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Independence of the Judiciary for the Third Century

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> For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers . . . the complete independence of the courts of justice is peculiarly essential in a limited constitution."[1]

Alexander Hamilton's impassioned advocacy of an independent judiciary rings as true now as it did when Hamilton was attempting to convince the people of the State of New York to ratify the new Constitution. For over 200 years, the independent federal judiciary has been a powerful tool in guarding the Constitution and the rights of individuals. Indeed, the principle of an independent judiciary is so strongly ingrained in our constitutional structure that most Americans scarcely give it a second thought.

Although the general principle of judicial independence enjoys broad support, its definition is elusive. For members of the judiciary, the concept of judicial independence has both an institutional meaning and an individual meaning. In its institutional form, it is a corollary to the principle of separation of powers. That is, the judiciary is a vital branch of government with constitutionally delegated powers, and we must be free to act and interact with the other two branches. Each branch must bear its appropriate share of constitutional responsibilities and be accorded full respect in regard to those duties.

In its individualized sense, judicial independence means simply that a life-tenured federal judge is free from all political and other outside

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1. THE FEDERALIST No. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 1990) (quoting Montesquieu, Spirit of Laws, p. 181).

pressures to decide cases in a wholly impartial manner. She must commit herself to following the Constitution, the statutes, common law principles, and the precedent that interprets each of them. Her decisionmaking is limited to properly admitted evidence, constrained by appropriate procedural rules, records, and legal principles. Prevailing political winds have no effect. The codes of conduct require a judge to adhere not only to the principle of actual impartiality and absence of outside influence, but also require a judge to be free from even the appearance of any improper influence. Thus, a judge resigns from all other affiliations that would call her impartiality into question, divests herself of any financial interests which would raise similar questions, and refrains from all activity that appears to have the capacity to influence personal decisionmaking.

Examining the independence of the judiciary and perceptions about its erosion requires that one see the issue in both the institutional and the individual sense. Alexander Hamilton saw it both ways. He refers in some places to "the judiciary" as a body, in other places he refers to the independence of "courts of justice," and he clearly points to the importance of the "independence of the judges."[2] In quoting Montesquieu, he refers to "the power of judging."[3] In this article, I will attempt to illustrate some of the problems that face the judiciary in both the individual and institutional contexts.

Before I begin my comments, however, I should admit my own biases on this subject. I understand that any discussion of the independence of the judiciary is self-serving to me and my colleagues and may be dismissed on that ground. I implore persons concerned about these issues, and particularly the legislative and executive branches of government, to pierce the obvious personal interests of the judiciary in protecting its independence and examine with us what it means in the contemporary context.

My perception is that most people, including many judges, think about independence of the judiciary in the rather simplistic form of the life tenure protection. That is certainly one important characteristic. It does not, however, define on a day-to-day basis what factors allow a judge as an individual and the judiciary as a whole, to act independently in the decisionmaking role. Life tenure symbolizes the individual judge's ability to resist any temptation to do the popular or politically correct thing and to conform to the case or controversy requirement and other judicial constraints.

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2. THE FEDERALIST No. 78, at 402-404 (Alexander Hamilton) (George W. Carey & James McClellan eds., 1990).

3. *Id.*

As I attempt to point out in this article, however, protection of judicial independence includes subtle but important protections in the relationships between the judiciary and the other two branches of government. Alexander Hamilton's discussions about the importance of an independent judiciary in THE FEDERALIST Nos. 78-83 contain suggestions of many attributes beyond life tenure that should be protected in order to maintain an appropriate level of independence for the exercise of judicial power. My hope is that all of us will look beyond the blatant personal interests of judges and see the attributes of independence that are indispensable to protecting the republic and the rights of those of us who call it home.

I. IMPINGING ON JUDICIAL INDEPENDENCE IN THE INDIVIDUAL SENSE

Whether real or perceived, judges experience a sense of pressure that suggests to them that they are not as independent in their decisionmaking role as Hamilton told them they should be and as the American public has a right to expect. I served as Chair of the Judicial Conference Committee on the Judicial Branch[4] from 1990-94. Because of that ostentatious title, I received numerous letters from judges around the country. These letters gave me increasing concern. Thoughtful jurists, none of whom falls within the category of those who simply seek additional comforts or resources beyond their needs, are echoing a growing refrain of concern about whether the independence of the federal judiciary is being gradually eroded. The letters contain a sense of sorrow and urgency, asking the judiciary itself and, implicitly, the other branches of government, to consider the importance of protecting the independence of the judiciary.

The concern on this topic reached a mild crescendo when a group of judges from the Fourth Circuit formally requested that the Judicial Conference, through its Committee on the Judicial Branch, specifically consider the question of the independence of the judiciary. I appointed a subcommittee chaired by Judge Randy Rader of the Federal Circuit to consider the issue. They, along with several able scholars and practitioners, looked at this question. This symposium is one of the products of that inquiry. We have all struggled with the contemporary meaning of judicial independence. None of us are particularly satisfied with the scope of our inquiry, the extent of our ability to analyze the question, and certainly any resulting suggestions. We are, however, satisfied that

4. The jurisdiction of the Committee on the Judicial Branch includes addressing problems affecting the judiciary as an institution and affecting the status of federal judicial officers.

the issue of judicial independence is one that deserves careful consideration and thought, giving emphasis to Hamilton's statement about its importance and trying to place its value into the context of the federal government that we know today.

I do not pretend with this essay to evaluate substantively the concept or even the values of judicial independence. It is a given that judicial independence is a good in this republic. I know that it is a value that judges think is eroding, and I hope only to shed a little light on some of the aspects of the concern of the judges. I know that the dialogue will not even begin in an effective manner until the other two branches of government are actively involved. Indeed, the question is probably much larger than government. The issue probably also relates to the extent of the public's understanding, or lack thereof, of why the judiciary should be independent and even of the role of the judiciary. I have addressed those topics in other contexts and will not attempt to do that now.[5] My goal here is only to provide a rudimentary description of those factors that may contribute to the concern of the judges with what is happening to the principle of judicial independence.

Implicit in the definition of an independent decisionmaker is the view that the judge is independent in her manner of carrying out her duties. That is, the independent judge sets her own cases, controls a trial or appellate calendar, follows personal preferences in utilization of staff, and works at a speed and in a manner most compatible with her own work habits.

A description of judicial independence which includes the capacity to allow each individual judge to follow her own working habits and preferred patterns of handling the caseload has another subtle characteristic which, on its face, implicates the troublesome area of adequate budgetary resources. In order for a judge to handle her caseload and maximize productivity, she implicitly must possess adequate staff, equipment, and physical facilities to carry out her responsibilities. Independent judicial action requires an appropriate level of support which allows a judge to carry out the judicial function without relying on other entities, depending on someone else's assessment of the judge's needs, or giving any thought in the case-deciding role to tangential factors that might influence the speed of deliberation or the outcome. For example, inadequate funds for jury service or defense attorneys has an immediate and detrimental effect on a judge's ability to move her caseload as rapidly as the litigants, the public, and she herself prefers.

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5. *See* Deanell Reece Tacha, *Renewing Our Civil Commitment: Lawyers and Judges as Painters of the "Big Picture,"* 41 KAN. L. REV. 481 (1993).

Of course, these impinging factors on the independence of the judiciary are clearly contemplated by the Constitution. Congress has the power of the purse, and therefore, appropriation and budgetary oversight powers over both other branches. Hamilton himself said, "And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter."[6] Thus, for all of its compensation and support services, the judiciary is dependent upon Congress to provide adequate resources for independent judicial action at every level. As federal budget constraints force ever more attentive budget committees to scrutinize all governmental spending, the judiciary feels its share of the impact along with the rest of the federal government.

It is therefore important to recognize that an independent judiciary must not be unduly restricted by the annual vicissitudes of the current approach to governmental spending. Judges obviously cannot expect levels of support that do not reflect attention to the grim details of constrained budgets. However, in 1995, the judiciary is less than a fifth of one percent of the total federal budget. The judiciary in recent years has struggled to defend appropriate levels of support to allow the flexibility for courts and judges to do their work without excessive oversight.

Judges believe that we share a portion of the responsibility for addressing the fiscal concerns of the nation. Judges, in my experience, are good stewards of the resources they are allotted. Admittedly, there is the occasional extravagance that naturally fuels a new debate about the extent of oversight necessary to assure fiscal responsibility. The judicial councils and the Judicial Conference have a laudable record in detecting and eliminating these abuses. The judiciary has taken the responsibility for trying to make certain that spending in the judicial branch is directly related to a responsible, but adequate, allocation to support the judicial function.

Congress and the executive branch, with a watchful eye, are to a great extent the protectors of the ability of the judiciary to do the work it is assigned. Still, the other branches should recognize that adequate, but not extravagant, resources are imperative for judges to work independently and responsibly. The appropriations process itself demands careful respect for the constitutional scheme of separation of powers. For example, the Office of Management and Budget normally sends the

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6. THE FEDERALIST No. 79, at 408 (Alexander Hamilton) (George W. Cavey & James McClellan eds., 1990).

judiciary's budget to Congress without revision.[7] Congress no doubt must look carefully at the request and ask appropriate questions, but significant annual swings in the judiciary's budget have a detrimental impact on the judiciary's ability to carry forward the tasks that it is assigned. Although in the past decade Congress has generally recognized the increasing resource needs of the courts, depending on the difficulties of any particular budgetary year, courts have had to suspend civil trials and civil juries, cease to pay appointed defense attorneys, and engage in a host of temporary budget-shifting mechanisms. The symbolic benefits of a constant, assured budgetary level with modest annual increments for inflation would make an important statement to the judiciary about its equal footing and about its independence.

The Judicial Conference Committee on the Budget has been exceedingly effective in working on behalf of the judiciary with Congress and the executive branch. One of the roles of Judicial Conference committees is to provide opportunities for members of Congress and officials in the executive branch to ask questions and become more fully informed about the work of the judiciary. Certainly the Committee on the Budget has done an extraordinary job in providing this avenue of communication for the judiciary. The obvious effectiveness of their work also suggests a level of understanding and respect that should comfort judges about the budget pressures that seem to haunt them.

Equitable compensation for all public servants, including high-ranking government officials such as judges, is important for the long-term good of the nation. Thus, the importance of cost-of-living adjustments for judges should not be discounted. Although judges recognize that their appointments carry with them a certain amount of financial sacrifice in exchange for a position of great importance, judges have also been caught by a political climate that links judges' compensation to congressional pay. Inevitably in the last few years, political pressure has mounted to the extent that elected officials have felt they could not even marginally increase their own salaries or those of other high-ranking officials.

In 1993, at a time when all responsible public servants were concerned about the federal budget deficit, the judiciary accepted the decision of the President that no senior officials would receive a cost-of-living increase. Judges demonstrated that they were willing to join in mutual efforts to address important fiscal priorities, but in the intensely political climate of 1994, judges again were subject to the political imperatives felt by the elected branches of government. Such erosion of judicial

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7. *See* 31 U.S.C. § 1105(b) (1988).

compensation will make it more difficult to attract and retain qualified jurists.

To the best of my knowledge, judges are able to carry out their judicial responsibilities with full energy and dedication. But the obvious concern for the long-run is that judges be compensated fairly regardless of the prevailing political attitude. The public perception of integrity and removal from the political process would, in my judgment, be greatly enhanced if judges were entirely separated from elected officials for the purposes of annual modest cost-of-living adjustments in their salaries. The nation is far better served by judges who are not affected in any way, particularly in their compensation, by prevailing political attitudes about paying elected officials.

These concerns apply with special force to senior judges' compensation.[8] In 1989, Congress passed legislation that requires senior judges to be certified as carrying a twenty-five percent caseload before they can receive extraordinary pay increases.[9] The Judicial Conference Committee on the Judicial Branch drafted the proposed regulations pursuant to this statutory requirement.

At that time, the reaction of senior judges, who were carrying an almost phenomenal portion of the caseload of the federal courts, ranged from saddened to outraged. For the senior judges, the change implied that they were not doing their job. There may have been an occasional abuse of senior judge status but statistically, intellectually, and professionally, senior judges account for more than twenty-five percent of the quality and capacity of the federal courts. Virtually no judge was particularly worried about whether he or she would, at least, meet the twenty-five percent requirement. Most were, however, surprised and disappointed that somehow their colleagues in another branch of government thought they were not carrying their share of the load.

I find the experience of working with senior judges both uplifting and disquieting. What had been viewed by almost all senior judges as a privilege has, to some extent, been diminished by the requirement of a statistical analysis of their activities. The experience under the regulations in the intervening years has been that the requirement is not onerous, and the judiciary has adapted. It remains, however, a duty which chief judges must carry out, circuit executives must quantify, and for which senior judges must account. The irony of all of this is that the certification process has never been used for any meaningful purpose

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8. Judges may take senior status at any time after age 65 provided they have at least 15 years of service as an Article III judge. A senior judge is one who remains on the federal bench but is retired from full-time active service. *See* 28 U.S.C. § 371(c) (1988).

9. *See* 28 U.S.C. § 371(f) (1988 & Supp. V 1993).

because no extraordinary pay increases have been appropriated since the certification requirement was instituted.

II. INDEPENDENCE OF THE JUDICIARY AS A WHOLE

In order to take its proper place in the constitutional scheme and be a "branch of the government," the judiciary must necessarily act institutionally. The federal judiciary's effort to act in unison on administrative, budgetary, procedural, rule-making, and the host of other non-case related activities of the judiciary is itself antithetical to the notion of independent judges. By speaking in unison we necessarily act as a body. The Judicial Conference of the United States was established in 1922[10] and serves as the policymaking body and principal representative for the federal judiciary in the policy arena. The Administrative Office of the United States Courts serves as the administrative and staff support office. At the institutional level, while the judicial branch must remain independent, it is also important to recognize that the judiciary shares an interdependence with the other branches to carry out our assigned constitutional functions.

Certainly in a "big picture" way of looking at the federal government, each branch is doing precisely that. Congress is passing legislation at an unprecedented rate. The executive branch concomitantly is involved in executing these laws and regulating a host of activities that profoundly affect our national life. The judiciary is hearing and deciding an ever-increasing number of cases. Looked at in its most elementary functional sense, each branch is operating at full capacity, carrying out the functions assigned to it by the Constitution.

In operating at this pace, inevitably the areas of overlap among the three branches expand. The passage of new criminal laws requires the building and administration of new prisons and a greatly increased criminal docket for the courts and probation officers. Similarly, the passage of new federal laws involving family leave, discrimination against persons with disabilities, and workplace safety add new causes of action for litigation in the federal courts and an overlay of regulation in the executive branch. The list of overlapping interests goes on and on. It is the evolution of the contemporary federal government itself that has impinged, to some extent, on the absolute independence of the federal judiciary. This is not a new phenomenon. Certainly the last century has been marked by this gradual expansion of the role of the

10. In 1922, Congress created The Conference of Senior Circuit Judges. In 1948, Congress enacted section 331 of title 28, United States Code, changing the name to the Judicial Conference of the United States.

federal government and the inevitable impact that each branch has upon the activities of the other.

The most recent example of this changing federal judicial focus is the attention that has been directed toward crime, drugs, and guns. These policy changes in substantive federal criminal and civil law are uniquely and exclusively within the powers of Congress alone. Nonetheless, the passage of legislation such as the Violent Crime Control and Law Enforcement Act of 1994[11] will no doubt have far-reaching implications for the federal judiciary. Many of these implications are matters of substantive law. In that respect, the courts will and must follow the directives of the legislation. Looked at another way, however, that legislation and others like it affect not only the substantive law but the jurisdiction of the federal courts and the flow of cases to federal court.

The effect of this ever-increasing flow of federal cases has its subtle implications for judicial independence. On a national basis, the judiciary is required to be particularly attentive to statistical caseloads in order to make certain that resources are allocated properly. Much of this numerical caseload scrutiny ignores the complexity of the cases themselves. Some refinement and greater efficiency is no doubt possible at all levels. Nonetheless, the bureaucratization of statistical analysis for appropriations, judge and case assignment, probation and pretrial services, magistrate judges, and the host of services attendant to the judicial function has an incremental, deteriorating effect on the initiative, productivity, and ingenuity of a branch of government that has largely been characterized by independence of intellectual inquiry, widely-varying practices, and remarkable efficiency. Certainly the courts, like every other governmental entity, must be accountable for their productivity. Nevertheless, some believe the tendency to nationalize and quantify the work of the federal courts is a threat to the independent work of the judicial branch.

The judicial docket has also been directly affected by case management requirements, such as the Civil Justice Reform Act of 1990.[12] Congress, in considering and passing that legislation, was responding to a legitimate public concern about delay and access to justice for civil litigants. The Judicial Conference was apparently not, however, involved in the discussions that led to the legislation, although the matter was of great importance. Initially, some members of the judiciary opposed portions of the legislation and expressed concern about erosions in the independence of trial judges to evaluate cases, to determine the course of proceedings, and to tailor schedules to match the

11. 108 Stat. 1796 (1994).
12. 18 U.S.C. §§ 471-482 (1988 & Supp. V 1993).

requirements of a particular case. That legislation clearly implicated one of the characteristics that judges perceive to be an important part of judicial independence: the ability to handle their caseloads according to judicial docketing principles.[13]

In the years since the passage of that legislation, several pilot projects and other statutory mandates have provided an array of possibilities for courts to consider, suggesting that one way of balancing Congress' policy interests and the high value that must be placed on the independence of the judiciary is for Congress to suggest incentives and possibilities to the judiciary for mutual discussion. When the issue involved is not one of substantive law, but rather goes directly to the way in which the courts do their business, the process particularly calls out for institutionalized mechanisms to bring the judiciary to the drafting table.

Variations in procedures and caseload management are healthy and strengthen the federal court system. Judges and courts are allowed to follow their preferences with appropriate constant refinement and adoption of innovations and efficiencies without the artificial structure that any national legislation would put on the system. Passage of the Speedy Trial Act[14] may have been a necessity in providing fair and rapid justice for criminal defendants.[15] Nonetheless, the judiciary and Congress need to work together closely on any similar legislation that clearly implicates the independence of judges and courts to handle their caseload.

When Congress acts to curb the discretion that judges have historically exercised, some judges have taken the view that those restrictions are also a threat to the judiciary's independence. Stated another way, when Congress dislikes the way in which judges exercise discretion independently and removes that discretion, the result may be perceived as another factor impinging the independence of the judiciary. Most curbing of judges' discretion on substantive law issues is a lawful exercise of Congress' legislative powers or of the President's executive policy.

An obvious example in that area that has been the subject of much discussion in the judiciary is the passage of the Federal Sentencing Guidelines. The United States Supreme Court set to rest suggestions of unconstitutionality in *Mistretta v. United States*,[16] concluding that separation of powers fears were "'more smoke than fire,' and do not

13. Subsequently, representatives of the Judicial Conference did work closely with members of Congress and most of the major issues in dispute were resolved.

14. 18 U.S.C. §§ 3152, 3161 (1988).

15. 18 U.S.C. §§ 3161-3174 (1988 & Supp. V 1993).

16. Mistretta v. United States, 488 U.S. 361 (1989).

compel [the Court] to invalidate Congress' considered scheme for resolving the seemingly intractable dilemma of excessive disparity in criminal sentencing."[17] Thus, a great deal of what is perceived as a threat to the independence of the judiciary in curbing discretion is in fact Congress carrying out its constitutional powers. I have great respect for the many federal judges who have opposed the Federal Sentencing Guidelines since their inception. Their opposition is based in large measure upon a legitimate concern that the best sentencing decisions are those made by the sentencing judge who knows the details of the case, the crime, and the defendant. Nonetheless, Congress and the Supreme Court have spoken on this matter. But I admit that I am not a disinterested part of that system.[18]

Curbing judicial discretion on how courts function and how judges handle their workload is much more troublesome. Just as Congress must operate in a world of political pressures, judges operate under pressures of their own, largely unseen in the political process. These pressures relate to evaluating the totality of their caseload, interacting with other judges, serving the needs of the bar and the litigants, and considering a host of other factors that cannot be generalized into national legislation. Efforts to nationalize court procedures and the speed of handling caseloads not only significantly erode the independent activity of individual judges, but nationalize the work of the judiciary when in fact the work varies significantly among districts and circuits.

I suspect that judges are concerned that, because they are away from Washington, they are unable to influence those aspects of federal decisionmaking that profoundly affect the judiciary and the judicial function. To a large extent, that concern is inherent in the constitutional scheme. The legislative branch particularly, as well as the executive branch in its agency and representational capacities, are both simply doing their constitutional jobs and thereby impacting directly the work of the federal courts. Nevertheless, the Judicial Conference and its committees serve as representatives for the judiciary on those subjects about which judges can speak appropriately. On matters relating to federal court rules, jurisdiction, caseload, and a host of other procedural and administrative matters, the judiciary can and should speak.[19] Under the Code of Conduct for United States Judges, judges, and therefore the Judicial Conference, may speak on topics related to the legal system and the administration of justice. Thus, the Judicial

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17. *Id.* at 384.

18. In 1994, I was confirmed as a member of the United States Sentencing Commission.

19. *See* Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 292-95 (1991).

Conference was actively involved in discussing the recent crime legislation with Congress and the Office of the Attorney General. The Judicial Conference expressed the concerns of the federal judiciary about federal jurisdictional questions, federal caseload, and the appropriate role of the federal courts.

In order for the judiciary to be a participant in these issues, the judiciary must take an active role only on those topics that are appropriate for judicial comment and refrain from commenting on substantive policy issues which are more appropriately left within the purview of Congress. Continuing efforts to institutionalize dialogues among the three branches of government will no doubt help relieve a sense of unease felt by judges that so much is "happening to them" in a way that suggests inequality in the process. I suspect most of this is borne of each branch carrying out its functions, but to the extent that the judiciary is excluded from debates where they should appropriately be involved, the independent status of the judiciary is in question.

Some judges have also observed that the law itself is being hurt by a general lack of understanding of the federal court system, its duties, jurisdiction, and the effects of the actions of Congress, the executive branch, and independent regulatory agencies on the work of the courts. This concern focuses on the federalization issue such as the trend toward enacting federal crime legislation in areas traditionally prosecuted in state courts. It can also be traced to concern about increasing caseloads and the impact that has on a judge's ability to carry out her responsibilities independently and satisfactorily. Many judges worry that elected officials, with the exception of members of the judiciary committees, do not have experience with the day-to-day activities of federal courts. To address this concern, the Committee on the Judicial Branch established a simple, but apparently effective, program of encouraging judges and courts to invite members of Congress into the courthouse while they are in the district. These visits are informal. Most judges have no particular agenda other than illustrating the judge's daily activities and giving the members of Congress an opportunity to ask questions and raise issues with the judges. Though simple in format, the benefit of these meetings goes a long way in providing both judges and members of Congress with valuable information about each others' areas of concern.

Finally, a discussion of factors that impinge upon the independence of individual judges would be incomplete without reference to factors internal to the judiciary. The judicial branch itself has created some of the bureaucracy that is seen as eroding the independence of individual judges. Scarce resources, pressing caseloads, and a desire for enhanced efficiency have resulted in the judiciary's reporting and accountability

requirements that necessarily impact the way judges do their work. The Judicial Conference makes determinations about staffing in judges' chambers, the size of courtrooms and courthouses, automation, and a host of other support services that directly influence the way judges work. Much of this simply cannot be avoided. Thus, in the name of acting responsibly as a whole, the judiciary itself circumscribes the independence of individual judges. Judicial councils in each circuit make decisions regarding space and facility usage, misconduct complaints, staff, and other support services that affect the judges in that circuit. Chief judges of each district court and chief circuit judges also have some decisionmaking authority that affects individual judges tangentially or directly. While much of this internal administration is inevitable in a large institution with limited resources, the judiciary itself must be careful to avoid all unnecessary impediments to judges acting independently in carrying out their judicial function. I consider it a strength of judicial independence in the institutional sense that the judiciary exercises such control from within the branch without intrusion from the other branches.

III. CONCLUSION

Some issues must always be resolved by Congress as policy and political issues. To the extent that an issue imposes on the judiciary's independence, it is essential that all three branches of government stand firm in maintaining the constitutional principle of separation of powers. Having the judiciary actively involved in an issue's debate and resolution is one way to avoid infringement on its institutional independence.

Sometimes the other branches will decide not to act, while in other instances they will decide to proceed with the policy changes. Nevertheless, the process demands mutual respect and careful attention to the constitutional role of judges. No one is arguing for preferred status. I argue simply for careful attention to the constitutional principle of the independence of the judiciary as a value that is not absolute but which deserves watchful protection.

My personal experiences confirm the need to uphold the principle of an independent judiciary. Under the auspices of the Central and East European Law Initiative sponsored by the American Bar Association and other interested foundations, I was privileged in 1992 to visit the newly-established democracy in Albania. A small group of American lawyers, law professors, and two judges went to Albania to confer with a group of highly-placed Albanian judges, scholars, and elected officials on proposed provisions for their new constitution. During one discussion session, we focused on two proposed provisions. One provision guaranteed a classic First Amendment right to freedom of assembly and

freedom of speech. The other draft provision outlawed ethnic minority political parties. Judge Patrick Higginbotham of the Fifth Circuit and I were asked what judges in our country would do if confronted with the ban on ethnic minority political parties, assuming the freedom of assembly provision were ratified. We declared that in the United States such a ban would be ruled unconstitutional as a violation of the right of free assembly. The group of Albanians looked puzzled. The next question with which we were confronted was: "What if the President doesn't like it?" Yet again we cavalierly responded "tough," blindly relying upon our explicit authority as an independent judiciary.

Then came the question to which we had no answer. After hearing these two American judges claim that the President's views would not influence the outcome of a judicial opinion, a young newly-elected official asked hesitatingly, "But what if the military came after you?" Judge Higginbotham and I looked at each other with the unspoken knowledge that we had no answer to that question. We quickly realized that we had never been forced to consider that question. In that moment, both of us experienced a new appreciation for the history and tradition of a judiciary where judges need not fret over the personal physical repercussions of a particular decision. We could not answer the Albanian official's question except with the most feeble speculation. Our questioners knew firsthand the reality of a government where there was not an independent judiciary.

We learned a lesson which will remain an intellectual sentinel guarding my understanding of the continued vitality of Montesquieu's and Hamilton's insistence upon an independent judiciary for a free people. As Hamilton said,

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the meantime to occasion dangerous innovations in the government, and serious oppressions of the minority party in the community.[20]

I find guidance in Hamilton's words. Everything we hear and read, and indeed experience, tells us that the public level of confidence in government and public servants is at a low ebb. Thus, no matter what our role is in this constitutional scheme, Hamilton's words never rang

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20. THE FEDERALIST No. 78, at 404 (Alexander Hamilton) (George W. Carey & James McClellan eds., 1990).

more true than when he pointed to the importance of any mechanism that will play a role in reversing public mistrust and the perception of political maneuvering. If carefully guarded, the constitutional protection of an independent judiciary is one such mechanism. In my view, it has never been more important to all three branches for the public to feel confident that the judiciary is independently pursuing its appropriate constitutional role. Thus, a renewed focus on the meaning of an independent judiciary is important to defining its scope, protecting its integrity, and charting a future course for the relationship between the judiciary and the two elected branches of government.