitution provides that the president “shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States [including today federal appellate and district judges], whose appointments are not herein otherwise provided for, and which shall be established by law” (Art. II, sec. 2).<sup>120</sup> Congress has enacted no statutes to regulate the appointment of life-tenured judges and has adopted no age, professional, or training prerequisites. The country relies on the selection process to screen potential federal judges for quality and integrity.

Although federal judges are generally regarded as among the most independent in the world, political parties play a significant role in the process by which they are selected. In filling 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). Around

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<sup>120</sup> Federal supreme court justices, court of appeals judges, and district judges all have the tenure and salary protections of Article III. They comprise roughly 900 of the 1,700 or so federal judges (including retired judges who still perform some judicial work). Bankruptcy and magistrate judges are selected, respectively, by the courts of appeals of their circuits and by the district judges of their districts, in what is referred to as a “merit selection” process because of formal requirements for review of qualifications.

90 percent of any president’s judicial nominees are at least nominal members of his political party; in the most recent four presidential administrations, the percentage of judges who were active party members ranged between 73 percent (Carter) and 56 percent (Clinton) (Goldman and Slotnik 1999: 280). Government investigators, however, also scrutinize potential nominees’ personal backgrounds. And since the 1950s, a special committee of the American Bar Association has undertaken detailed evaluations of each potential nominee’s professional competence; potential nominees rarely survive a “not qualified” ranking. The Committee on the Judiciary of the U.S. Senate conducts its own investigation of each presidential nominee. After confirmation, federal judges almost universally honor the provisions of Canon 7 of the Code of Conduct for U.S. Judges that tell judges not to hold office in political organizations, endorse candidates, solicit funds, or attend political gatherings of any type.

Some commentators say that, because each president draws appointees almost exclusively from members of his political party, the judges so appointed are in effect party functionaries on the bench. This is a frequent charge of foreign observers, including those from countries with formal arrangements similar to those in the United States but where judges are traditionally heavily dependent on their executive appointers. There is, to be sure, a clear although relatively slight correlation between U.S. federal judges’ prior political party membership and decisional tendencies. Carp and Rowland’s analysis of their data set of over 57,000 published opinions of district judges appointed by Presidents Woodrow Wilson through William Clinton, confirms, not surprisingly, that decisions of judges who had been Democrats were more “liberal” than the decisions of judges who had

been Republicans, although the differences were slight.<sup>121</sup>

What do the differences suggest about judicial independence? There is little evidence that these contrasting decisional tendencies reflect judges’ conscious efforts to discard controlling legal provisions in favor of the wishes of their appointing presidents or former political parties. Rather, judges, when confronting the relatively small number of cases in which the precedents and evidence are not dispositive, fall back on other factors to make decisions. It is not surprising that their decisions are influenced by the same outlooks on life and the law that influenced their party preferences before they became judges. In fact, some argue that this influence, given that it is relatively slight, serves a healthy function in a democracy. As Chief Justice William Rehnquist has said (1996: 16), because “[b]oth the president and the Senate have felt free to take into consideration the likely judicial philosophy of any nominee to the federal courts...there is indirect popular input into the selection of federal judges.”<sup>122</sup> (The chief justice was contrasting this type of input with efforts to influence judges’ decisions through threat of impeachment.)

No doubt some of the over 3,000 persons who have served as federal judges since 1789 have decided specific cases with an eye to pleasing the presidents who appointed them. However, references to this fact inevitably call forth a long list of examples of judges who confounded their

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<sup>121</sup> For example, whether decisions—not only those disposing of non-jury cases, but also on motions for admission of evidence and various procedural rules—favored the defendant in criminal cases, the regulator in government economic regulation cases, and so forth. Overall, Democratic judges made “liberal” decisions 48 percent of the time, versus 39 percent of the time for Republican judges (Carp and Stidham 1998).

<sup>122</sup> This benign view of the influence of partisan affiliation on executive appointments may not necessarily hold in other countries.

appointers. President Theodore Roosevelt, for one, complained of Justice Oliver Wendell Holmes that “the nominal politics of the man has nothing to do with his actions on the bench....Holmes should have been an ideal man on the bench. As a matter of fact, he has been a bitter disappointment” (White 1993: 307). Presidents Richard Nixon and Clinton were no doubt disappointed that unanimous Supreme Courts, including their appointees, decided respectively that executive privilege did not protect the “Watergate tapes”(U.S. v. Nixon, 1974), and that presidents could be sued in civil court while in office (Clinton v. Jones, 1997).

A final claim that the federal appointive system may compromise independent decision-making of life-tenured federal judges involves, not loyalty to those who appointed them, but rather efforts to please those who could appoint them to a more prestigious court. In the 18<sup>th</sup> century, judicial promotions were very rare (Klerman, 1999: 456). By contrast, 36 percent of the 253 judges on the U.S. Courts of Appeals in 2000 first served as U.S. district judges<sup>123</sup> and seven of the nine current members of the Supreme Court in that year served previously on the U.S. Court of Appeals. Judges considered for appointment to a higher court are subject to the same selection and review process described above. It is plausible that the prospect of such appointment could lead some judges to decide cases to curry favor with those responsible for the appointments,<sup>124</sup> a tendency observed in two

quantitative studies of district judges’ decisions in cases challenging the constitutionality of the U.S. Sentencing Commission (Sisk, Heise, and Morris 1998: 1423-27, 1487-93). On the other hand, there are many more district judges than vacancies on the courts of appeals, and many more court of appeal judges than Supreme Court vacancies, leading one student of the subject to conclude that “the typical judge’s chance of promotion is so low that it is unlikely that desire for promotion affects the decisions of more than a handful of judges” (Klerman 1999: 456).

Elections of judges. Over the 19<sup>th</sup> century, most states replaced gubernatorial appointment of state judges with either partisan or non-partisan elections. Twentieth century court reformers in turn sought to replace election systems with gubernatorial appointment from lists of nominees developed by commissions of judges, lawyers, and lay persons (labeled “merit selection systems”). Judges so selected stand for periodic “retention elections” in which the voters are asked, not to chose between two candidates, but simply to vote “yes” or “no” on whether to retain the judge in office. The result of these various efforts is a patchwork of selection systems among the states and even within the same states, as shown in Table 4 (drawn from Rottman (1995: Part II)). The table is an approximation, not a precise list.

Most U.S. judges and court reform organizations regard elections as a poor method for selecting judges. They believe judges can be influenced by the fear of electoral retaliation against decisions that conform to the law but not popular preferences. They also fear that judges may compromise their independence by incurring obligations to those who provide financial support to their election campaigns. Judicial elections present a complicated landscape, in part because of many variations in types of elections. A state supreme court justice who must mount a vigorous media campaign against a well-financed opponent is in a different

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<sup>123</sup> As of July 1, 2000. Numbers include both active judges and those in “senior status,” a form of semi-retirement. For active judges only, the figures are 52 and 158 (32 percent). The source of the data is the Federal Judicial Center’s Federal Judicial History Office’s database.

<sup>124</sup> One federal judge acknowledged to a public forum his view that younger district judges “aspire to the court of appeals, and they know their votes are being watched” as do court of appeals aspirants for the Supreme Court (American Judicature Society 1996: 81).



**TABLE 4: Number of States with a Particular Judicial Selection Methods\* in the 50 States, the District of Columbia, and Puerto Rico**

	Supreme court	Trial court, gen. juris.	Trial court limited juris.***
Partisan election**	9	8	14
Partisan election, then retention election**	1	4	0
Non-partisan election**	13	17	12
Nomination by governor (without commission)	2	2	2
Nomination by governor from commission list, (usually with retention election)	15	10	3
Selection by the legislature	4	3	1
Selection by other judges (e.g., a higher court)	0	0	2
Other (typically variations of methods)	8	8	15

Data reflect the presence of more than one court in some categories in some states.

\* Most states impose formal age and education qualifications on their judges (Rottman, 1995, tables 5 and 7).

\*\* Judges in states that use election methods often gain office initially by gubernatorial appointment to a vacant judgeship. In some states, it is traditional for judges who are sympathetic to the governor and contemplating retirement at the end of their terms to retire early to allow the governor to appoint a replacement who will then have the advantages of incumbency in the next election.

\*\*\* In many states, there are two or three or more limited jurisdiction courts. Data here are for the most important of the courts.

position than a state trial judge facing a low visibility retention election.

The rhetoric about judicial elections is heated and not always informed by empirical evidence. What impact do elections have on judicial decision-making? There is no shortage of examples of judges who have been the object of campaigns to defeat their re-election or retention because of unpopular decisions. Three well-known cases involve the defeats of Chief Justice Rose Bird of California and Justice Penny White of Tennessee (both for decisions limiting death sentences), and Justice David Lanhier of Nebraska (for decisions involving laws limiting legislators' terms in office, citizen ballot initiatives, and the state's second degree murder statute) (American Judicature Society, 1999: 49-52). It is reasonable to assume that these and similar experiences<sup>125</sup> have made some other

<sup>125</sup> Additional examples are available at <<http://www.ajs.org/cji/fire.html>>, the website of the American Judicature Society's Center for Judicial Independence.

judges more cautious about making decisions that are legally meritorious but unpopular. There is also some more systematic evidence of the influence of elections on judicial behavior. Pinello, for example, found differences in decisional patterns on six supreme courts in the eastern United States based on whether the judges were elected or appointed. Judges who did not have to stand for re-election or reappointment, at least within a partisan tradition, were, for example, more likely to sustain criminal defendants' rights (Pinello, 1995: 130-131). Such findings suggest, but do not confirm, that elections inject non-legal factors into judicial decision-making. A study of the retention election systems in 10 states (Aspin and Hall 1994: 306) found that, although a majority of the 645 trial judges surveyed preferred retention elections to standard multi-candidate elections, they also believed that retention elections influence judicial behavior. The specific effects they reported varied considerably, but the largest single response, offered by a quarter of the respondents, was that

retention elections made judges more sensitive to public opinion than they would otherwise be.

On the other hand, most retention elections are uncontested (Burbank, 1999: 332). Although Aspin and Hall found sensitivity to public opinion a prominent result of retention elections, very few judges in the 10 states they surveyed acknowledged that such elections affected specific decisions. (Of the 60 percent of respondents who reported any effect of elections on behavior, 5 percent said they sentenced more conservatively because of them (312-13)).

A related subject is judicial campaign financing. Can the public be confident that a judge is deciding cases independently when lawyers or the parties they represent provided funds to help the judge obtain or retain office? The extensive literature on this subject (Eisenstein 2000) does not establish links between judicial decisions and campaign contributions, but it does document the sometimes substantial sums contributed, especially to state supreme court candidates, and the sources of the contributions. In 1997, for example, four candidates for a single open seat on the Pennsylvania supreme court collected an average of \$722,720 in campaign contributions (Eisenstein 2000: 13), primarily from lawyers. A study of Texas supreme court elections concluded that the amount of money received by candidates for the court is the best predictor of the victorious candidates (Cheek and Champagne 2000: 23). (Two public interest groups filed a lawsuit in federal district court in Texas in 2000, claiming that the state's judicial election system permits judges to accept contributions from litigants appearing before them, in violation of the constitutional right to a fair trial [*The Fort Worth Star-Telegram*, 4 April 2000]).<sup>126</sup>

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<sup>126</sup> According to a recent survey commissioned by the Texas Supreme Court, "83 percent of Texans believe that campaign contributions have a significant effect on judicial decisions" *The Houston Chronicle*, 9 April 2000.

Again, however, the picture is complex. Uncontested retention elections constitute a major proportion of judicial election activity. Aspin and Hall report that judges who experienced retention elections have self-financed, low-cost campaigns and only 18 of the 645 surveyed reported accepting outside funds (306). This proportion, however, would no doubt be higher for judges in traditional elections, facing opponents. In fact, an examination of partisan judicial elections in Illinois in the 1980s found that most of the judges who did not have opposition nevertheless received campaign funds in averages varying between \$17,000 and \$35,000 per election (Nicholson and Nicholson, 1994: 297).

Findings such as those summarized here suggest that judicial elections and their financing affect to some degree the appearance and reality of judicial independence. Although most judicial elections proceed without costly and controversial election campaigns, chief justices of 15 state supreme courts were sufficiently worried about the increase in the number of highly-contentious and high-cost judicial elections to call a "summit meeting" to try to do something about the trend. (National Center for State Courts, 2000). Furthermore, it is not clear how much popular accountability judicial elections provide. In an echo of the broader debate in the United States over electoral campaign financing, those who exercise their right to contribute to judicial campaigns come primarily from a narrow slice of the public: lawyers and law firms.

Judicial discipline and removal. Although the federal constitution provides federal judges tenure during "good behaviour," it also authorizes removal of life-tenured judges and other officials by impeachment (i.e., indictment) by the lower house of the legislature and trial in the upper house. Almost all state constitutions have similar provisions. The grounds for impeachment on the federal level are vague:

“treason, bribery, or other high crimes and misdemeanors” (Art. II, sec. 4). The failure of an 1804 effort to impeach a controversial Supreme Court justice for his judicial actions established for most observers that the federal impeachment provision is only to be used to punish judicial malfeasance (Rehnquist 1992: 114).

Furthermore, impeachment and conviction are laborious and time-consuming. For both these reasons, in the history of the republic, the House of Representatives has impeached only 11 federal judges (the Senate convicted seven of them). Despite periodic calls for increased use of impeachment to remove judges who some perceive have exceeded their authority,<sup>127</sup> there does not appear to be any serious possibility on the horizon of making impeachment a form of discipline for judicial decisions.

On the state level, impeachment is similarly rarely used. There are, however, among the states additional means of removing judges from office, such as recall elections. Ten states and the U.S. Virgin Islands have recall provisions for state officials, including judges (The Book of States 2000–01: Table 5.23). Because impeachment is an inappropriate remedy for the vast majority of allegations of judicial transgressions, all states have established, within the judicial branch, commissions for judicial discipline and removal. In some states, these commissions only investigate and refer charges to other bodies; in other states they investigate and may take action. All state bodies include mixes of judges, lawyers, and laypersons.

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<sup>127</sup> In 1997, for example, the House Judiciary Subcommittee on Courts and Intellectual Property held hearings on whether “judicial activism” is an impeachable offense, during which House Majority Whip Thomas Delay told the subcommittee that impeachment should not be used for “partisan purposes, but when judges exercise power not delegated to them by the constitution, I think impeachment is a proper tool” (U.S. House of Representatives 1997:16).

In the federal system, regional councils of judges handle claims of judicial misconduct or disability. Anyone may present a complaint to the chief judge of one of the regional federal appellate courts alleging that a federal judge in that region “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or...is unable to discharge all the duties of the office by reason of mental or physical disability” [28 U.S.C. 372(c)(1)]. In 1999, about 800 complaints were filed, and almost all of them were dismissed, many because they were, contrary to the statute, “directly related to the merits of a decision or a procedural ruling.”<sup>128</sup> Occasionally councils exercise their authority to discipline judges, as through private or public reprimand or the removal of cases, and the courts have generally upheld these efforts and the underlying statutory provisions against constitutional challenge (McBryde v. Review Committee, 1999). The situation is similar in the state courts, where judicial conduct commissions generally dismiss more than 90 percent of the complaints filed with them each year (AJS Judicial Conduct Reporter 1999: 1). Some judges have expressed concern that enabling other judges to determine whether a judge is, for example, derelict in carrying out the duties of the office or abusive to litigants has the potential to chill independent judicial decision-making (e.g., Battisti, 1975). A thorough review of a random sample of (non-dismissed) complaints that federal chief judges handled between 1980 and 1991, however, revealed no matter that the researchers viewed as interfering with or seriously threatening

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<sup>128</sup> Of the 826 complaints acted upon during the year ending September 30, 1999, chief judges dismissed 406 complaints, 300 of them because they were directly related to a decision or procedural ruling. Chief judges forwarded the other 420 complaints to councils of judges for review, which dismissed 416 of them. (Grounds for council dismissal not available.) (Source, Report of the Director of the Administrative Office, 1999: 80-81).

judicial independence (Barr and Willging 1993: 177-80).

Accountability through legislative oversight. As discussed earlier, U.S. judicial branches have primary responsibility for their own administration, but the legislature retains the authority to determine how much public funds to spend each year on the courts and to direct, within broad categories at least, how to spend it. Legislatures furthermore often have the constitutional authority to change court organization and jurisdiction. The legislature's power of the purse and, in the federal and some state systems, the authority to structure the courts creates a legislative oversight role that promotes a form of public accountability. For example, for the last four years, at congressional request, the federal judicial branch has submitted a report to Congress on *Optimal Utilization of Judicial Resources* (Administrative Office of the U.S. Courts 2000).

Accountability through statistical reporting. Reporting systems that provide descriptive statistics on judicial activity can also promote accountability. They can indicate, for example, how many cases were presented to the courts for decision and how many the courts disposed, and by what methods. These data can be compared to pre-established standards (e.g., not more than six months should elapse between filing of a major civil case and its disposition) or among courts. The federal judicial system has one of the world's most elaborate reporting systems (Administrative Office of the U.S. Courts), and many state court systems are also highly developed.

The object of most reporting systems is to describe case processing activity. They usually report activity in the aggregate (e.g., by an entire trial court) rather than by individual judge. The fact of reporting such data may exert some pressure on judges to change their behavior to conform to that of their peers. Some reporting

requirements have behavioral change as a specific objective. For example, in 1990, Congress directed the Administrative Office of the U.S. Courts to disclose, semiannually, for each federal judge by name, the number of motions pending for six months, the number of non-jury trials with no decision for over six months, and the number of cases pending for over three years (along with the names of the cases involved) (28 U.S.C. §476). The object was to encourage judges to dispose of cases with sufficient promptness to avoid the embarrassment of a public report. The legislation, and similar state legislation, probably has that effect to some degree, although such requirements are amenable to manipulation. For example, some courts had adopted a practice of accepting notice from an attorney that she would file a motion but then giving the filing party 30 days to collect all papers, briefs, and other documents necessary for a "fully submitted" motion, even if some documents were not necessary for a decision on the merits. The courts then used the "fully submitted" date instead of the initial motion filing date as the start date for the six month pending period, thus creating an extra 30 days to decide the motion. (The judicial conference disallowed this practice and has disallowed similar practices.)

## 5. *Cultural Expectations*

An important factor shapes judicial independence in the United States, in addition to or perhaps despite the many legal provisions summarized above. That factor is the cultural expectation that judges ought to behave independently. To be a judge in the United States is to decide cases according to the law and the facts despite the pressure of political sponsors and even popular opinion. "Judicial independence," said Supreme Court Justice Stephen Breyer (1998: 3), "is in part a state of mind, a matter of expectation, habit, and belief among not just judges, lawyers, and legislators,

but millions of people.” This expectation is strongest with respect to direct intervention in cases. A 1996 survey revealed that 84 percent of U.S. citizens regard it as “not reasonable” for political actors to attempt to influence a judge’s decision in a case (Lou Harris & Assoc., 1996). Certainly, the press stands ready to dig out and report such tampering. As one U.S. judge put it during a hemispheric judicial conference, the “media would have a field day” if it learned that a political party or government official had tried to influence a judge’s decision behind the scenes (Torruella and Mihm, 1996: 975). Courts in the United States are not perceived as simply instruments of the state. Rather, courts are to be impartial, regardless of the parties and the issues, and must enforce the rights of individuals against the government, even when it may be unpopular to do so.

While most people think individual interventions to influence judicial decisions are improper, there is probably less popular support for judges’ deciding cases contrary to widely held public preferences. As noted, voters have removed from office some state judges who have done so, and a federal judge was recently subjected to demands that he be impeached in retaliation for his controversial decision in a drug case. Despite such examples, the U.S. public has regularly shown a high level of tolerance for independent decision-making. Recurring calls for term limits for federal judges have never gotten very far, and for the last several decades states have been incrementally changing their judicial selection systems away from partisan elections and toward nominating commissions and retention elections.

To the degree people have attitudes toward the courts, public trust in the judiciary is generally high. According to a Gallup poll conducted at the end of 1998, Americans express more confidence in the judicial branch (78 percent giving it a high rating) than the executive and legislative branches of government (The Gallup

Organization, January 8, 1999). Maintaining that confidence, furthermore, presents a challenge for those who select judges at every level. This challenge involves ensuring that the bench is not only competent and honest but also that it reflects the demographic make up of the society it serves. These efforts are important not so that loyalty to demographic interests replaces independent decision-making. They are important rather so that all members of society will have confidence that the judicial decisions affecting them were made by a judiciary accountable to and representative of the diverse interests of society.

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