On Judicial Independence

by

The Honorable Clarence Thomas

The Federalist Society
for Law and Public Policy Studies

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I want to speak tonight about judicial independence. There can be little doubt that in the last few years the political branches and the public have paid increasing attention to judicial decisions, and to the men and women who make them. Indeed, controversy has even emerged over whether judicial independence itself is under threat due to this scrutiny and debate. I think that recent discussion of judicial independence, and its relationship to the criticism of judges, has confused several distinct issues and mistaken the healthy discussion of a robust democracy for actual assaults on the third branch. At the same time, I think this public attention has missed the real threat to the freedom of judges to say what the law is, and that is the creeping involvement of interest groups - most notably the American Bar Association - into the nomination and confirmation process.

Today we celebrate judicial independence as one of the fundamental elements of our American form of government. Our judicial system is built upon a belief that those who judge will do so impartially, and in accordance with the law, without regard for race, creed, religious belief, or other affiliation. It is this ability to render judgment without concern for anything but the law that should distinguish judges from members of the legislature or the executive branch. As Americans, we have long recognized the importance of an independent judiciary to our ongoing experiment in democracy. As Chief Justice John Marshall once declared: "The greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary."

When we speak of judicial independence, however, we are really referring to two distinct ideas. First, it describes the judiciary's institutional separation from the other branches. In Great Britain, at the time of the framing, the courts were considered part of the executive. Even under the Articles of Confederation, Congress had exercised both legislative and judicial powers. Drawing on Montesquieu's theory of the separation of powers, the framers recognized that the judiciary had to be institutionally independent in order to perform its function. Unless the branches remained separate and distinct, they feared, democracy would not succeed. As James Madison explained, the consolidation of legislative, executive, and judicial authority into a single body represents the "very definition of tyranny." Some Justices in the past have been so concerned about maintaining the separation between the judiciary and the political branches that they have even thought of not attending the State of the Union address.

Second, judicial independence refers to our freedom to render decisions without political pressure or outside influence. By establishing this independence, the Framers ensured that judges would decide cases according to the rule of law, and not of men.

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* United States Supreme Court Associate Justice Clarence Thomas delivered this address to the Federalist Society’s Annual National Convention Banquet on November 12, 1999.

Crucial to this is the insulation of federal judges from the political process. Thus, federal judges hold their jobs for life, unless impeached, and receive an irreducible pay. Once appointed, federal judges are unaccountable to the polity in a way that the other actors in the political process - such as Presidents and Congress, who must undergo periodic election - are not. We judges can decide controversies without worrying about whether our constituents will support us, whether public opinion will approve, or whether our opinions will hurt us in the next election. Judicial unaccountability fosters impartiality and adherence to the rule of law, even when doing so stands in opposition to popular wishes.

According to some, all of this is now under threat. Those arguing that our independence is under attack point to the perceived escalation of criticism of judicial opinions. It is true that in the recent past, members of Congress and political candidates have attacked judges and their decisions. They have identified judges who allegedly had substituted their own policy preferences for that of the law. They even attacked opinions with which they disagreed in order to hold certain judges out as practitioners of judicial activism. Some politicians even talked of impeaching judges, although as we now know, they soon turned to more challenging matters.

As a result of these criticisms, some fair, more overblown, the press began reporting that judicial independence, which the Chief Justice has called the "crown jewel" of the federal judiciary, was under assault. But the purported attacks amounted to little more than criticism of individual opinions and vague threats of impeachment. I emphasize the term "threats" here. No one cut our pay. Not once, to my knowledge, did Congress act as a body to condemn a judge. Nor did the House of Representatives even come close to contemplating articles of impeachment. Indeed, even in the most notorious example of supposedly unwarranted judicial criticism, which involved a trial court judge's initial ruling on a drug suppression motion, Congress declined to seriously consider impeachment proceedings. At no time did the Congress, as it has in days gone by, ever seriously attempt either to circumscribe the federal courts' jurisdiction or, as President Franklin Roosevelt had once tried, to pack the courts with additional members. In other words, the political branches did nothing to try to force judges to change their opinions.

What is truly surprising about today's judiciary is how strong it really is. Long past are the days when President Lincoln might make the argument that the Court's decisions bind only the parties before it. No one is suggesting, as Presidents Jefferson and Jackson did, that the Court's decisions should be ignored or remain unenforced. No one has suggested altering the number of seats or the composition of the Supreme Court to alter its decisions. Nor have any credible attempts been made to impeach a member of the federal judiciary for political reason. We must go back to the Jefferson administration for the only example of an effort to remove federal judges because of differences over the substance of their decisions. If anything, the judiciary's authority in our society is at its peak.

Certainly, criticizing the judiciary can be a one-sided fight. Judges are not in a position to defend themselves; our very institutional and decisional independence prevents us from entering into what are usually partisan debates about the substantive outcome of cases. Nonetheless, I believe that such debates - particularly when engaged in by coordinate constitutional officers - are not unhealthy. In fact, it is only to be expected in a robust democracy. As judges, we must expect that our opinions will be dissected not only by the parties, but by scholars, journalists, students, politicians, and the bar. Such scrutiny can even be useful, at times. It can force judges to be self-reflective. Judges do not get everything right; as Justice Jackson has said, we are not final because we are infallible, we are infallible because we are final. Judges can benefit from constructive criticism to improve the quality of their work, just as anyone can.

Even when such criticism is not very helpful, it does not necessarily represent an assault on the independence of the federal judiciary. We can better view it as the natural result of the increasing scope of judicial review. As courts have moved with increasing frequency to override the democratic lawmaking process or to decide issues of significant religious, philosophical, or political import, it is only to be expected that we, as judges, would come under increasing criticism from the other branches. After all, in the first 50 years of the Supreme Court's existence, it invalidated but one federal law. In the Court's 1996 Term alone, we struck down three laws of Congress. Regardless of the merits of those decisions, it is certainly not unusual that members of Congress would cry foul. In fact, as the Court takes on issues that have great meaning to a great many people, the polity can only discuss certain policies within the context of our decisions. That will inevitably lead not only to praise, but attacks. What would really worry me is if discussion, and even criticism, of judicial opinions in our democracy were to cease.

The recent controversy, however, does indicate confusion in the way some think about the purposes and benefits of judicial independence. A good example of this was a recent statement by an ABA president: "Make no mistake, an attack on activist judges is an attack on the Constitution." Sometimes, individuals mistake judicial independence for broader, and very different, notions of judicial review. It is often said that the courts must enjoy independence so that they can better stand up to the political branches, so that they can strike down unconstitutional laws without fear of reprisal. While judicial independence no doubt makes it easier for the courts to engage in judicial review, it is by no means clear that the Constitution included its protections for judges so that they could do so.

Indeed, there has been substantial controversy from the very beginnings of our Republic as to whether the Article III courts even possess the power of judicial review. Certainly the text of the Constitution provides no clear statement that the judiciary should enjoy this vast power. In fact, the only provision that discusses such authority, Article VI's Supremacy Clause, refers to the power of *state* courts to set aside *state* laws that conflict with federal laws. While we can infer that federal courts therefore must have the same power, the constitutional text does not compel the conclusion that they also must possess it over coordinate branches of government in addition to the states.

My purpose, however, is not to prove that the Constitution precludes judicial review, but to point out that the Framers established judicial independence without regard to these questions. In other words, the Framers believed that the courts should be independent even if they did not enjoy the power of judicial review. Judicial independence was not necessary because of the nature of the federal courts, particularly, but because of the nature of courts as courts. As Hamilton wrote in Federalist No. 78, judicial independence "is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws." In my view, judges must be independent so that they can be impartial; if they are not impartial, they are no longer judges.

Impartiality is central to the very idea of the rule of law. Even if no great question of constitutional law is at stake, whenever any two parties have a dispute, they will need a neutral decision-maker who can render a judgment free from any bias or interest in the case. It is only because the judge gains no benefit from his decision that the rule of law, in every case he or she decides, can flourish.

Now cases often involve the government, either because the dispute is based on a public right or because the government itself is one of the parties. When the state uses courts to enforce its policies, it undermines the traditional structure of adjudication by a neutral decision-maker whose decisions are voluntarily obeyed. The judge, after all, works for the state, and the state has an interest in the case. Judicial independence gives us a way out of this dilemma. Although the government still performs the adjudicatory function, and it still has an interest in achieving its policy goals, it can attempt to do both by creating a wall of separation between the state and its judges. Even though my colleagues and I are government servants, the fact that once appointed we cannot be removed, or forced from office by imposed poverty, allows us to decide disputes without making the government's interests our own. Our impartiality, ensured by our institutional independence, advances the idea that our decisions will be voluntarily accepted. This seems to be to be the real message behind Hamilton's oft-quoted language in Federalist No. 78 that the courts have "neither Force nor Will, but merely Judgment." In a sense, the judiciary does not need either force or will to enforce its opinions, so long as it actually exercises judgment and reason.

None of this is really under threat in the current controversy over judicial independence. Open debate of judicial decision-making only strengthens the legitimacy of the judiciary. If our decisions can withstand public scrutiny and reasoned discussion, then the people will only accept them all the more. What is a matter of concern are proposals by some bar associations that would impose penalties upon lawyers who level "unfair" or "inaccurate" criticism against judges or their opinions. Judges are adults; we do not need cyberpatrol or surfwatch to protect our sensibilities. The First Amendment guarantees free speech exactly so that citizens can discuss matters of important public policy. Salving the psychological wounds of judges simply is not worth restricting anyone's ability to say what they please.

Now, I have some experience with criticism myself. Early in my service on the Court, I was painted by the New York Times as the "youngest, cruelest" justice for a dissent that I had written about the proper interpretation of the Eighth Amendment. Especially now that the gray in my hair has become ever more apparent, I appreciate the "youngest" part of that statement. At that time, no person or outside groups jumped to my defense, nor did I expect or want anyone to do so. There were no cries from bar organizations or groups, that I am aware of, that my opinions were being unfairly criticized, or that the criticism amounted to illegitimate pressure on my decision-making freedom. I did not need anyone to defend me. I am willing to let my opinions speak for themselves, and it is part of my judicial duty to accept outside criticism, however incorrect or unjust, to go by unanswered. It is just surprising to me that only now have journalists, academics, and public figures suddenly discovered that judicial independence is a value worth protection, and quite loudly at that. Perhaps in my case they were too busy piling on.

While I am sympathetic to claims that some discussion distorts and unfairly criticizes certain judges and opinions, I think the claim that judicial independence is itself under attack is grossly overstated. Instead, it masks what I believe to be a more serous threat to the independent judiciary: the politicization of the nomination process by interest groups. The true modern threat to judicial independence, in my view, is not the criticisms leveled by co-equal branches of government, but by the attempts of interest groups to politicize the judicial selection process by mis-characterizing nominees' records and by holding them to impossible litmus tests.

I am not launching a general attack on the participation of interest groups in American political life. Judicial appointments, however, are different than legislation. Legislation lends itself easily to compromise. Judges do not. Delete a provision here, add a provision there, and soon you have a legislative bargain. Judges, on the other hand, are individuals, not a collection of policy preferences. Interest groups cannot sit down at a table and alter and adjust the different qualities and thought processes of a man or woman to come up with their desired compromise. Interest groups cannot clone or splice together the judge of their choice no matter how much they would like to add a part here, change a part there, until all interested groups have had a say in a judge's makeup. Instead, the best we can do is appoint men and women whose character, abilities, and qualifications lead us to believe that they will be impartial judges.

So while interest groups may be well suited to the business of formulating legislation, they are not appropriate actors in the judicial arena. By their very nature, interest groups are biased; a judge should not be. Unfortunately, I believe that almost no group is immune from this problem. Even the American Bar Association, which claims itself to be a neutral representative of the legal profession, suffers from bias. The ABA, like any other interest group, has its own agenda, its own positions, and its own goals. The ABA has not helped itself by aggressively promoting a slate of positions of political and social issues that go beyond representing the interests of lawyers as a profession. At the last several annual meetings, for example, the ABA adopted positions on gay

adoption, racial preferences, needle exchange programs, prenatal care, English-first, childcare, and gun control.

While President of the ABA, Lewis Powell once said that the ABA "must follow a policy of non-involvement in political and emotionally controversial issues - however important they may be - unless they relate directly to the administration of justice." Failure to do so, he warned, would fragment the organization and ultimately lessen its influence. Justice Powell's words have proved prophetic. No matter what side you take on these issues, it is hard to dispute that when the ABA takes a position, it has become an interest group. I am not sure it is even appropriate for judges, who are supposed to be neutral, impartial decision-makers, to belong to the ABA so long as it continues down this path.

The ABA's decision to play more of a role in politics and public policy undermines its special role in the judicial appointments process. For many years, the ABA has been permitted to investigate judicial nominees with the cooperation of the executive branch and the Senate. The ABA's decision to wade into the political fray, rightly or wrongly, engenders the view that the ABA will be favorably disposed to those nominees who tow its party line. Indeed, so many had begun to hold this view that the Senate recently ended the ABA's special status in the process. The ABA cannot credibly portray itself as an impartial evaluator of professional competence while at that same time increasingly involving itself in widely contested political debates.

I am doubtful whether the ABA can ever "reform" itself so as to deserve a quasi-governmental role in judicial appointments. Since the ABA is an interest group that serves its profession, I am not even sure that it should. Even during other moments in history, when the ABA's role as the representative of the legal profession went unchallenged, it could not help but become embroiled in the nominations process, and not always to its credit. For example, a man of superb and unquestioned professional competence once was nominated to the Supreme Court, only to be savagely attacked by partisan detractors. Certain ABA members, including seven former Presidents of the Association, denounced the nominee and sought to distort his record. What Supreme Court nominee aroused such intense politicking? Justice Louis Brandeis.

The bitterness and enmity surrounding nominations to the federal bench have proven to be one of the principle modern threats to judicial independence. Interest groups have turned the judicial appointments process into merely another theatre of operations for their unending battles. By making examples of nominees with whom they disagree, interest groups can seek to pressure potential or future nominees to adhere to certain positions and eschew others. They can force members of the political branches to impose litmus tests on the views of nominees, which seems to me to be the very antithesis of the promise of judicial impartiality. They can so distort the nominations process, by using the techniques of legislative lobbying and campaigning, that the political system and the public come to believe that judges should just embody different groups' views, rather than the ideal of impartiality and neutrality.

Rather than worry about whether judges, secure in lifetime appointments and irreducible salaries, are the subject of too much popular criticism, the bar should seek to do its best to de-politicize the selection and nomination process of judges. We should not allow interest groups to undermine the very neutrality that is at the real heart of what it means to be a judge. Only by standing up to these pressures can we all really defend judicial independence.

Our Purpose

The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.

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The Courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequences would be the substitution of their pleasure for that of the legislative body."

The Federalist No. 78