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ARE WE TURNING JUDGES INTO POLITICIANS?

*James Michael Scheppele**

People value the notion of an independent judiciary,¹ but they also think that the judiciary should be held accountable for its decisions.² At one end of the spectrum, too much emphasis on independence creates a risk that judges will usurp power from the legislative and executive branches. However, as is discussed below, too much emphasis on accountability creates a risk that judges will not be adequately impartial. This Article questions how independent our judiciary really is, discusses some of the mechanisms limiting that independence, and considers the risk that too much accountability may reduce impartiality to undesirable levels. The discussion centers primarily on state-level courts, where independence currently occupies an inferior position on the independence / accountability scale, but also touches on some issues that courts face at the federal level.

I. INDEPENDENT YET ACCOUNTABLE

There are two primary arguments for the importance of an independent judiciary. First, an independent judiciary is better able

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1. See Am. Bar Ass'n, *Speech Ideas/Talking Points: Independence of the Judiciary*, (2002) [hereinafter ABA Survey] (“[N]early three-fourths of Americans are concerned that the impartiality of judges is compromised by their need to raise campaign money.”), at <http://www.abanet.org/publiced/lawday/talking/judiciaelections.html>.

2. See *id.* (“[C]itizens think judges are not being held accountable. Judicial discipline systems are criticized as ineffectual, and judges face increasing pressure to conform their decisions to serve the interests of particular constituencies.”).

to make impartial decisions based on the merits of individual cases. Second, the judicial branch was designed to be a separate, third branch of government, as part of the checks and balances central to our form of government. A strong example of this is *Brown v. Board of Education*,³ a politically unpopular decision at the time it was made, in which the Supreme Court declared the doctrine of "separate but equal" unconstitutional in the educational setting.

It is also important, however, that judges retain some sort of accountability. A total lack of accountability poses the risk that courts will become "super legislatures," upsetting the balance of power between themselves and the other two branches of government. Some people might articulate this idea with the term "activist judges." A completely unaccountable judiciary is as undesirable as a judiciary that is not independent.

II. DO WE REALLY HAVE AN INDEPENDENT JUDICIARY ABLE TO OPERATE IMPARTIALLY?

The judiciary arguably has very limited independence. A judiciary that is not self-sustaining may need to form alliances to operate effectively. This need to form alliances may in turn reduce its ability to achieve the ideal level of impartiality and raise accountability to undesirable levels. In addition to alliances, the following are mechanisms that may prevent the judiciary from achieving full independence and impartiality.

A. Laws

Legislatures, at both the federal and state levels, can pass laws that limit the ability of the court to decide matters that otherwise would be within the scope of judicial activity. These laws may be punitive, passed as punishment for doing something that the legislature did not like. These laws may also represent an attempt by the legislature to impose its goals and biases on the judicial process, where they do not belong. Below are examples of such laws.

The legislature can pass laws denying the courts jurisdiction to hear certain matters. At the federal level, the House of Representatives recently proposed the Pledge Protection Act of

3. 347 U.S. 483 (1954).

2003,⁴ which would stop the federal judiciary from hearing cases regarding the constitutionality of the phrase “under God” in the Pledge of Allegiance.⁵ The constitutionality of laws in this country has historically been a judicial question.⁶ Thus, even if Congress could technically limit the ability of federal courts to hear this type of case, an attempt to do so impinges on power traditionally viewed as belonging to the judiciary. This is not an isolated incident. In the past two years, the House of Representatives has “passed six bills limiting [the] jurisdiction [of the federal courts].”⁷

Also at the federal level, until recently, the legislature further limited the discretion of the courts through federal sentencing guidelines.⁸ These guidelines limited the sentence a judge could impose. Limiting available alternatives reduces a judge’s ability to recognize the need for mercy where justified. There was one notable exception to the guidelines, called a downward departure. Under this exception, a judge was allowed to impose a lesser sentence than specified in the sentencing guidelines, but had to explain the reasons for doing so. However, as discussed in section II(C) below, the executive branch further sought to limit judicial independence by monitoring, and thereby implicitly threatening to publicize, the use of downward departures.

State courts are also often subject to determinate sentencing. California’s Three Strikes Law is another legislated limitation on judicial independence. Under current law a person with two prior violent felonies, subsequently convicted of any felony, must be sentenced to a minimum of twenty-five years to life.⁹ This

4. H.R. 2028, 108 Cong., 1 Sess. (2003).

5. *Id.*

6. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

7. *Special Report with Brit Hume: They Thumbed Their Nose* (Fox News Channel television broadcast, Mar. 30, 2005) (transcript at <http://www.foxnews.com/story/0,2933,152179,00.html>).

8. In *United States v. Booker*, 125 S. Ct. 738 (2005), the Supreme Court declared certain provisions of the guidelines unconstitutional, essentially overruling their mandatory nature. Thus, even though the guidelines are not currently in full effect, they serve as an example of ways a legislature may attempt to limit the independence of the judiciary.

9. CAL. PENAL CODE §§ 667(b), 667.5, 1192.7 (West 2004).

sentencing scheme, like the federal sentencing guidelines, reduces a judge's ability to impose a lesser sentence even if the facts seem to warrant it.¹⁰

B. The Budget

“As the Judiciary's workload continues to grow, the current budget constraints are bound to affect the ability of the federal courts efficiently and effectively to dispense justice.”¹¹ If the judiciary does not receive sufficient funds to operate, can it really be an independent third branch of government? There is no more efficient means of controlling an entity than controlling its purse strings. Thus, the legislative and executive branches can use budgets to control the judicial branch. For instance, if the legislature were inclined to punish the judiciary for some reason, would a retaliatory cut in the budget of the judicial branch be a logical next step?

Budget cuts to the judiciary can also simply be an unintentional consequence of something as benign, albeit unfortunate, as a shortage of money. The judiciary is very vulnerable to budget cuts in times of recession. Legislators who must preserve their popularity with voters will be tempted to allocate scarce funds to the things that affect the average person most directly and dramatically, such as law enforcement, schools, and the health care system.¹² Average people tend not to be aware of the degree to which the judicial system serves their needs. Consequently, the judicial system cannot compete effectively in a popularity contest that influences the allocation of scarce resources.

A common legislative argument to accompany judicial budget shortages is that the judiciary should lobby more effectively to obtain

10. *Cf.* *Ewing v. California*, 538 U.S. 11 (2003) (sentencing a man who stole three golf clubs to twenty-five years to life because of two prior violent felony convictions).

11. Chief Justice William H. Rehnquist, *2004 Year-End Report on the Federal Judiciary*, 37 *THIRD BRANCH* 1 (2005), <http://www.uscourts.gov/ttb/jan05ttb/2004/index.html#crisis>.

12. Audio Archive: Panel on the Independence of the Judiciary, Access to Justice Symposium, Loyola of Los Angeles Law School, at 43:00 (Oct. 1, 2004) [hereinafter *Independence Panel*] (Wesson, panelist), at <http://events.lls.edu/cjp/schedule.html>.

its fair share of budget money.¹³ This is an untenable solution for two reasons. First, lobbying by the judiciary is unseemly. As both a coequal branch of government and an impartial arbiter of disputes, it would be inappropriate for the judiciary to solicit money.¹⁴

Second, lobbying takes money. The state funds state courts.¹⁵ Many would find it inappropriate, not to mention inefficient, to use state money to lobby the state. Legislators have suggested that judges should do what teachers and the police do—contribute to the lobbying efforts conducted on their behalf.¹⁶ This is impractical. Teachers and policemen have an incentive to contribute to their unions' lobbying efforts, as those efforts are often focused on salary and benefit increases.¹⁷ Judges do not have this same incentive because the budget money they seek is not for salary increases, but merely to pay the expenses needed to keep the courthouse doors open.¹⁸

Legislators also suggest that the courts might assure adequate funding by forming lobbying partnerships with groups (such as consumer attorneys or other groups sympathetic to the need for court funding) who can assist in lobbying the legislature.¹⁹ This suggestion is also fraught with peril for judicial independence. What happens when one of these groups becomes a litigant? Can members of the judiciary who have relied upon this ally in their lobbying efforts really be impartial when faced with concerns that they may be left without a partner the next time they need to fight budget cuts? Even if they can, what about the need for the appearance of impartiality? Who would want to be the party on the other side of such a case?²⁰

13. *Id.* at 42:30 (Wesson, panelist).

14. *Id.* at 51:30 (Taylor, J.).

15. The federal government, meanwhile, funds the federal courts.

16. Independence Panel, *supra* note 12, at 42:30 (Wesson, panelist).

17. *E.g.*, Center for Governmental Research Inc., *Did You Know . . . Who Influences State and Local Employee Pay and Benefits Policies?*, at <http://www.cgr.org/ICSG/Articles/?id=14> (last visited Aug. 1, 2005); David B. Caruso, *Teachers Win Plan For Early Retirement*, at <http://cltg.org/cltg/cltg2000/00-06-23.htm> (June 23, 2000).

18. Independence Panel, *supra* note 12, at 53:00 (Miller, J.).

19. *Id.* at 46:00 (Wesson, panelist).

20. These concerns are also reflected in the context of elections.

The reality is, however, that the judiciary is now faced with some difficult choices. In 2004 the federal judiciary eliminated 1,350 “employees other than judges and the staff who work in their chambers.”²¹ As a state-level example, the Los Angeles Superior Court has suffered approximately \$100 million in budget cuts over the last three years.²² Despite the inappropriateness and inefficiencies of lobbying by the judiciary, judicial leaders today may be compelled to lobby because of the threat that budget cuts will prevent the judicial system from serving the public.

Under these circumstances, the danger is that judges may be tempted to make decisions that will not offend legislators, the public, or their lobbying allies in order to prevent the loss of funding that may result from unpopular decisions.

C. Intimidation

Intimidation of judges may be used to reduce impartiality. At the federal level, until *United States v. Booker* declared the mandatory nature of the federal sentencing guidelines unconstitutional, the use of downward departures was a useful tool against a judge. In California, attorneys may strategically use a “CCP 170.6 challenge”²³ to put pressure on a judge.²⁴

1. A Return to Downward Departure

As noted in Section II(A), the downward departure mechanism allowed a federal judge to deviate from the federal sentencing guidelines if the judge gave a reason for it. Recently, former Attorney General John Ashcroft, and Congress, were “statistically track[ing] . . . those federal judges they believe[d] to be granting too many downward departures.”²⁵ Using downward departures too

21. Rehnquist, *supra* note 11.

22. Independence Panel, *supra* note 12, at 1:25:00 (MacLaughlin, J.).

23. CAL. CIV. PROC. CODE § 170.6 (Deering 2004).

24. Although elections may also be used as a means of intimidation, they bring up other issues as well. Thus, they are discussed in the next section.

25. Edward Lazarus, *Ashcroft's New Charging, Plea Bargaining, and Sentencing Policies*, <http://www.cnn.com/2003/LAW/10/03/findlaw.analysis.lazarus.ashcroft/index.html> (Oct. 3, 2003). With the recent decision in *United States v. Booker*, 125 S.Ct. 738 (2005), it remains to be seen if the use of downward departures will be necessary anymore. Even if they

often can give rise to the label of being “soft on crime.” Knowing that his or her downward departures were being tracked, a judge might be less inclined to use them so that they would not haunt him or her later.

The next logical question is: “So what?” Federal judges have life terms. They are not going to lose their jobs over a “soft on crime” label. This is great if a federal judge is planning to remain a federal judge in the same court for life. But as a practical matter, many judges aspire to other things. For example, a trial court judge may hope to serve on an appellate court or in another position such as United States Attorney, Attorney General or other high office. A “soft on crime” label, while it would not cost them their jobs, might cost federal judges these opportunities in other arenas. It is therefore in the best interest of these judges to avoid such a label. Being only human, it is logical to assume that judges contemplating downward departures or other sentencing issues may have been tempted to consider their self-interest as well as the equities in imposing sentences. Thus, while downward departures may have appeared to be a sufficient control on any undesirable inflexibility in the federal sentencing guidelines, their use may in practice have been restricted by judges who would have preferred to avoid the label of “soft on crime.”

2. CCP 170.6 Challenges

In California courts, each side in a case has one chance to disqualify a particular judge without having to justify the disqualification. To accomplish this, the party files an affidavit of prejudice pursuant to California Code of Civil Procedure section 170.6, stating that the judge is prejudiced against that party.²⁶ No facts are required to prove this assertion.²⁷ Consequently, the exercise of the 170.6 challenge has the potential to limit judicial independence in making impartial decisions.

The 170.6 challenge can be used to put pressure on a particular judge. In the context of criminal practice, Assistant District

are, with the appointment of new Attorney General Alberto Gonzalez it is unclear whether their use would continue to be tracked.

26. CAL. CIV. PROC. CODE § 170.6(2) (Deering 2004).

27. *Id.* § 170.6(3) (Deering 2004).

Attorneys and Deputy Public Defenders are present in the courts in large enough numbers to comprise their own constituencies. If the District Attorney's Office decides that a particular judge in a criminal court is not "law and order" enough²⁸ (perhaps the judge does not impose the death penalty very often), the District Attorney's office can intimidate that judge by filing a CCP 170.6 challenge in every case that comes before that judge.²⁹ This could cause the judge to lose his or her value to the court because he or she will not hear any cases. Since the judge will not be accomplishing the work of the court, the court might eventually be forced to transfer the judge out of a criminal assignment.³⁰ This is a very serious problem for a judge whose entire legal career has been spent in the criminal justice system.

This can create a concern for judges "that if they make a decision that is sufficiently offensive to one side or the other . . . they could in effect be taken out of their career."³¹ Judges are only human, and do not want to lose their jobs or be sent to undesired assignments. In a best-case scenario, a judge will be able to look past this concern and render an impartial decision. At worst, this concern could mean that a judge will impose the death penalty because he or she is intimidated by the District Attorney, rather than because it is appropriate. Is this level of accountability really desirable?

D. Elections

Judicial elections have become hotly contested battles.³² There are two major ways judicial elections adversely affect the

28. "Soft on Crime" would be another term for this.

29. Alternatively, the Public Defender's Office could impose a blanket 170.6 on a judge because he or she is *too* "Law and Order."

30. Independence Panel, *supra* note 12, at 20:30 (MacLaughlin, J.). Note that Judge William MacLaughlin, the Presiding Judge of the Los Angeles Superior Court, stated at the symposium that courts generally avoid taking such action, although it has happened. *Id.*

31. *Id.* at 51:30 (Taylor, J.).

32. Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. OF L.A. L.REV. 1483 (2005).

independence of the judiciary.³³ Both make it difficult for a judge to render impartial decisions. Both pose a risk to the checks and balances inherent in a three-branch form of government.

First, as with downward departures and CCP 170.6 challenges, elections can be used to intimidate judges. Fear of being defeated in the next election or fear of a recall election may tempt a judge to make decisions that will be popular at the ballot box.³⁴ Second, with elections comes the need to raise money. With the need to raise money comes the need to establish relationships with contributors who expect a quid pro quo. Thus, as with other mechanisms designed to assure that judges are accountable, the need to stand for election may reduce a judge's impartiality.

The good news about elections is that the public can boot an incompetent judge out of office. But the question remains whether the positive sides of removing a judge with relative ease are outweighed by the negative impact on impartiality and independence.

1. More Intimidation

Elections can be used to intimidate judges who are legitimately doing their jobs. Litigants who are unhappy about the outcomes of their cases sometimes decide that the best course of action is to try to replace the judge. For example, the Campaign for California Families, an anti-gay-marriage group, recently said "it would try to recall a Sacramento judge who . . . upheld California's domestic-partner laws, which gives same-sex couples a host of marriage-like

33. Since the only way a federal judge can take office is through appointment, this discussion applies solely to state court judges in states that hold judicial elections.

34. One could argue that Senate confirmation hearings for judicial nominees have become analogous to elections in this respect, as a judge's past decisions are likely to be closely scrutinized during the confirmation process. See *Stalled Bush Judicial Nominee Sent to Full Senate*, at <http://msnbc.msn.com/id/7221797/> (Mar. 17, 2005) (discussing the nomination of former Interior lawyer William Myers for the 9th U.S. Circuit Court of Appeals, and stating that his "[o]pponents contend his past writings and decisions suggest he would side with [anti-environmental] interests as a judge"). This may not be an unfair scrutiny, however, it does give lower-level judges at least some incentive to decide high profile cases according to opinion polls instead of the facts.

rights and obligations.”³⁵ This judge simply upheld a statute based on a defensible position. As a result, he may be required to raise large sums of money to fight a recall and, if unsuccessful, will lose his job. This situation demonstrates the danger that a judge may decide a case “based upon political positions and not based upon the facts, the law and the Constitution.”³⁶ It can be difficult for a judge to render an impartial decision when he or she has to wonder whether a particular decision will subject the judge to a recall.

Persons unhappy with a judge’s actions may also use the threat of an election campaign to intimidate the judge. This occurred in the 2004 judicial elections in Los Angeles. As a result of a controversy between the District Attorney’s Office and judges at the Los Angeles Superior Courthouse, the head of the Association of Deputy District Attorneys led an effort to encourage people to run against two judges in the upcoming judicial election.³⁷ Ads appeared in local newspapers attacking the judges.³⁸ Although both judges were ultimately reelected, both had to incur the costs and contend with the trouble of the election process.³⁹

As another recent example, the Florida state court judge who ordered Terry Schiavo’s feeding tubes removed has not only been targeted for impeachment,⁴⁰ but he has also been excommunicated from a church,⁴¹ and has had someone attempt to take a contract out on his life.⁴² Talk about pressure to decide in a particular way! These stories serve as a warning to judges that they might face a

35. Hudson Sangree, *Judge Who Upheld Domestic-Partner Law Targeted*, DAILY JOURNAL, Sept. 10, 2004, at 2.

36. Public Statement, Cal. Judges Ass’n, CJA Board Position Regarding Attacks Against Sacramento Superior Court Judge (Sept. 2004) (on file with author).

37. *Prosecutors Oppose Five Judges for Reelection*, North County Times, at http://www.nctimes.com/articles/2003/11/05/news/state/11_4_0320_05_29.txt (last modified Nov. 4, 2003); see also *Endorsements*, L.A. WEEKLY, Feb. 27–Mar. 4, 2004, <http://www.laweekly.com/ink/04/14/endorsements.php>.

38. See sources cited *supra* note 37.

39. Independence Panel, *supra* note 12, at 31:00 (Taylor, J.).

40. See <http://www.impeachjudgegreer.com/>.

41. *A Southern Baptist Church Excommunicates Judge*, at <http://caldreaming.dailykos.com/story/2005/3/26/21622/0373> (Mar. 26, 2005).

42. *Man Arrested in Alleged Schiavo Case Murder Plot*, at <http://www.cnn.com/2005/US/03/25/arrest.schiavo/index.html> (Mar. 25, 2005).

recall, impeachment, or worse if they displease the wrong person or group.

2. The Need to Raise Money

Judicial campaigns have been getting “noisier, nastier, and costlier”⁴³ in recent years. For example:

There was a 61 percent increase in total money raised by state supreme court candidates since 1998, according to a recent study.

According to “The New Politics of Judicial Elections,” the amount of money raised for supreme court candidates doubled between 1994 and 2000.

In Alabama, candidates for the supreme court raised \$13 million—an average of \$1.2 million each.⁴⁴

These statistics make it clear that many judges must raise large amounts of money to ensure a fair shot at retaining their seats on the bench.

One “nastier” judicial election campaign commercial resorted to showing miniaturized figures of the judges running for office, dancing foolishly in horsehair wigs and robes in the pocket of an insurance executive.⁴⁵ Another commercial depicted the female judge seeking reelection as a blindfolded figure holding the scales of justice. In the commercial, she raises the blindfold to peek out at insurance company contributors placing currency on the scales of justice she is holding.⁴⁶ This level of discourse cannot help but intimidate its targets, in addition to compelling targets to raise money to counter these attacks.

Putting judges in the position of having to raise substantial amounts of money to finance election campaigns, and to withstand humiliating commercial depictions of themselves, creates the risk of bias in favor of contributors and against opposing parties. It also

43. See ABA Survey, *supra* note 1 (quoting Roy Schotland, Comment, 61 LAW & CONTEMP. PROBS. 149, 150 (1988)).

44. *Id.*

45. *Markman, Taylor and Young* (Michigan candidate television commercial, 2000 election).

46. *Resnick Is Justice for Sale* (Ohio: Citizens for a Strong Ohio television commercial, 2000 election).

creates an appearance of impropriety because it is common sense that contributors would not give money unless they reasonably believed they could gain an advantage thereby.⁴⁷ What happens when a contributor to a judge's campaign comes before that judge in court?

By contributing to a judge's campaign, persons and entities are essentially "lobbying" the judiciary in a fashion similar to lobbying the legislature. This lobbying brings with it the possibility that a judge will decide a case based on who contributed to his or her last campaign, rather than on the merits. Once again, the need to raise money may reduce the judge's ability to render an impartial decision. Furthermore, it subjects the judiciary to similar political pressures felt by the legislature and executive, thereby hindering the judiciary's ability to serve as an independent check on the power of those two branches.

III. CONCLUSION

The mechanisms that have been fashioned to promote the desirable end of judicial accountability have the undesired side effect of making judges dependent. This dependence requires judges, and even whole courts, to fashion alliances and to avoid antagonizing various interest groups. Furthermore, making judges too accountable for defensible decisions in their judicial capacity not only hinders their ability to render impartial decisions, especially when the outcome may be politically unpopular (think *Brown v. Board of Education*), but it also raises issues concerning the checks and balances inherent in our three-branch government. When considering how much accountability to impose on the judiciary, we need to decide whether we want politicians or independent thinkers dispensing justice.

47. This "advantage" can manifest itself in one of two ways: (1) the contributor hopes to influence a judge's decision-making in the future; or (2) the contributor already knows a judge's tendencies and hopes to take advantage by inserting the user-friendly judge into office.