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Federal Judges and the Judicial Branch: Their Independence and Accountability

Gordon Bermant* and Russell R. Wheeler**

I. INTRODUCTION

This issue of the Mercer Law Review was stimulated in part by a concern expressed by some federal judges that federal judicial independence is at risk. For example, the Committee on the Judicial Branch of the United States Judicial Conference expressed its hope that the symposium and other efforts will “address the concerns of judges about the protections afforded to them individually and to the Judiciary as an institution.” The Committee emphasized that those concerns “extend beyond the salary and tenure guarantees of the Constitution.” To

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1. REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE JUDICIAL BRANCH 10 (1994). The activity of this committee of the Judicial Conference arose from a resolution of the judges attending the executive session of the Fourth Circuit Judicial Conference on June 25, 1992. That resolution found that the "historical limited and specialized role" of the federal courts was threatened by continued legislative federalization of crimes and civil causes that are traditionally within the ambit of state law. The judges were concerned that federal courts might be forced to "usurp the role of state courts."

2. Id.
many judges they also involve legislative and executive intervention into the operation of the judicial branch and the expansion of federal jurisdiction and workload. This paper addresses these concerns from a perspective gained by working within the federal judicial system.

Our purpose is to establish the validity or at least the plausibility of the following seven claims:

1. "Judicial independence" is an umbrella term covering several partially overlapping categories of activity within the judicial role and judicial branch organization: decisional, personal, procedural, and administrative.

2. Decisional independence is the sine qua non of the judicial function.

3. Federal judges do not now generally believe that their decisional independence is directly threatened from within or from outside of the judicial branch.

4. Some federal judges are concerned that their procedural and administrative independence are threatened by legislation and executive intervention.

5. The argument that administrative independence is a necessary condition for the exercise of decisional independence is a forceful one, but support for it comes from sources other than the text of the Constitution or the history of federal judicial administration.

6. Concern over loss of administrative and procedural independence flows from the widespread perception within the judicial branch that federal jurisdiction and workload have grown so large that the historical prestige and quality of the federal bench are at risk.

7. Efforts by the judicial branch to sustain or increase its administrative and procedural independence is enhanced by internal organization that emphasizes and displays strong within-branch accountability.

Sections II-V, taken together, attempt to establish these seven claims. Section II defines the framework within which to consider both the scope of judicial independence and the protection that society should afford its several categories. Section III deals with decisional independence, noting that if there are real threats to judges' decisional or personal independence, they would most likely arise through the operation of procedures for disciplining and removing judges. The recent history of congressional review of judicial discipline and removal, in particular some of the research conducted for and conclusions of the National Commission on Judicial Discipline & Removal, suggests that current disciplinary activities within the branch do not, nor do they appear to, invade judicial independence in the sense of biasing or coercing judicial decisions in specific cases.

Section IV concentrates on judicial assessments of branch independence and particularly on the perceived intrusiveness of the legislature
and executive into the administrative and procedural aspects of judicial branch function. Some federal judges believe that these perceived encroachments threaten the long term decisional independence of the Article III bench.

Branch independence is a relatively new idea. It does not have the same clear constitutional or historical antecedents that decisional independence has. Section V analyzes the idea of branch independence within the environment in which federal judges currently operate, attempting to discern whether the administrative and procedural pressures affecting the judges erode or otherwise detract from their decisional independence. The analysis suggests that judges see a threat to branch independence in the expansion of federal jurisdiction and caseload, with resulting deleterious impacts on the size and institutional quality of the federal courts. As viewed from within, coping with problems of ever-increasing size and workload represents the largest problem facing the federal courts. Other, more detailed complaints about intrusiveness flow from this root concern. The degree of urgency of this problem, however, is not shared by many influential actors outside of the federal judiciary. The lack of shared assumptions makes communication and problem solving harder than it would otherwise be.

The section concludes with the following conjecture: the success of the judicial branch in reaching its goal of branch independence may depend in part on the extent and publicity of judicial accountability that the branch exercises internally. Appropriately, by its nature within the constitutional framework, the judicial branch is largely insulated from the partisan and popular pressures that operate on the political branches. Congressional and executive intrusions into the administration and procedure of federal courts may be fueled by a perception that internal judicial branch systems of control and accountability are insufficient, thus making it necessary for the political branches to intervene. The unique salary and tenure provisions of the Article III bench create requirements on the members of the bench to act, and to appear to act, according to the highest standards both on and off the bench. Maximum independence of the judicial branch from administrative and procedural control by the political branches needs to be grounded on public perception that the judicial branch accepts and rigorously enforces those standards in respect to the quality of judicial decision making, procedural efficiency and safeguards, and administrative economy.

II. CATEGORIES OF INDEPENDENCE

This section presents a general framework for the discussion of judicial independence. Our analysis is not concerned primarily with the
Constitution's tenure and salary provisions; rather, we consider what, if anything, judicial independence requires in addition to secure salary and tenure. 3

In 1978, Judge J. Clifford Wallace identified four categories of judicial independence. 4 This paper borrows Judge Wallace's categories. We thus refer to: decisional independence—the judge's authority to decide law cases based solely on the law and the facts; personal independence—the judge's freedom to participate, subject to the demands of the judicial role, in the normal activities of social intercourse; procedural independence—the judicial branch's authority to devise the rules of procedure by which the judicial process operates; and administrative independence—the judicial branch's authority to administer itself as a co-equal and coordinate branch of government.

These four categories aggregate, with some overlap, into the two larger categories of independence: the independence of the individual judge and the independence of the judicial branch. Decisional and personal autonomy vest primarily in the individual judge and secondarily in the branch, while procedural and logistic autonomy vest primarily in the branch, through its rule-making powers and governance, and secondarily in the individual judge.

Decisional independence is the sine qua non of judicial independence. It is important to remember, nevertheless, that decisional independence is an instrumental, not a fundamental value. Courts do not exist to provide judges with independence. The Constitution protects judges' independence, so that they can provide justice impartially. As decisional independence exists to serve the impartial administration of justice, so do procedural and administrative independence exist to serve decisional independence.

3. Thus, the analysis does not apply precisely to federal bankruptcy and magistrate judges, or to almost all state judiciaries. Rhode Island is the only state which allows judges to serve for life during good behavior. Massachusetts and New Hampshire also grant judges life tenure during good behavior, but require them to retire at the age of 70. New Jersey gives a judge life tenure during good behavior only if he or she has served an initial 7 years term and then is reappointed by the governor. LARRY BERKSON, SCOTT BELLER & MICHELE GRIMALDI, JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 23-25 (1993).


5. Id.

6. Id.

7. Id.

8. Id.
III. DECISIONAL INDEPENDENCE

Judges must be able to render decisions in the cases before them free from both threat of coercion and susceptibility to proffered favor. This is as true of the trial judge working alone as it is of the appellate judge working in a panel or en banc. In 1871, the United States Supreme Court announced the principle, in the context of clarifying limits on judicial immunity:

It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences.  

It is the essence of good judicial process that it is uncontaminated by pressures for decision beyond those presented by the particular facts and the applicable law. The salary and tenure protections of the Constitution were intended to secure decisional independence. It is the decisional independence of federal judges that the nation relies on for the emergence of its "unlikely heroes" on the bench.  

Judicial opinions are perpetually attacked by editorial writers, national and local officials, and disgruntled litigants. The constitutional protections ease the judges' burdens in putting up with these attacks.

Still, our political and legal systems are not designed to make the independence of judges absolute. Absolute independence, for example, would require shielding judges absolutely from any susceptibility to proffered favor. Nevertheless, the fact remains that Presidents may select Supreme Court Justices and circuit judges from the ranks of sitting circuit and district judges. A judge hoping for elevation might conceivably adapt his or her behavior to please those making such appointments. The risk that a judge would let the desire to curry a President's favor contaminate the judicial process is deemed too low to override the assumed benefit to the judicial process that comes from picking judges with previous federal judicial experience.

Likewise, there are legal and institutional constraints that discourage independent judges from doing anything they please. Within the ordinary course of judicial conduct, the appellate process can rein in judges whose decisions depart from responsible legal interpretation. For cases of abuse of the judicial role, the Legislature retains the power of impeachment and trial, and the executive branch retains the power of criminal prosecution of judges. Either of the latter methods could be used to punish judges who are exercising proper judicial independence and thus make others afraid to behave with similar independence. There have been occasional charges that those methods have in fact been used to limit decisional independence. Jefferson and his followers were accused of using impeachment to curtail independence, as were, in this century, opponents of Chief Justice Warren and Justice Douglas. There has been even greater concern that the cumbersome impeachment process would lead Congress to adopt expedient alternatives.

The greatest potential threat to decisional judicial independence resides in proposed statutory procedures to remove judges from the bench—proposals that can trump the Constitution's salary and tenure protections. How real is that potential threat? The most recent results of ongoing congressional concern were the establishment and subsequent report of the National Commission on Judicial Discipline & Removal. The Commission completed its work of almost three years with a comprehensive report and voluminous supporting documents, submitted to Congress in August 1993. The Commission's report contains sixty conclusions and recommendations addressed separately to constitutional issues and each of the three branches of government. Regarding impeachment, the Commission concluded unequivocally that any statutory provision for removing Article III judges by means other than impeachment and trial (e.g., as a criminal penalty), or for diminishing the salary of a criminally convicted Article III judge, would be unconstitutional. The Commission concluded further, as a matter of policy,

12. Obviously, the judiciary participates in this process through the conduct of the trial and the imposition of a sentence upon conviction.
13. Such accusations have also been made about more recent impeachments and prosecutions. See, e.g., M. Volcansek, Judicial Impeachment (1993).
16. Id. at 147-55.
17. Id. at 20-21.
that no changes in the current constitutional scheme of impeachment should be attempted.\textsuperscript{18}

The Commission's conclusions represent the most recent stage of a long debate about the proper procedure for the disciplining of federal judges and where that authority should reside. Numerous constitutional and statutory initiatives were introduced in Congress between 1936 and 1991,\textsuperscript{19} but only two of consequence were enacted. One was the 1939 statute that established each court of appeals as a judicial council to see that "the work of the district courts shall be effectively and expeditiously transacted."\textsuperscript{20} That law thus regularized somewhat the loose disciplinary authority that circuit judges had exercised over district judges before 1939.\textsuperscript{21} The other was the 1980 Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, discussed below in more detail.\textsuperscript{22}

Many other proposals failed to pass. In some cases, the initiatives were prompted by one or more contemporary impeachment proceedings. Some proposals would have limited the terms of all federal judges, while others called for automatic removal or suspension of pay upon conviction of a felony.\textsuperscript{23} What is more important for the present Article is that many of these proposals would have established procedures within the judicial branch to undertake a greater and more formal role in the judicial discipline and removal process—a role greater and more formal than the circuit councils have ever exercised. These initiatives prompted distinguished federal judges to present strong defenses of the traditional form of judicial independence.\textsuperscript{24} Opponents of strengthened disciplinary mechanisms were faced with a difficult dilemma: if Congress had the will to work some change in discipline and removal procedures, would it be better or worse, for the protection of decisional and branch independence, to locate the mechanism of that change within the judicial

\begin{itemize}
  \item 18. Id. at 22-26.
  \item 19. Id. at 157-61.
  \item 21. § 306, 53 Stat. at 1224.
  \item 22. See supra note 14, and infra text with notes 28-39.
  \item 23. S. 52, 104th Cong., 1st Sess. (1995). Senator Thurmond has introduced this legislation to that end in the 104th Congress: A Bill to Provide that a Justice or Judge Convicted of a Felony Shall be Suspended from Office Without Pay.
\end{itemize}
The question of the limit of circuit judicial council authority over the work of an active judge had reached the Supreme Court in Chandler v. Judicial Council of the Tenth Circuit, but the Court's decision in the case did not provide guidance for councils generally.

A. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 authorizes "[a]ny person alleging that [any federal judge] has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that [such judge] is unable to discharge all the duties of office by reason of mental or physical disability," to complain in writing through the office of the clerk of the court of appeals of the circuit in which the judge sits. The Act further specifies how the chief circuit judge and, if necessary, the circuit judicial council, are to respond to the complaint. The Act empowers the judicial council to impose several actions including certification of disability, a request to the judge that he or she retire, a freeze for a specified time on the assignment of new cases to the judge, and private or public censure or reprimand; however, the council may not under any circumstance order the removal of a district or circuit judge.

One of the major tasks of the Commission was to assess the courts' activities pursuant to the 1980 Act. In support of this task, Jeffrey Barr and Thomas Willging summarized data filed by the courts with the Administrative Office of the United States Courts about the 2405 complaints brought under 28 U.S.C. § 372(c) between 1980 and 1991.

25. See, e.g., Kaufman, supra note 24, at 710-16 (arguing that the largely informal means of judicial discipline then in place within the branch should not be enhanced by more formal process; such process, a "Trojan horse," would turn judges against each other and destroy the collegiality essential to sound judicial decision making).


27. Id.


30. Id. § 372(c)(3)-(17).

31. Id. § 372(c)(6)(B)(i-vii).

Their summary table is provided in the footnote.\textsuperscript{33} Barr and Willging also reported a thorough analysis of a sample of 469 complaints drawn from the entire corpus of reported complaints.\textsuperscript{34} Barr and Willging's study "revealed no matter that can be considered to have directly interfered with or seriously threatened independent judicial decision-making,"\textsuperscript{35} though they found "two instances ... that appeared to implicate judicial independence."\textsuperscript{36} These two arose from complaints made by parties about the judges' comments during sentencing hearings.\textsuperscript{37} Barr and Willging noted that calling judges to account for such conduct implicates their independence to speak from the bench about matters pertinent to the case.\textsuperscript{38} These cases were resolved when the judges took corrective action to the satisfaction of the chief circuit judge.\textsuperscript{39}

It seems, then, that the internal disciplinary powers available to the courts under the 1980 Act, as implemented, have neither chilled decisional independence nor, so far as is reported, reduced judicial collegiality. Further, because the discipline is exercised entirely within the branch, the 1980 Act has not eroded judicial branch independence. We will return to this matter in Section IV.

There are also forms of review or oversight by appellate courts that, some might argue, trench on the decisional or personal independence of

\begin{center}
\begin{tabular}{lrr}
\textbf{Outcome} & \textbf{Number} & \textbf{Balance} \\
Complaints Filed & 2405 & 2405 \\
Withdrawn Before Chief Judge Action & 16 & 2389 \\
Unknown or Incomplete Data & 129 & 2260 \\
Dismissed by Chief Judge & 2143 & 117 \\
Corrective Action Taken & 73 & 44 \\
Action No Longer Necessary & 4 & 40 \\
Judicial Council Dismissal & 27 & 13 \\
Incomplete Data (Judicial Council Level) & 4 & 9 \\
Judge Reprimanded & 5 & 4 \\
Judge Impeached & 1 & 3 \\
Voluntary Retirement & 1 & 2 \\
Voluntary Retirement & Certification of Disability & 2 & 0 \\
\end{tabular}
\end{center}

\textsuperscript{33} Reported § 372(c) Filings and Outcomes of Complaints, All Circuits and National Courts, 1980-1991 (N=2405).

\textsuperscript{34} Id. at 52, Table 9.
\textsuperscript{35} Id. at 60-61.
\textsuperscript{36} Id. at 177.
\textsuperscript{37} Id. at 176-77.
\textsuperscript{38} Id. at 177.
\textsuperscript{39} Id. at 176-77.
district judges. Sometimes these have followed on judges making controversial comments that caused the court of appeals to act to preserve the court's reputation for impartiality in appearance as well as in fact. In another case, a judge was required by the appellate court to justify his decision in a case in a form that, he argued, was not required by federal rule. More generally, granting the extraordinary writs of mandamus or prohibition represents a departure from typical judicial review and a direct imposition on the conduct of the judge below by the reviewing court. Judicial discipline exercised through the channel of the appellate courts is in any event rare in the federal courts and has not raised widespread alarm about judicial independence among Article III judges.

In sum, when judicial independence is divided into its natural parts, decisional independence emerges naturally as the indispensable category that all agree must be vigilantly guarded for the sake of supporting impartial judges who may make decisions that create considerable controversy and intense animosity. The salary and tenure provisions of the Constitution accomplish that task for judges appointed under Article III. Article III also limits the exercise of the judicial power of the United States to judges appointed with Article III protections. Statutory developments that require some judges to exercise discipline over colleagues who have acted prejudicially to the effective and expeditious administration of the business of the courts have not reduced the decisional independence of federal judges.

IV. BRANCH INDEPENDENCE

Decisional independence is not under greater attack than heretofore; yet there remains a current of complaint among federal judges, somewhat inchoate to be sure, that their independence is being diminished. It appears that the sources of concern must be about procedural and administrative, rather than decisional or personal,


44. Id.
independence, or, more subtly, about how any such infringements will come to erode decisional independence. This section concentrates on this perception of judges that, as an institution, the judicial branch is subject to increasing control and intrusiveness by the legislature and the executive. The term “branch independence,” comprising procedural and administrative independence, identifies the locus, but not the source, of the concern.

Judicial branch independence refers to the freedom of the branch to operate according to procedural rules and administrative machinery that it fashions for itself through its own governance structures. Those structures were put in place in 1939, when Congress removed administrative authority over the federal courts from the Department of Justice and placed it in the newly created Administrative Office of the United States Courts, which was to function under the “direction and supervision” of what is now called the Judicial Conference of the United States. Attorney General Homer Cummings, who worked with the judicial leadership to design the new system, told Congress that the change boiled down to a simple proposition: “Let the judges run the judiciary.”

Decisional independence is not absolute, and branch independence is less so. The phrase often used by the Supreme Court to describe the relationship between the branches is “separateness but interdependence, autonomy but reciprocity.” There are no well-accepted arguments that the judicial branch should have the same near total independence to govern itself that individual judges must have in deciding a case or


46. Hearings before the Committee on the Judiciary, United States Senate, on S. 3212, A Bill to Establish the Administrative Office of the United States Courts, and for other Purposes, 75th Cong., 3d Sess. at 31 (1938).

47. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). "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." Id. The language has been cited in subsequent important separation of powers cases, including e.g., Mistretta v. United States, 488 U.S. 361, 381 (1989); Morrison v. Olson, 487 U.S. 654, 694 (1988); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 954 (1983); and Buckley v. Valeo, 424 U.S. 1, 121 (1976). Most recently, Chief Justice Rehnquist, in his 1994 Year-End Report on the Federal Judiciary, used Justice Jackson’s language as the basis of his discussion of relations between the judiciary and Congress. Chief Justice Rehnquist Reflects on 1994 in Year-End Report, 27 The Third Branch 1 (January, 1995) (containing the text of the Chief Justice’s ninth annual year-end report).
controversy. For example, the necessary degree of branch independence
does not require that judges have the sole or even the major role in
determining the annual appropriation of tax dollars that operate the
courts. Settled constitutional practice demonstrates that branch
independence is consistent with Congress's exercise of its authorization,
appropriation, and oversight powers, as well as its authority to regulate
judicial rule-making authority, internal disciplinary procedures, and
general administrative operations.

When Judge Wallace reviewed concerns related to judicial indepen-
dence in 1978, he concluded that matters involving only logistical or
administrative matters were not at that time "viewed as inimical to
judicial independence." Our view of the present landscape suggests
that such matters are now more salient to members of the life-tenured
bench. The following paragraphs present examples of the issues as seen
from within the federal courts.

A. Placing or Returning Functions to the Third Branch

On March 13, 1995, the Judicial Conference of the United States
received from its Committee on Long Range Planning the committee's
in the proposed plan organized under the heading of Administrative
Autonomy are undergirded by the policy position that the courts, as a co-
equal branch of government, should operate with "all reasonable
autonomy." The plan identifies three programs over which the
judiciary should exercise significantly greater control: the judicial space

48. We do not take up the question of inherent powers litigation. See Jeffrey Jackson,
Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers, 52 MD. L.

49. See Linda S. Mullenix, Judicial Power and The Rules Enabling Act, 46 MERCER L.

50. NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL, supra note 15, at 22-26
(provides the most recent review of federal judicial discipline conducted pursuant to statute).

51. Wallace, supra note 4, at 55. Judge Wallace did note one historical concern that
logistical or housekeeping matters are essential for the core judicial function, citing to the
dispute in 1932 over the continuation of the position of messenger for federal judges. Id.
at 55. For another view of what "housekeeping" means in judicial administration, see
Judith Resnik, Housekeeping: The Nature and Allocation of Work in Federal Trial Courts,

52. COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED
STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (March 1995) [hereinafter
PROPOSED PLAN]. The Conference also established a procedure for subsequent review and
debate of the proposed plan's recommendations.

53. Id. at 79.
and facilities program, which currently resides largely with the General Services Administration; the court and judicial security program, which currently rests largely with the Marshal’s Service of the Justice Department; and bankruptcy estate administration, once a third branch function but now primarily resident in the Office of the United States Trustee in the Justice Department. These recommendations arose from a context of concern that has been expressed by leading members of the federal bench for some time. In respect to the transfer of bankruptcy estate administration from the courts to the Department of Justice in 1986, for example, the then chair of the Bankruptcy Committee of the Judicial Conference testified before a Senate committee that “[E]ach branch of the government has ‘administrative functions’... which are integrally related to their performance of... duties. As a matter of policy, we should be cautious in over-involving one branch of the Government in the ‘administrative functions’ of another.” In regard to the control of courtroom construction, the chair of the Space and Facilities Committee of the Conference testified that

[as a separate branch of government, the Federal Judiciary believes that it should have a direct relationship with the Congress about space and facilities, as it does about other matters. Decisions about what courthouses should be built, when, and at what cost, should be made between the Congress and the Judiciary; the Executive Branch should not set the agenda as it does now ... I want to emphasize that our request for legislative relief is not made lightly. It is made to correct deep-rooted, systemic problems caused by the Judiciary’s total dependence on the Executive Branch—and on the Executive Branch’s processes and procedures—to provide facilities essential to the conduct of Judicial business.]

Thus, the argument in these instances is that the lack of administrative autonomy within the judiciary negatively affects the essential, integral judicial function, making judicial decisions.


B. The Budget: Size and Authority

Judges express two different but related concerns about the process of fixing the federal courts' annual appropriation. The first is whether Congress might diminish the quality of federal court decision-making by failing to increase judicial branch appropriations in proportion to increases in work load created by legislation expanding federal jurisdiction. This concern has been expressed by judges even while acknowledging generous congressional funding, and it moved into the press in a 1992 Washington Post op-ed article by former federal judge Charles Clark, who had been Chief Judge of the United States Court of Appeals for the Fifth Circuit and chair in turn of the Budget Committee and Executive Committee of the Judicial Conference. Judge Clark argued that Congressional under-funding of the judiciary's budget request would create a crisis of Constitutional proportions in the provision of criminal and civil jury trials: funds to support criminal jury trials guaranteed by the Sixth Amendment would be depleted by March, 1993, and funds to support civil jury trials guaranteed by the Seventh Amendment would vanish in August of that year. Under these conditions, judges would be forced to delay trials or deny them, in apparent violation of the Constitution, for purely administrative reasons. The judges' control of essential aspects of their courtrooms would have been overtaken by budgetary decisions.

The second concern of judges relates to the handling of the judiciary's annual request to Congress for appropriations. Each year, the federal courts forward their request to the Office of Management and Budget for inclusion, as a matter of convenience, into the overall proposed budget that the President sends to Congress in January. The President has a

57. Jackson, supra note 48, has reviewed separation of powers questions in regard to the budgets of state judiciaries.


60. Id. See also Stephen Labaton, Federal Judges Blame Money Woes for Slowdown, N.Y. TIMES, April 9, 1993, at B16. For Judge Clark's views on systemic solution to the problem of the federal court workload, see Charles Clark, Mules and Wagons—A Plea for Jurisdictional Reform, 14 MISS. COL. L. REV. 263 (1994).


62. Id. In the event, Congress provided additional funds in a supplemental appropriation.
statutory obligation to forward the judiciary's budget request to Congress without change. Autonomy in appropriations submission is a fundamental element of the branch independence achieved in 1939. Chief Judge John Parker said at the time that "it is in conflict with the division of powers which the Constitution contemplates to allow the executive department to formulate the budget for the judiciary."

There is, moreover, a long tradition that executive branch officials will not "comment" to Congress on the judiciary's request; in 1979, in fact, the then-chair of the House subcommittee with authority over the judiciary's request stated that he could not "recall that the OMB has ever exercised its right under the law to comment on the budget of the federal judiciary." More recently, the judiciary has indicated its understanding that it has a firm promise by the OMB that the Office would not use its position to comment on the judiciary's budget request.

Judges and court officials took issue in 1993 when the OMB packaged the Administration's budget-cutting goals along with the budget itself in the submission to Congress; the Administration's document contained a reference to an eighteen percent cut in the judiciary's proposed budget and thus appeared, if not to recommend a change, certainly to offer a comment. Judge Richard Arnold, chair of the Budget Committee of the Judicial Conference, stated that the event was "disturbing because it has all sorts of implications for judicial independence .... We are an independent branch of government, with a status different from ... somebody that's part of the executive establishment."

The language of the Long Range Planning Committee's proposed plan reflects these concerns. The plan calls for all responsibility for developing and presenting the courts' budget to Congress to remain "solely within the judicial branch." The text supporting the recom-

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63. 28 U.S.C. § 605 (Supp. VI 1994) (directing the Director of the Administrative Office to submit the courts' appropriations request to the Office of Management and Budget); 31 U.S.C. § 1105(b) (Supp. VI 1994) (directing the President to submit the judiciary's proposed budget to Congress "without change").

64. Hearings before the Committee on the Judiciary of the House of Representatives, on H.R. 2973, subsequently amended and reintroduced as H.R. 5999, A Bill to Provide for the Administration of the United States Courts, and for Other Purposes, 76th Cong., 1st Sess., at 20 (1939). See also the testimony by Alexander Holtzoff, then-special assistant to Attorney General Cummings. Id. at 48-49.


67. Id. at 23.

68. Proposed Plan, supra note 52, at 80.
mendation observes that "there have been and may continue to be efforts by executive branch to protect the funding of other federal programs at the expense of the courts. If the courts are to perform their constitutional mission, these efforts must be resisted." 69

C. Legislative Control of Judicial Discretion: The Sentencing Guidelines, Mandatory Minimum Sentences, and the Civil Justice Reform Act

Some judges contend that legislation that reduces discretion in judicial decision-making is a reduction in their independence. They have argued vigorously against the changes in criminal sentencing policy introduced by the 1984 Sentencing Reform Act and the sentencing guidelines issued pursuant to it, and by the increasing number of congressionally-imposed mandatory minimum sentences. 70 While some judges' objections have been leveled against the new sentencing severity, 71 others have objected that such strict control over sentencing perverts the exercise of appropriate decisional independence:

Finally—somewhat paradoxically—federal trial judges themselves retain substantial discretion over sentencing decisions, despite the presence of the guidelines, but they are now permitted to exercise this discretion only by performing elaborate gyrations within the confines of the guidelines calculations. This element of judicial discretion within a purportedly mandatory system of rules produces a game of tug of war between the bureaucracy and the bench, as the Sentencing

69. Id. at 81.
70. The sentencing guidelines are promulgated by the United States Sentencing Commission pursuant to 28 U.S.C. §§ 991-998. 28 U.S.C. §§ 991-98 (1988). Whether the rigid structure of the guidelines is perceived as an infringement of decisional or branch independence, or both, is unclear, in part because the status of the Commission in relation to "intra-branch" and "inter-branch" distinctions is ambiguated by terms of the Commission's organic statute, which creates the body as "an independent commission in the judicial branch of the United States" all of whose members are appointed by the President with advice and consent of the Senate, except that three of members must be Federal judges "selected after considering a list of six judges recommended to the President by the Judicial Conference . . . ." Id. § 991(a). Indeed, the structure and membership of the Commission caused a Constitutional challenge on separation of powers grounds; the Commission withstood the challenge. Mistretta v. United States, 488 U.S. 361 (1989).
71. Judge Spurns Rule on Sentencing; Rejects 17½-Year Term for Drugs, N.Y. TIMES, Jan. 27, 1991, Sec. 1, at 18. "A Federal judge in San Diego, J. Lawrence Irving, resigned last year, saying he could not continue to impose the harsh sentences mandated by the guidelines." Id.
Commission struggles to incorporate or repudiate the exceptions articulated by individual judges or appellate courts.  

The draft long range plan addresses this concern by encouraging Congress not to prescribe mandatory minimum sentences and the Sentencing Commission to provide judges with greater flexibility in fixing terms of punishment.  

Finally, the Civil Justice Reform Act of 1990, including the so-called civil justice expense and delay reduction plans, which the act requires each district court to develop on the advice of a bench-bar committee, is perceived by some federal judges as legislative micro-management and an undue encroachment on procedural independence. One judge commented on a draft version of the act:

I have concluded that this bill interferes with both the integrity and independence of our Article III courts. I oppose it not only because it may raise constitutional issues but also because it is bad policy . . . . Federal judges almost unanimously oppose this legislation not only because they deem it unnecessary but because they honestly believe it will increase costs and delays rather than reduce such costs and delays . . . . The tendency for the Legislative Branch to micro-manage the Judicial Branch should be resisted by those who truly see the value of an independent judiciary.  

The draft long range plan comprehends this concern when it recommends that rules regulating correct procedure "should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act." 

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73. PROPOSED PLAN, supra note 52, at 45-46.


76. Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 431-433 (1990) (statement of Judge G. Thomas Eisele, Chief Judge of the U.S. District Court for the Eastern District of Arkansas). The bill as enacted did not contain some of the provisions most offensive to federal judges. For a vigorous critique of the CJRA, see Mullenix, supra note 49. The debate about the CJRA echoes one of two decades ago over the legislative requirement that each district adopt and implement a "Speedy Trial Plan" to implement the Speedy Trial Act.

77. PROPOSED PLAN, supra note 52, at 44.
The judiciary's grievances against infringements on administrative and procedural independence have arisen within a context of expanding federal jurisdiction and, in most courts, judicial workloads. The rising workload has raised judicial concerns that the growth will affect the quality of the courts' work. The results of the Federal Judicial Center's 1992 survey of judges' opinions on planning issues provides support for this claim. For example, eighty-one percent of the Article III judges who returned the survey reported that the volume of criminal cases was either a moderate, large, or grave problem; sixty-seven percent of the responding judges held the same opinions about the volume of civil cases.\(^7\) To take another example, one of the major action items on the agenda of the Judicial Conference of the United States in 1993 was a request by the United States Court of Appeals for the Ninth Circuit that the Conference ask Congress to add ten new judgeships to the court's existing complement of twenty-eight.\(^7\) Opposition among judges on and off the Judicial Conference prompted intense and extended debate\(^8\) that culminated finally in a Conference decision to recommend that Congress create these judgeships on a temporary basis, i.e., that for each new judgeship an existing judgeship would lapse upon the death or retirement of its incumbent.\(^8\) At the same time the Conference reaffirmed its adherence to the principle that federal courts are courts of limited jurisdiction and that the Article III judiciary should be "relatively small."\(^8\)

V. "A SEPARATE WAY OF LIFE AND WORK": BRANCH INDEPENDENCE NOW AND IN THE NEAR FUTURE

How is one to assess the claim by judges that the judicial branch itself needs independence in order to protect the operation of the judicial function? Compared to the matter of decisional independence, the claim for branch independence has a much more tenuous grounding in

\(^7\) Survey, supra note 72, at 3, 25. For the volume of criminal cases, 679/627 judges; for the volume of civil cases, 557/827 judges. Id. Eighty-four percent of all Article III judges serving at the time of the survey responded to it. Id. at iii.


\(^8\) Report of the Proceedings of the Judicial Conference of the United States 51 (1993). Congress has created numerous temporary appellate judgeships over the years; all have eventually been made permanent. As of the date of this writing, Congress has not acted on the request for 10 temporary judgeships.

\(^8\) Id.
constitutional history. The founding generation proclaimed the value of life tenure and irreducible salaries for judges in both the Declaration of Independence \(^{83}\) and the Constitution, and Hamilton's defense of those provisions in Federalist 78 remains very much on point today.\(^{84}\) By contrast, there seems to have been almost no notion of branch independence in the late eighteenth century.\(^{85}\) As indicated elsewhere in this volume,\(^{86}\) the current institutional apparatus that today may be required to protect the decisional independence of federal judges was not part of any original understanding in the early days of the republic or, indeed, until well into the twentieth century. As Calabresi and Larsen put it, "the idea that the judiciary was a wholly independent and coequal department with the other two did not have deep roots in America at the time of [the Constitution's] drafting."\(^{87}\)

To the authors of the Constitution and the 1789 Judiciary Act, rather, there appeared to be very little notion that the judicial branch comprised anything more than a group of judges and the clerks of court who managed the papers filed in litigation, and no notion that judicial independence required more than the salary and tenure provisions of Article III. The First Judiciary Act established the district and circuit courts and their geographic boundaries,\(^{88}\) specified the times and places of holding court,\(^{89}\) and authorized the courts to prescribe procedural rules not inconsistent with the laws of the United States.\(^{90}\) The judicial power, to be sure, was a power separate from the legislative and executive power—Hamilton referred to "the different departments of power"\(^{91}\)—but the concept of a separate, independent judicial branch as an administrative entity was not present. The first federal judicial system had no independent administrative apparatus except for the authority of each court to appoint its own clerk.\(^{92}\)

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83. DECLARATION OF INDEPENDENCE, para. 11 (U.S. 1776). The ninth of 18 indictments of the King was that "He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." Id.
84. THE FEDERALIST No. 78 (Alexander Hamilton).
85. The ideas presented in this section have additional exposition in RUSSELL WHEELER, JUDICIAL ADMINISTRATION: ITS RELATION TO JUDICIAL INDEPENDENCE (1968).
88. Act of Sept. 24, 1789, ch. 20, §§ 2, 4, 1 Stat. 73, 76.
89. Id. §§ 3, 5.
90. Id. § 17.
91. THE FEDERALIST No. 78 (Alexander Hamilton).
92. See supra note 88, § 7.
The early federal judicial system was essentially a small group of judges, some serving part-time, administered in turn by the Treasury Department until the 1840s, then by the Interior Department, and then by the Justice Department upon its creation in 1870. Furthermore, numerous statutes of the early Congress made federal district judges, in effect, agents of the executive departments. They evidently complied, in one way or another, not only with the well-known directive to Supreme Court Justices, sitting as circuit judges, to examine Revolutionary War veterans for pension eligibility, but also with other statutes that, in effect, made federal judges hearing examiners for non-judicial officials in the nation's capital.

The authors of the court's draft long range plan note that "[f]or the federal court system to operate with the autonomy required of a co-equal branch of government, it should not be required to rely on executive

94. Act of March 3, 1849, ch. 108, § 4, 9 Stat. 395. Congress directed the Treasury Department to prescribe "the forms of keeping and rendering all public accounts whatsoever," thus making the Department responsible for what little financial administration of the courts occurred in the earlier years. Act of May 8, 1792, ch. 37, § 9, 1 Stat. 279, 281. By like token, the Department exercised responsibility for other aspects of federal administration that were later transferred to other, more appropriate agencies. Department of the Treasury, A National Historic Landmark (GPO, 1972) at 5.
97. See infra notes 98-99.
98. Act of March 23, 1792, ch. 11, 1 Stat. 244. The assignment was to Supreme Court justices sitting as circuit judges. Id. The judges refused to do so in their judicial capacity in a series of cases generally reported under the style of Hayburn's Case, 2 U.S. (2 Dall.) 408, 409 n.a (1792), although they agreed to regard the statute as appointing them pension "commissioners for the purposes mentioned in it, by official instead of personal description." 2 Dall. at 409 n.a (quoting an unidentified New York circuit court opinion).
99. See, e.g., Act of July 20, 1790, ch. 29, 1 Stat. 131 (federal judges were directed to receive and evaluate maritime exports reports of unsafe vessels); Act of May 26, 1790, ch. 12 § 1, 1 Stat. 122 (federal judges to investigate claims of remission for fines or forfeitures imposed for unintentional violation of the customs laws and report their findings to the Treasury Secretary, who would decide whether to remit the penalties); Act of April 14, 1792, ch. 24, § 1, 1 Stat. 254 (federal judges to protect wrecked ships from unwarranted seizure by salvagers); Act of March 1, 1792, ch. 8, § 2, 1 Stat. 239, 240 (federal judges to receive copies of the votes of presidential electors for safe keeping); Act of January 23, 1796, ch. 8, 1 Stat. 537 (federal judges to hold hearings of contested elections and forward their findings to Congress); Act of January 29, 1796, ch. 20, 1 Stat. 414 (federal judges to receive aliens' applications for naturalization and investigate their character, something at the time that was more than a mere ministerial act). Russell Wheeler, Extrajudicial Activities of the Early Supreme Court, 1973 S. CT. REV. 123, 131-39 (1973).
branch agencies for administrative support." As the plan recognizes, this is a mid-twentieth century concept. Those who established the system of separation of powers, including an independent judiciary, were content to allow judges and their clerks to rely on executive branch support. Moreover, they made the judges agents of the executive. The idea of a truly independent judicial branch, administratively responsible and competent, even if not administratively autonomous, emerged only in the twentieth century as a product of the Progressive Movement's effort to rationalize government and make it more efficient. To that end, wrote Roscoe Pound, Louis Brandeis, and others, in 1914, "the court should be given control of the clerical and administrative force through a chief clerk, [appointed by and] responsible to the court for the conduct of this part of the work." The notion of a separate administrative governance machinery for the courts emerged gradually from those beginnings. In 1939, Congress agreed to the judiciary's request that administration of the courts be transferred from the Department of Justice to an Administrative Office of the United States Courts, which was to operate under the supervision and direction of what is now the Judicial Conference of the United States. And even in 1939, the judges' argument for a separate administration was based both on constitutional and efficiency grounds.

That the creators of the federal judiciary fashioned the institution as they did hardly means that those late eighteenth century elements are consistent with an independent judiciary in the twenty-first century. It only means that we can find little guidance in the views of the founders for the concept and elements of administrative judicial independence as they present themselves to us today. Rather, it might be better to argue that the 20th century has completed the evolution of judicial administration protections begun with the Constitution's tenure and salary clauses, an evolution that was largely dormant through the entire nineteenth century and some of the twentieth.

Protection of branch independence, however, needs more than appeals to concepts of co-equal branches of government. The unique institutional character of the federal judiciary is eloquently captured by Senior Judge

100. PROPOSED PLAN, supra note 52, at 66.
Frank M. Coffin of the United States Court of Appeals for the First Circuit:

Drawn from the busy thoroughfares of the practice or teaching of law, or service in politics in local, state, or national government, judges become strangers in our midst. Theirs is a separate way of life and work.

... Their most elusive mission is that of safeguarding individual rights in a majoritarian society with due regard to the legitimate interests of that society.\textsuperscript{104}

Judge Coffin’s reference to “a separate way of life and work” tells us that the federal judicial role requires separation of judges from the “busy thoroughfares” on which the judges had previously traveled and generally flourished.\textsuperscript{105} The prudential restrictions placed on federal judges by the Code of Conduct, for example, are greater than those imposed on persons in business or attorneys in private practice.\textsuperscript{106} But “a separate way of life and work”\textsuperscript{107} also suggests that taking the judicial role permits and supports the same separation by providing measures of power, respect, prestige, and, backed by constitutional guarantees, lifetime financial security that other travelers on the “busy thoroughfares”\textsuperscript{108} do not receive. The demands placed on judges for complete adherence to the rule of law, for remaining above fear and favor in fact and appearance, are compensated for by relieving judges from worrying about their security and from performing many of the compromises and obediences that the rest of the population endure in the workplace. The financial and other benefits attached to the responsible exercise of the judicial power of the United States must be worth the costs that the judicial occupation inevitably extracts from its incumbents, or else the incumbents will, finally, serve the republic poorly. Judges are already subject to public criticism from those whose interests have not been served by the judges’ exercise of decisional independence. The attractiveness of the judicial occupation is further reduced when the separation that is both a cost and a benefit of the judicial role is abruptly, unilaterally, or disrespectfully abridged by acts of the other branches of government. On this view, any legislation or executive intervention that increases oversight over procedural or

\textsuperscript{104} FRANK M. COFFIN, THE WAYS OF A JUDGE 249 (1980).
\textsuperscript{105} Id.
\textsuperscript{106} See JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES (1994).
\textsuperscript{107} COFFIN, supra note 104.
\textsuperscript{108} Id.
administrative activity in the judicial branch will, when judges are already concerned about the erosion of their unique positions in American public life, further elevate judicial apprehension that the independence of the third branch is under siege—even though there are no direct attacks on the freedom of judges to decide cases strictly according to their readings of the facts and the law.

Many judges thus perceive congressional and executive branch initiatives that are, presumably, intended to enhance court efficiencies and fairness, as creating or exacerbating the judiciary's problems rather than easing them. There is, inevitably, a sense of diminished autonomy, even though there has been no direct attack on the decisional independence of individual judges in specific cases. The judiciary's largely decentralized and democratic governance structure, and its tradition of great deference among all life-appointed colleagues, require it to arrive at large decisions on the national level through painstaking consensus building; it is for this reason an inherently conservative institution. Rapid innovation worked on the judiciary from the outside is inevitably taken by some judges to be an overreaching abridgment of judicial branch autonomy.

Judicial objections to invasions of their administrative independence are not limited to actions by Congress or the Executive; they extend as well to management from within the branch by non-Article III judges and administrative employees. One consequence is that effective senior court administrators must accomplish their statutory duties without arrogating, or appearing to arrogate, powers whose exercise judges deem to be restricted to members of the life-tenured bench.

109. See Wheeler & Bermant, supra note 45, at 84-85.

110. For example, on June 16, 1994, the Judicial Council of the Second Circuit resolved, inter alia: "The existing governance structure of the federal judiciary places governance authority of the federal courts (other than the Supreme Court) in designated Article III judges of the courts of appeals and the district courts. That is a sensible placement of authority and should not be altered. It is inappropriate for non-Article III officers to be making governance decisions affecting Article III judges" (Resolution on file, the Federal Judicial Center). Judges have objected strenuously to the proposal that the national level of judicial branch governance would be organized under a "Chancellor" or "Executive judge" with significantly more administrative authority than is now held by any single administrator in the current governance structure, even though such an official would be selected from the membership of the Article III bench. See Wheeler & Bermant, supra note 45. A trenchant attack on the "bureaucratization" of federal judicial administration was presented by Judge William G. Young at a Federal Judicial Center seminar on court governance held in Washington, D.C. on March 3-4, 1994. An audio tape of Judge Young's comments is on file at the Federal Judicial Center.

111. The substantial responsibilities of the Director of the Administrative Office of the U.S. Courts, for example, are given at 28 U.S.C. §§ 602-604 (1988). The Director is the
Our final observation is more speculative. At any time, the judiciary is in a dialogue or negotiation with the other branches about the short term future of the courts: their budget, jurisdiction, size, and diverse aspects of their procedural and administrative apparatus. The political branches respond to electoral pressures by proposing and passing legislation that gets into court either as a cause of action (e.g. new federal criminal or regulatory statutes) or a procedural modification (e.g. local expense and delay reduction plans that courts adopted pursuant to the Civil Justice Reform Act) or administrative change (e.g. the disciplinary provisions of the Judicial Council Reform and Judicial Conduct and Disability Act of 1980). We conjecture, perhaps too crudely, that neither Congress nor the Executive wants to intervene in procedural and administrative judicial branch affairs, for the simple reason that there is so little political capital to be gained by the intervention. Further, members of the United States House of Representatives and the United States Senate find impeachment and trial to be substantial drains on their time, and they therefore resent them. If the judiciary is perceived as imposing on itself very high standards of accountability for official conduct, fiscal prudence, and efficient operations, then the political branches have little incentive to initiate additional procedural and administrative interventions. They may even have some incentive to divest themselves of controls, such as managing courthouse construction, that are legacies of the time that the courts had no administrative capability or autonomy.

The proposed long range plan recognizes this point when it says that the judicial branch should achieve "effective coordination and review in


112. See supra notes 28-39.
113. See supra note 15, at 1.
114. Something of this idea was captured by Tennessee Congressman Walter Chandler, a supporter of the 1939 Administrative Office Act:
Congress has created the inferior Federal courts and has the right to expect that they will function efficiently and expeditiously, but Congress thus far has failed to provide adequate administrative machinery whereby the best results will be obtained from the Federal judicial system .... [The Administrative Office Act] placed the responsibility for judicial administration where it belongs—with the judiciary—and it will be an urge to the avoidance of the evils of judicial delays that the citizens of the country know that the courts have in their power the prompt and adequate disposition of pending cases.
Congressional Record, July 17, 1939, 76th Cong., 1st Sess. at 9310.
The plan notes that the decentralized and collegial nature of court governance makes both more difficult and more necessary a coordinated review of budget requests from individual courts before they are aggregated for the single annual submission to Congress—if the courts are not to be reviewed by the Office of Management and Budget, then they should, the plan recommends, maintain a similar review function of their own.

In the 1970s, an influential Senator, concerned that the judiciary was not accepting what the Senator regarded as sufficient accountability for actions within the branch that brought negative publicity to the courts, emphasized that Congress would exercise more control over the courts through "vigorous oversight." A judicial branch that, as it were, creates no problems for the political branches is certainly in a stronger position to persuade them on at least some matters of substantial interest to judges. In other words, there are trade-offs between branch independence and individual judicial accountability that form the basis of dialogue, usually indirect or implicit, between the judiciary and their co-equal partners. The judiciary must of course approach these trade-offs with care, because some problems between the branches are inevitable and, in our system at least, appropriate.

VI. CONCLUSION

In conclusion we review briefly the seven claims that are set out in Section I.

1. "Judicial independence" is an umbrella term covering several partially overlapping categories of activity within judicial role and judicial branch organization: decisional, personal, procedural, and

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115. PROPOSED PLAN, supra note 52, at 81.
116. Id. at 67. The plan points to the relatively new Economy Subcommittee of the Judicial Conference Budget Committee as a recognition within court governance of the importance of this function.
118. Each branch "should have a will of its own." THE FEDERALIST NO. 51 (James Madison). This argument is part of a more general discussion that goes beyond the scope of this paper viz., whether branch independence is always a necessary condition for the exercise of individual decisional independence. An argument against the need for such a linkage is found in R.D. Nicholson, Judicial Independence and Accountability: Can they Co-exist? 67 AUSTL. L.J. 404, 409-10 (1993).
The utility of Judge Wallace's categories of judicial independence seems beyond dispute. The categories establish a framework within which natural distinctions emerge that would otherwise be obscured and produce confusion in communication and interpretation.

2. Decisional independence is the sine qua non of the judicial function. There is nothing controversial about this claim. Disagreement is found only among different opinions about how important other categories of judicial independence are for maintaining decisional independence.

3. Federal judges do not now generally believe that their decisional independence is directly threatened from within or from outside of the judicial branch. Neither the results of research conducted for the National Commission on Judicial Discipline & Removal nor any other source we are aware of provides facts or opinion to the effect that federal judicial decision-making in individual cases is being unduly influenced by positive or negative inducements from inside or outside of the judicial branch. Where decisional independence has been compromised by judicial misconduct, the impeachment process is deemed sufficient to correct the problem.

4. Some federal judges are concerned that their procedural and administrative independence are threatened by legislation and executive intervention. Numerous examples are presented above to support this claim. In this as in most matters, one can not expect complete consensus among the members of the life-tenured federal bench. It is important that judges within the leadership of the branch, acting in their official capacities, have made this claim.

5. The argument that administrative independence is a necessary condition for the exercise of decisional independence is a forceful one, but support for it comes from sources other than the text of the Constitution and the history of federal judicial administration. We have provided historical information to show that the administrative independence of the courts from the other branches was not a feature, in theory or fact, of the original organization of the three branches. The progressive amount of independence of the courts from the other branches was a response to the growing size and complexity of court operations and to the threat to decisional independence that many judges saw as a byproduct of external administration.

6. Concern over loss of administrative and procedural independence flows from the widespread perception within the judicial branch that federal jurisdiction and workload have grown so large that the historical prestige and quality of the federal bench are at risk. We have not and can not prove this claim beyond doubt, but the information presented above does, in our view, establish its plausibility. There is no doubt that
federal judges express concern about their workload and about congressional actions that limit judicial discretion while expanding federal jurisdiction, and that they frequently cast their concern in terms of judicial independence or loss of discretion. There is also little doubt that, as the judiciary's budget grows it will come under more congressional and executive branch scrutiny. (It is also likely, if not inevitable, that as the size of the courts grows, the amount of internal administrative machinery required to run them will increase in ways that are objectionable to judges who cherish their individual administrative autonomy highly).

7. Efforts by the judicial branch to sustain or increase its administrative and procedural independence is enhanced by internal organization that emphasizes and displays strong within-branch accountability. This claim rests on the argument that there is little congressional or executive branch incentive to micro-manage federal court administration unless the courts present political issues that the political branches cannot ignore. These issues are less likely to rise to that level of concern if the courts do, and are seen to, demonstrate that everyone within the system is subject to high standards of accountability. The judicial branch may gain in administrative and procedural independence by clear and consistent demonstration of intra-branch judicial accountability. It is imperative, however, that the judicial branch not purchase increased branch independence by exposing individual decisional independence to undue oversight from within the judiciary's governance structure. That trade-off would not be good for the judiciary or the nation.