FEDERAL JUDICIAL INDEPENDENCE SYMPOSIUM

Introduction to Mercer Law Review Symposium on Federal Judicial Independence

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I thank the Mercer Law Review for the opportunity to write this Introduction and for publishing an edition on Federal Judicial Independence. This symposium presents a forum for academicians and for representatives of the three branches of government to discuss a subject which is fundamental to the constitutional concept of separation of powers. Each author brings a unique perspective and philosophy to a

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dialogue that is essential to the constructive development of good government.

John Jay, the first Chief Justice of the United States, when commenting upon the debate surrounding the formation of the federal judiciary, observed that "A judicial Controul, general & final, was indispensable. The Manner of establishing it, with Powers neither too extensive, nor too limited; rendering it properly independent, and yet properly amenable, involved Questions of not little Intricacy."[1]

More than two hundred years later, the parameters of judicial independence continue to be questioned and debated. The contemporary debate on judicial independence does not concern whether federal judges should be independent, but rather, the nature and extent of that independence. In an attempt to define the concept of judicial independence, one judge has recently opined:

> Judicial independence is a judge's ability to decide a case free from pressures or inducements. Judicial independence has an institutional character, which is best seen in our constitutional separation of powers. It has an individual character, which is partially protected by the Constitution in the provisions for life tenure and the guarantee of no diminishment of salary, but which extends further to encompass those conditions in which and under which a judge decides the cases. These ancillary elements of individual judicial independence, including security, facilities, support, workload, rules of procedure, and case management, normally do not impact upon judicial independence but under extreme circumstances may do so.
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> Judicial independence is important not only to the judicial system. The independence of the judiciary must be credible to those being judged. Therefore, the exercise of judicial power requires institutional arrangements which will instill confidence that the power is being properly applied.[2]

I consider an independent judiciary to be the cornerstone of a free society and the rule of law. My recent experiences with judges and court administrators from China and from emerging democracies have reinforced my fundamental belief that without a judiciary that operates independently, yet accountable to the public and political branches of the

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1. Maeva Marcus & Natalie Wexler, "The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?" Maeva Marcus, Ed., *Origins of the Federal Judiciary* 3 (1992) quoting John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York, April 12, 1790.

2. Memorandum dated April 22, 1994, from Judge Jane R. Roth (3d Cir.) to Steven M. Tevlowitz, Counsel to the Committee on the Judicial Branch. The memorandum is on file with the author in the records of the Judicial Conference Committee on the Judicial Branch Subcommittee on Judicial Independence.

government, the rights of citizens under a constitution go unchecked, development of the economy flounders, and powers associated with military dictatorships flourish. We are so fortunate to live in a country under a written constitution that has survived over two hundred years. To me, it is obvious that the preservation of judicial autonomy is integral to the strength of our democracy.

The founders of the republic recognized that it was difficult to define the extent to which the judiciary should be independent. Judges were expected to be final arbiters who followed the letter of the law; they were also expected to be independent and impartial.[3] Chief Justice Jay observed that the Judiciary Act of 1789—which literally created the American federal judiciary—did not resolve every question surrounding the powers of the third branch.[4]

These conflicting values remain contemporary concerns. One cannot have separate branches unless they are independent of each other. Yet independence is also a relative concept; a branch is only independent of another branch for certain purposes or to some degree. Given the tradition of shared, as well as separate powers in our Constitution, independence is often countered by interdependence.[5]

The Chief Justice, in his 1994 report on the federal judiciary, focused on the interdependence between the judicial and legislative branches. This dependence illustrates the "delicate relationship among the dispersed powers of the Constitution."[6]

> Article III of the Constitution vests the judicial power of the United States in the Supreme Court and in such other federal courts as Congress may create. It grants to Article III judges two significant protections of their independence: they have tenure during good behavior, and their compensation may not be diminished during their term of office. But federal courts are heavily dependent upon Congress for virtually every other aspect of their being.[7]

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3. Gerhard Casper, "The Judiciary Act of 1789 and Judicial Independence," Maeva Marcus, Ed., *Origins of the Federal Judiciary* 285 (1992).

4. *See supra* note 1.

5. Paul R. Verkuil, Separation of Powers, *The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 322 (1989). In a concurrence to a seminal opinion of the 1950s, Justice Jackson stated: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

6. William H. Rehnquist, 1994 Year-end Report on the Fed. Judiciary 1 (December 30, 1994).

7. *Id.* at 1-2.

The Chief Justice noted that Congress authorizes every individual judgeship in the federal system and establishes the level of judicial compensation. The jurisdiction of the federal courts is determined by Congress. Federal question jurisdiction, which today is the basis for so much litigation in the federal courts, was not conferred upon these courts by Congress until 1875. Congress is also responsible for establishing the substantive law and procedure to be applied in federal courts.[8]

> For the first century of our existence under the Constitution, Congress legislated relatively little, but beginning with the Interstate Commerce Act of 1887, Congress began to enact more and more federal statutes applicable in federal courts.
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> Congress also has authority to regulate the Rules of Procedure to be used in the federal courts. For many years it exercised that authority directly, but the Rules Enabling Act enacted sixty years ago delegated that authority to the courts. Amendments to the existing Rules of Procedure today are first recommended by the Rules Committees, and then presented first to the Judicial Conference and then to the Supreme Court. Those which survive this process are laid before Congress, and go into effect unless disapproved. I believe that this system has worked well . . . .[9]

The federal judiciary is also dependent upon appropriation of money by Congress for all of its day-to-day operations. The payment of salaries of judicial officers and employees, payment of jurors, and supplies are made with funds appropriated by Congress.[10]

The Chief Justice further observed:

> Thus when we examine the relationship of the federal judiciary to Congress, we see two branches of the federal government which are constitutionally separate, but whose ongoing functioning is steeped in interdependence.[11]

Since 1985, I have been Director of the Administrative Office of the United States Courts. My appointment is from the Supreme Court of the United States, but because of a recent statutory change,[12] my successor will be approved by the Chief Justice after consultation with

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8. *Id.* at 2.
9. *Id.* at 3-4.
10. *Id.*
11. *Id.* at 4.
12. 28 U.S.C. § 601.

the Judicial Conference of the United States[13]—the policymaking body of the Federal Judiciary. As Director, I am supervised and directed by the Judicial Conference. Implicit in my appointment is the ability of the judiciary to name an administrative officer. This autonomy over the administrative affairs of the judicial branch is a fundamental element of institutional judicial independence and promotes the decisional autonomy of individual judges.

As Director, one of my principal responsibilities is serving as Secretary to the Judicial Conference, which has twenty working committees. At the request of the district judges of the Fourth Circuit, the Judicial Conference asked its Committee on the Judicial Branch to study the concept of judicial independence. Under the leadership of its former chair, Tenth Circuit Judge Deanell Reece Tacha, the Judicial Branch Committee established a Subcommittee on Judicial Independence.[14]

Judge Tacha has worked tirelessly to enhance the ability of judges to deliver the finest-quality decisionmaking possible. Her article, "Independence of the Judiciary for the Third Century,"[15] follows. In it, she discusses judges' concerns about perceived erosion of judicial independence by describing some of the characteristics of individual (professional) independence and what independence means for the judiciary as a whole.

The strength of the federal judiciary today is not only attributable to the men and women who work in the judicial branch, but also to members of Congress who throughout the history of the republic have safeguarded the independence of the third branch. As Chairman of the Committee on the Judiciary, Senator Orrin G. Hatch (R-Utah) shares his views on interbranch relations in his article, "Congress and the Courts: Establishing a Constructive Dialogue."[16] He examines the different

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13. Congress created the Judicial Conference in 1922. Then it was known as the Conference of Senior Circuit Judges. In 1948, the name "The Judicial Conference of the United States" was created by law. Its enabling legislation is found at 28 U.S.C. § 331. The Chief Justice is the presiding officer.

14. Members of the Subcommittee on Judicial Independence included: Judges Randall R. Rader (Fed. Cir.), Chair, Glen E. Clark (Bankr. Utah), Michael M. Mihm (C.D. Ill.), Fred I. Parker (2d Cir.), James A. Redden (D. Or.), Jane R. Roth (3d Cir.), and Dennis W. Shedd (D.S.C.). Judge Tacha's charge to the Subcommittee included examining both the external and internal pressures that impact upon the judiciary to maintain its independence and exercise discretion. *See* letter of August 13, 1993, from Judge Deanell Reece Tacha (10th Cir.) to Judge Randall R. Rader (Fed. Cir.) on file with the author in the records of the Judicial Conference Committee on the Judicial Branch.

15. Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 MERCER L. REV. 645 (1995).

16. Orrin G. Hatch, *Congress and the Courts: Establishing a Constructive Dialogue*, 46 MERCER L. REV. 661 (1995).

meanings that judicial independence has and welcomes the opportunity for a constructive dialogue with the judiciary over its future course in carrying out the jurisdiction that Congress grants the federal courts and its administrative operations.

Also discussing the subject of interbranch relations are Harvey Rishikof and Professor Barbara A. Perry. They have analyzed hundreds of instances where federal jurists have testified before congressional committees on subjects such as court administration, federal jurisdiction, and budgetary policy. Their article, "Separateness but Interdependence, Autonomy but Reciprocity: A First Look at Federal Judges' Appearances Before Legislative Committees"[17] reviews these appearances and offers possible explanations for this marked increase in the modern era. They conclude with a discussion of the impact of this phenomenon on separation of powers.

Professor Martin H. Redish assisted the Subcommittee on Judicial Independence by examining the parameters of judicial independence. In "Federal Judicial Independence: Constitutional and Political Perspectives,"[18] Professor Redish suggests that judicial independence reflects a balancing of accountability with the need to curb democratic excesses. He focuses on certain court decisions, such as those upholding the constitutionality of the Federal Sentencing Guidelines, that have limited what some judges believe are matters affecting judicial autonomy. For example, after considering Professor Redish's analysis, one judge on the Subcommittee opined that perhaps the judiciary was eroding its own independence.

> Court decisions eroding federalism and separation of powers have contributed greatly to what some might see as a threat to judicial independence. I am starting to believe a large part of our "problem" has been created by us. In fact, our constitutional protections are limited to what the Supreme Court says the Constitution is.[19]

Professor Linda S. Mullenix responds to Professor Redish in her article, "Judicial Power and The Rules Enabling Act."[20] She asserts

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17. Harvey Rishikof & Barbara A. Perry, *Separateness but Interdependence, Autonomy but Reciprocity: A First Look at Federal Judges' Appearances Before Legislative Committees*, 46 MERCER L. REV. 667 (1995).

18. Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697 (1995).

19. Letter of May 25, 1994, from Judge Dennis W. Shedd (D.S.C.) to Judge Randall R. Rader (Fed. Cir.). On file with the author in the records of the Judicial Conference Committee on the Judicial Branch Subcommittee on Judicial Independence.

20. Linda S. Mullenix, *Judicial Power and The Rules Enabling Act*, 46 MERCER L. REV. 733 (1995).

that "Congressional intrusion into federal procedural rulemaking is the most significant contemporary issue of judicial independence."[21] Professor Mullenix argues that if the third branch is to be truly independent of the legislature, then procedural rulemaking should be left to the judiciary's discretion. She discusses the federal rulemaking process and its impact on the judiciary's ability to have decisional neutrality as a significant facet of branch autonomy.

Also discussing the rulemaking process are Professors Erwin Chemerinsky and Barry Friedman. In "The Fragmentation of Federal Rules,"[22] they contend that today's national uniform rulemaking process has been jeopardized in a movement towards localism. Chemerinsky and Friedman examine the effects of the Civil Justice Reform Act and the 1993 amendments on the procedural rulemaking process. They argue that the Federal Rules of Procedure should be the rules for all.

Judge James Zagel and Adam Winkler examine the psychology of judicial independence in their article, "The Independence of Judges."[23] Judge Zagel has recently completed a term on the Judicial Conference Committee on the Codes of Conduct. Thus, the article reflects the importance of accountability to the public and the judiciary as an institution as a means of strengthening impartial judicial decisionmaking.

Gordon Bermant and Russell R. Wheeler review different meanings of judicial independence, the perceived threats to independence, and the soundness of the premise that administrative independence is a necessary condition for the exercise of decisional independence in their article, "Federal Judges and the Judicial Branch: Their Independence and Accountability."[24] They suggest that judges' concerns over loss of independence result from increased federal jurisdiction and workload. Bermant and Wheeler suggest that judges perceive these changes as jeopardizing the historical prestige and quality of the federal bench.

The symposium would not be complete without a discussion of federal judges who are *not* within the judiciary. Richard B. Hoffman and Frank P. Cihlar consider the status of two kinds of federal judges who clearly lack Article III protections: (1) administrative law judges (in the executive branch) and (2) Article I judges (who are "legislative" federal

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21. *Id.* at 733.

22. Barry Friedman & Erwin Chemerinsky, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757 (1995).

23. James Zagel & Adam Winkler, *The Independence of Judges*, 46 MERCER L. REV. 795 (1995).

24. Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835 (1995).

judges without life-tenure). In "Judicial Independence: Can It Be Without Article III?"[25] they argue for expanding independence of these administrative law and Article I judges and for broadening the selection process for both kinds of administrative judges as a means of increasing the independence for those judges serving without life-tenure. If their prescriptions are followed, these judges will more closely resemble Article III judges—at least with respect to judicial independence.

As we enter the third century of this country with the judiciary as an independent branch of government, this symposium on federal judicial independence provides a time to reflect on the importance of maintaining and strengthening the independence of the federal judiciary as a means of improving the American system of government and its democracy. As one judge recently noted: "this symposium may demonstrate to the other branches that impingement on our independence may not always rise to a constitutional 'offense,' but can be quite an impediment to justice."[26]

It is a testament to the vitality of federal judicial independence that Mercer publishes this symposium. Judges are naturally concerned with protecting such a constitutional value, but they are interested for reasons outside themselves. History has demonstrated that a judiciary not beholden to the political whims of the times preserves the rule of law. In conclusion, one judge recently articulated what many believe:

> The independence of the federal judiciary is intact today. Federal judges regularly decide cases without being subjected to external pressures from other branches of government, or effective coercion by societal elements in general. Furthermore, orders of the court are regularly respected and enforced, probably in large part because of the independence and impartiality of the judiciary.[27]

Chief Justice Jay would be gratified.

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25. Richard B. Hoffman & Frank P. Cihlar, *Judicial Independence: Can It Be Without Article III?*, 46 MERCER L. REV. 863 (1995).

26. Letter of May 23, 1994, from Judge James A. Redden (D. Or.) to Judge Randall R. Rader (Fed. Cir.). This letter is on file with the author in the records of the Judicial Conference Committee on the Judicial Branch Subcommittee on Judicial Independence.

27. Letter of June 1, 1994, from Judge Fred I. Parker (2d Cir.) to Judge Randall R. Rader (Fed Cir.). The letter is on file with the author in the records of the Judicial Conference Committee on the Judicial Branch Subcommittee on Judicial Independence.