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# Congress and the Courts: Establishing a Constructive Dialogue

Orrin G. Hatch

# Congress and the Courts: Establishing a Constructive Dialogue

by Senator Orrin G. Hatch*

The topic of federal judicial independence is an amorphous one, and Professor Redish's fine contribution to this symposium provides meaningful shape and structure to this topic. I will leave it largely to the academics to debate the many theoretical questions raised by Professor Redish. At the outset, I would simply like to offer a few observations on the four categories into which Professor Redish subdivides the concept of federal judicial independence.

I agree with Professor Redish that what he labels "institutional" independence, "decisional" independence, and "counter-majoritarian" independence identify those basic respects in which the Constitution guarantees the federal courts protections from political intrusion. I must also note that none, or virtually none, of the current political debate over issues facing the federal courts relates to any of these three legitimate aspects of judicial independence. No one worries that Congress will attempt to reduce the compensation of sitting federal judges in violation of Article III, Section 1, of the Constitution.[1] Moreover, there is no reason to fear that Congress will attempt to control, or interfere with, the adjudication of specific cases or prevent the courts from addressing the constitutionality of the laws they are enforcing. In short, while these three types of independence raise a number of interesting academic issues, they are not the source of any immediate controversy over alleged threats to judicial independence.

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* Chairman, United States Senate Committee on the Judiciary. Chairman, Finance Committee Subcommittee on Taxation. Brigham Young University (B.A., 1959); University of Pittsburgh (J.D., 1962).

1. U.S. CONST. art. III, § 1.

The fourth subcategory, supposed "lawmaking" independence, is where much of the current tension between Congress and the courts is rooted. Professor Redish defines lawmaking independence as "the ability of the federal courts to create either controlling substantive legal principles or governing general rules of procedure in the course of individual adjudications."[2] I agree entirely with Professor Redish that judicial claims to lawmaking independence are misplaced and that Congress has full authority to prescribe procedural as well as substantive rules for the federal courts.[3]

I hasten to add that this does not mean that Congress should not delegate its authority to promulgate procedural rules to the courts, nor does it mean that Congress should not tap the experience and expertise of federal judges. I, for one, welcome the opportunity to engage in constructive dialogues with the judiciary. What it does mean, however, is that disagreements that judges have with Congress over policy matters involving the courts should not be transmogrified into supposed threats to judicial independence. There will undoubtedly be many instances in which Congress and the courts disagree on lawmaking policy affecting the courts. The fact of disagreement no more means that Congress is attacking judicial independence than it means that the courts are seeking to aggrandize their own power. I therefore believe that the label of "judicial independence" is an overbroad one insofar as it is used to subsume the entire range of relations between Congress and the courts.

Putting aside academic issues that genuinely involve judicial independence, I would like to offer some reflections on two legislative issues of concern to the federal judiciary: (1) federalization of traditionally state law matters, and (2) the size of the federal judiciary.

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2. Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 699 (1995).

3. I am unpersuaded, however, by Professor Redish's view that Congress may not establish procedural rules that operate in effect as an exception to a substantive rule of decision. Redish, *supra* note 2, at 715-18. If Congress may prescribe both substantive and procedural rules, how is judicial independence affected when Congress chooses one method rather than the other to achieve a desired policy? Professor Redish claims that decisional independence is undermined if Congress uses procedural means to achieve an exception to a generalized substantive rule of decision. But so long as the procedural rules are not designed to control or interfere with a particular case, decisional independence would appear not to be at stake. Indeed, Professor Redish's concern that "public policies [would] effectively be developed in disguise" indicates that it is broader concerns about open government that underlie his objections. *Id.* at 718. I do not see what is not open, or comprehensible to the general public, about a conclusive presumption (to use Professor Redish's example of *Michael H.*), but in any event the concern seems to me to have nothing to do with judicial independence.

I am well aware of the growing hostility among judges over Congress's tendency to federalize state crimes and civil causes of action. In fact, one federal judge wrote an editorial in the *New York Times* that characterized the original Senate-passed crime bill's proposals to federalize certain firearms offenses and gang offenses as "superficial" and "disingenuous."[4] As one who supported some of these legislative proposals, I have defended the Senate's decision to pass these measures. There is a growing, sincere belief among many members of Congress that federal prosecutors and federal courts should perhaps play a larger role in addressing our nation's most serious domestic problem, the growing epidemic of violent crime.

I regret that our efforts in the Senate aroused such a strong reaction among many members of the judiciary. I take very seriously the views of federal judges on matters affecting the administration of justice. In fact, the strong voice of judges turned my attention to the need to return some limited measure of flexibility in sentencing to district court judges in criminal cases involving first-time, non-violent offenders. (The final Violent Crime and Law Enforcement Act of 1994 contained a much broader version of this proposal.[5]) I firmly believe, however, that the need for the federal government to respond directly to the growing epidemic of serious violent crime that plagues the streets of our cities and towns far outweighs the interest on the part of some members of the judiciary in trying only those cases for which they believe they are uniquely qualified.

Having said this, I want to stress that I support the efforts being initiated by Chief Judge Wallace of the United States Court of Appeals for the Ninth Circuit and others to develop a set of guiding principles that will assist policymakers as they arrive at decisions on whether particular matters should be federalized. I also want to commend the Attorney General of the United States for furthering the discussion of this issue.

While it may well be that criminal trials are taking longer and judges may be spending more time managing their criminal caseloads, the facts do not appear to support claims that criminal cases are taking up a disproportionate amount of federal filings. According to the Administrative Office of the United States Courts, the criminal caseload per judge is nearly fifty percent below that of 1972.[6] The number of criminal

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4. Maryanne Trump Barry, *Don't Make a Federal Case Of It*, N.Y. TIMES, Mar. 11, 1994, at A31.

5. Pub. L. No. 103-222, 108 Stat. 1796 (1994).

6. *Criminal Trials Dominate District Courts' Workload*, THE THIRD BRANCH, Sept. 1993, at 4.

cases reached a forty-year peak in 1972. Despite all of the discussion, the number of criminal cases filed in 1992 was actually fourteen percent below the 1972 figure.[7] In fact, for the first time in ten years, the number of criminal cases filed decreased in 1993. There were fewer criminal cases in federal courts in 1993 than there were in 1972, even though the number of authorized judges is now sixty-two percent higher than in 1993.[8] These figures reveal that the impact of any federalized crime is largely dependent on the Executive Branch's willingness to corral its resources toward the investigation and prosecution of these offenses.

As Chairman of the Senate Judiciary Committee, I am prepared to work with the judiciary in an effort to delineate the respective spheres of operation of federal and state law. My goal is not to shift the focus of the federal judiciary away from those cases they are best equipped to handle. Rather, I sincerely believe that all of us in the federal government must do more to fight violent crime. The battle against crime is, in my view, a virtual prerequisite for success in other domestic policy endeavors—the economy, education, and the environment. The security of persons and property must be a priority of every level of government, including the federal level.

Of course, it is also appropriate that Congress give the federal courts the resources to handle the cases that Congress assigns them. This point brings me to a second legislative issue: the size of the federal judiciary.

Let me begin by emphasizing that increasing the number of federal judges is but one means of coping with an expanded caseload. Other alternatives might include giving the courts more law clerks, better support services, or more advanced technologies. Similarly, judges might be offered training to become more efficient at handling existing workloads. We in Congress might also be persuaded to divest the federal courts of a portion of their caseload. I do not intend to explore these or other alternatives here. I mean only to highlight that increasing the number of federal judges is not the only possible response to a mismatch between judicial resources and caseload. Nor is it obviously the most cost-effective means: according to reports, the annual total cost of a federal judgeship exceeds one million dollars.[9]

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7. *Id.*

8. *Statistics Reflect Active Year For Judiciary*, THE THIRD BRANCH, Feb. 1994, at 4.

9. Richard B. Schmitt, *Push For More Judges Gains Political Steam*, WALL ST. J., Feb. 24, 1993 at 1312; Stephen Labaton, *Clinton May Use Diversity Pledge to Remake Courts*, N.Y. TIMES, Mar. 8, 1993, at A1.

Moreover, some prominent jurists have argued that increasing the number of federal judges would create more problems than it would solve. For example, Chief Judge Newman of the United States Court of Appeals for the Second Circuit has argued that expanding the judiciary would inevitably lead to a decrease in the quality of judges, produce larger appellate courts that would be less efficient, and fragment federal case law.[10] Chief Judge Tjoflat of the United States Court of Appeals for the Eleventh Circuit has made similar arguments against what he calls "jumbo" appellate courts. In his words, "the problem for most circuits is not that they have too few judges, but that they have too many."[11] While I have not reached any firm conclusion on the merits of these arguments, it is clear that they warrant careful consideration.

In any event, even if judicial expansion were warranted at some point, it would be necessary to determine precisely how many judgeships should be added. Given the high costs associated with each additional judgeship, this is a calculation that should not be made hastily.

A fundamental problem with determining whether, and how many, additional judgeships are necessary is that the judicial system has not been operating at anything close to full capacity. There are currently 649 authorized district court judgeships and 179 authorized circuit court judgeships.[12] But as recently as January 1993, 113 of these judicial seats—more than 13.6% of the total—were vacant.[13] As ranking Republican on the Senate Judiciary Committee during the 103rd Congress, I worked together with the Clinton Administration and with Judiciary Committee Chairman Joseph R. Biden, Jr., to expedite confirmation of qualified judicial nominees. As a result of the extraordinary cooperation of Republicans on the Judiciary Committee, we were able to confirm 129 federal judges—two for the Supreme Court, nineteen for the courts of appeals, and 108 for the district courts—an all-time record for a President's first two years in office. Nonetheless, there remained at the beginning of this Congress fifty-three vacancies—a full 6.4% of the lower court seats—including vacancies in a number of positions created by the Judicial Improvements Act of 1990.[14] In addition, it will be some time before recent appointees are operating at full speed, especially since so many of the President's confirmed

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10. Jon O. Newman, *Are 1,000 Federal Judges Enough?; Yes, More Would Dilute the Quality*, N.Y. TIMES, May 17, 1993, at A17.

11. Gerald Bard Tjoflat, *More Judges, Less Justice: The Case Against Expansion of the Federal Judiciary*, A.B.A. J., July 1993, at 70.

12. *Conference Act on Courtroom Cameras*, THE THIRD BRANCH, Oct. 1994, at 2.

13. *Judicial Boxscore*, THE THIRD BRANCH, Feb. 1993, at 5.

14. Pub. L. No. 101-650, 104 Stat. 5089 (1990).

nominations were made (and were therefore confirmed) only very late in the 103rd Congress.

It is also not at all clear that recent legislation will significantly impact the caseload of the federal courts. With all respect, I must note that the record of the judicial branch in estimating the impact of legislation on the courts' caseload is mixed at best. For example, the Administrative Office of the United States Courts estimated that Congress's decision in 1992 to federalize child support obligations would result in an estimated 500 additional criminal cases per year in the federal courts. In fact, however, according to United States Sentencing Commission data, there has not been a single felony conviction for this offense.

In sum, in addressing the size of the judiciary, there are numerous serious issues that Congress must carefully address and evaluate. In considering these and other issues, I welcome the input and expertise of federal judges, and I welcome the opportunity for a constructive dialogue.