



Judicial Independence: Background

*There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. –U.S. Supreme Court Justice Felix Frankfurter, *United States v. United Mine Workers* (1947)*

Judicial independence means that judges are independent from political pressures and influences when they make their decisions. An independent judiciary is essential to maintaining the rule of law. Judges should not be pressured by a political party, a private interest, or popular opinion when they determine what the law means or requires. Keeping the judiciary independent of these influences ensures that everyone has a fair chance to make their case in court and that judges will be impartial in making their decisions. Judges also must explain their decisions in public written opinions, and their decisions can be appealed to a higher court for review. These elements of judicial decision-making ensure that judges remain accountable to the rule of law.

Origins of Judicial Independence

Judicial independence is protected by the U.S. Constitution because the framers of American government had firsthand experience with being a persecuted minority in courts they felt were unfairly controlled by the ruling party. Courts were viewed as instruments of oppression. Juries could be locked up until they reached the “right” decision. Judges were viewed as puppets of the king. In fact, the Declaration of Independence criticized King George III for making “judges dependent upon his will alone for the tenure of their offices and the amount of payment for their salaries.”

This experience convinced the framers that America needed independent courts to protect them from overreaching government powers. Judges had to be servants of law and the Constitution, not of political bosses, the media, or special interest groups. In the Constitution, the framers protected the independence of the federal judiciary by:

- Specifying that federal judges hold their office “during good behavior.” This meant that judicial appointments could be for life.
- Specifying that their salaries cannot be diminished during their tenure. This prevents Congress from retaliating against federal judges by cutting their pay.
- Making the removal of federal judges difficult—only on “impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.”

Judicial independence assures that cases can be decided on their merits. Decisions can be based on what is right and just under the law, not what is popular at the moment. Throughout American history, the independence of the judiciary has protected individual liberties. Examples include extending voting rights, ending segregation, and protecting the average citizen from unwarranted government intrusion.

Elements of Judicial Independence

To fully understand the concept of judicial independence, it is important to examine the factors that influence its existence within a culture. These are applicable to any federal or state government as indicators of an independent judiciary. Factors include:

- **Method of selecting judges.** All methods of judicial selection are political to some extent, and each method favors some interests over others, but some methods encourage partisanship more than others. Some sort of merit selection of judges, based on objective assessments of qualifications is probably the best compromise. In the United States, some judges are elected, while others are appointed. All federal judges, however, are appointed, following a bipartisan nomination and confirmation process.
- **Tenure of office.** Federal judges have lifetime terms. Long terms of office, adequate guarantees against a reduction in pay, and stringent safeguards against retaliatory removal are essential for an independent judiciary.
- **Removal for official misconduct.** Procedures for removal might conflict with the last point, there must be some due process by which to remove or discipline judges for misconduct such as bribery, corruption, professional incompetence, or liability. In the United States, federal judges may be impeached. Many state governments have impeachment or other disciplinary protocols in place for judges.
- **Adequate resources.** Courts must have staff, facilities, and resources to accomplish their duties. This factor, in particular, has received media attention in recent years as both federal and state courts struggle to operate under strapped budgets.
- **Institutional rules that protect the integrity of judicial decisions.** Judges must operate independently of other judges, and their decisions respected by other judges.
- **Legal and political culture that is supportive of the rule of law.** All of the previous elements of an independent judiciary may be inadequate unless there is broad cultural agreement to abide by the rules of the system—i.e. respect the judiciary and its protocols—*no matter what*. This culture is an important component of the American system of law.

Moments in Judicial Independence History

Marbury v. Madison (1803)—This landmark Supreme Court case established the power of judicial review for the Supreme Court and provided the high court with the means to maintaining a co-equal status with the president and Congress. Indeed, with the stroke of his pen, Chief Justice John Marshall elevated what Alexander Hamilton had labeled “the least dangerous branch” to the role of final arbiter in the American constitutional system. “It is emphatically the

province and duty of the judicial department,” he wrote, “to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with one another, the courts must decide on the operation of each.”

Impeachment trial of Justice Samuel Chase (1805)—Samuel Chase was an outspoken Federalist justice on the Supreme Court. He was under attack from antifederalist supporters of Thomas Jefferson for allegations of judicial misconduct. He was put on trial by the Senate, per constitutional provisions. Ultimately, the Senate acquitted Chase, setting the precedent that a federal judge may not be removed from office on the basis of judicial acts. In more than 200 years, only 13 attempts have been made to formally impeach federal judges, and only 7 judges have been convicted and removed from office. No other Supreme Court justice, besides Chase, has ever been subject to such a trial.

Ex parte McCardle (1869)—After the Civil War, the so-called Radical Republicans, who controlled Congress, passed a series of laws, the Reconstruction Acts, which divided the American South into districts that were administered by military governors and commissions. The commissions replaced the jury trial for individuals charged with any of a certain number of offenses deemed detrimental to the Reconstruction government. When William McCardle, a Mississippi newspaper editor, found himself arrested and held for trial by a military tribunal, he sought habeas corpus in the federal court in Mississippi. The federal court in Mississippi ruled against McCardle, but he appealed to the Supreme Court. After the case was argued before the Court, and fearing that a majority of justices would use the case as a vehicle for striking down the Reconstruction Acts, Congress quickly repealed the law that provided the Court’s jurisdiction in the case. The Court held the case until the next term, heard arguments on the constitutionality of the repeal legislation, upheld it, then dismissed McCardle’s case for lack of jurisdiction. Justice William Renquist later concluded, “It may be that the Court’s apparent decision to live to fight another day was the best conceivable under the circumstances.”

Supreme Court Reorganization (1937)—After a majority of the “nine old men” had invalidated 13 pieces of New Deal legislation, President Roosevelt sent a message to Congress recommending a reorganization of the federal judiciary, which included a provision that would allow him to appoint one justice to the Supreme Court for every current member over 70 years of age up to a total of 15 justices. He argued that the advanced age of six of the current justices was a detriment to their expeditious handling of cases. In response to Roosevelt’s “court packing” plan, Chief Justice Charles Evans Hughes provided statistics to the Senate Judiciary Committee indicating that the Court was completely current with its workload. That, combined with the Court’s support of two pieces of legislation, and the announced retirement of justice Willis Van Devanter, and public opinion that never really supported the reorganization, led to the plan’s demise. The Supreme Court emerged with its independence intact.

Judicial Independence in State Courts

According to the American Judicature Society, there are over 30,000 judges across the individual states of the United States. A key factor in determining judicial independence in American states is the judicial selection process and judicial terms, which both can vary from state to state. Generally, the longer the term of office and less political the selection process, the more

independent the state judiciary. Five modes are typically used to select state court judges: appointment by the governor, election by the state legislature, partisan election, nonpartisan selection, and merit selection (often via an appointed commission.) The most common modes of judicial selection among states is merit selection—21 states, nonpartisan election—18 states, and partisan election—11 states.

Judicial terms also vary across states. Only three states follow the federal practice of guaranteeing tenure “during good behavior,” or for life. In 42 states, the term for judges on the state’s highest court is 10 years or less. Even in states that have adopted merit selection, state judges serve for set terms in office and must periodically seek another term. In these states, as well as in some that have adopted nonpartisan elections, judges run unopposed in retention elections, in which voters approve or disapprove of their performance in office.

Disciplining Judges

At any level of government, judges face stiff discipline for serious misconduct, on or off the bench. Federal judges can face impeachment, which leads to removal from the bench upon conviction, or lesser sanctions such as reprimands and removal of work.

Every state has a commission with authority to investigate complaints that a judge violated a state’s ethical standards. Everyday citizens are often members of these commissions, ensuring representation by the public. Complaints about judges often include serious misconduct or mental incapacity. The commission can recommend removal of judges from office, public or private reprimand, censure, and suspension, as well as involuntary retirement. State judges may also face impeachment or recall, a summons to go before voters in an election to determine whether the judge should be removed from office.

The Third Branch of Government

Courts do not operate in a vacuum, no matter their independence. The decisions of all lower courts may be reviewed by higher courts. And the court system as a whole is influenced by the other branches of government.

The executive branch influences the judicial branch by nominating judges to the federal bench; governors nominate judges in many states. If a court finds an enforcement procedure faulty, the executive branch can cure the problem by changing the procedure. Likewise, the executive branch can issue new regulations to deal with difficulties that courts have found.

Congress and the state legislatures influence the judicial branch through legislation in a variety of ways. The legislative branch might make laws specifying the jurisdiction of the courts, the number of judges on particular courts, or appropriations to the courts. The legislative branch is also responsible for approving the executive branch’s nominees to the federal bench. Finally, the legislative branch has the power to change or clarify laws that the courts have deemed inappropriate or unconstitutional.