AN ESSAY ON INDEPENDENCE OF THE JUDICIARY: INDEPENDENCE FROM WHAT AND WHY

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Probably no topic is more frequently raised at judicial conferences throughout the world than independence of the judiciary, and properly so. But why is judicial independence important? Independence of the judiciary is not itself an important governance value. A judge may believe in the doctrine due to status or protection of profession. But others will embrace the principle only when its reality leads to ensuring fundamental interests. Thus, judicial independence is, in the main, significant to the extent it provides the citizens with certain values they might not enjoy but for independence of the judiciary.

Thus, to justify judicial independence, there must be an emphasis on how the doctrine protects values held dear by society. For example, it has been asserted that neither justice nor human rights guaranteed by the Constitution become secure for the people without a free and independent judiciary. This we need to examine. Our investigation is aided by understanding that judicial independence is an evolving doctrine.[1] Societal need appears to be the moving force in development of the doctrine as part of governance.[2]

I.

Judicial independence starts with an established judicial review, which allows the judiciary the opportunity to protect fundamental interests. That is the essential foundation. Unfortunately, however, other factors that restrain the achievement of justice are not solvable through the structuring of the judiciary itself. It is one thing to determine what is an efficient, effective, and desirable means of judicial review, and quite another to put it into practice. Political considerations often impose limitations on the substantive

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1. J. Clifford Wallace, *Judicial Administration in a System of Independents: A Tribe with Only Chiefs*, 1978 BYU L. REV. 39, 40–43.

2. *See id.*

decisions of the courts. The goal of an independent judiciary is often just that—a goal with little reality.

Judicial independence is most important in those cases where courts are called upon to resolve disputes between individuals and the state or between different branches of government. Judicial independence, at its basis, means that judges are free to rule against the government, should the law so dictate, without fear of reprisal. The threat of reprisal may also arise in nearly any case if political figures are corruptible to the extent that they will attempt to intervene on behalf of powerful members of their constituencies. Thus, the independence of the judiciary from political pressures is an essential aspect of justice at any level.

The movement toward independence must begin by focusing on the judiciary itself. Although judicial appointments are often made by political figures, the independence of judges after appointment to the bench should be protected to ensure that the rights of litigants are not compromised by illegitimate or illegal considerations.

Whether protection from reprisal is achieved through life tenure, or some other form of protection that insulates against arbitrary removal or transfer from office, depends upon both the level of trust placed in those entrusted with judicial power and the level of protection they require to perform their duties independently.

In the United States, this issue was confronted in the debate over adoption of the Constitution. In *The Federalist Papers* No. 78, Alexander Hamilton argued that the standard of judicial tenure "*during good behavior*" was the most effective bulwark against encroachment by the legislative branch, providing for "steady, upright, and impartial administration of the laws."[3] He stated that life tenure for judges was not to be feared because the judiciary comprises the "least dangerous" branch.[4] Hamilton argued that life tenure was also critical to securing highly qualified individuals for judgeships, since few would leave lucrative law practices for the bench if they knew their tenure there would be limited.[5] Hamilton was convinced that the more trust to be put in members of the judiciary, the more important it was to assure them tenure during good behavior; indeed, he was of the opinion that the pool of potential

3. THE FEDERALIST NO. 78, at 226–27 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed., Johns Hopkins Univ. Press 1981).

4. *Id.* at 227.

5. *Id.* at 233.

judges is small because they must be both qualified for the position and of sufficient integrity to be worthy of the trust placed in them.[6]

The method by which federal judges in the United States are selected, appointment by the President and confirmation by the Senate, is an attempt to free federal judges from the political pressures associated with elections. Elections can be very expensive to win, and elected judges may well be viewed by the public as being beholden to their supporters. The appointment and confirmation process, combined with the constitutional guarantee of tenure during good behavior and a salary that will not be decreased, is the Constitution's effort both to ensure the independence of the federal judiciary in the face of political pressures, and to assure the people that their disputes will be fairly settled by independent and unbiased arbiters.

Further, when political interference is left unaddressed, it is likely to impinge upon the ability of the judiciary to arrive at justice under the law in a confident and convincing manner. The existence of any unchecked political pressure, however infrequently used, casts a long shadow over the independence of the courts, causing them to be aware of political considerations extraneous to the cases at hand. This interference with the process of justice is insidious, and only the strongest of judges will be able to act unconcerned about its possible use.

In this regard, two examples come to mind. A former Chief Justice of an Asian supreme court advised me that he learned of his removal from the court by reading about it in the local newspaper. When heads of government have this authority, independence of the judiciary is a hollow claim. Another vivid example of the extreme to which this may lead occurred in the Philippines. I was present in Manila when the Minister of Justice to President Ferdinand Marcos argued that justice for the people occurs when the judiciary follows the executive. Certainly, this cannot be the case. Indeed, in *The Federalist Papers*, Hamilton argued precisely the converse, stating:

> "[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . .[7]

6. *Id.*

7. *Id.* at 227–28 (quoting M. DE SECONDANT, BARON DE MONTESQUIEU, 1 THE SPIRIT OF LAWS 165 (Thomas Nugent trans., Edinburgh 1772) (1748)); *see also* Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in*

If the people are to have any realistic check on a powerful executive short of armed conflict, it must be by an independent judiciary authorized and able to decide cases contrary to the position of the government when required by law. Thus, the ability of courts to perform their task of administering justice may well lie initially in the extent to which the concept of judicial review is developed and accepted. Courts are often called upon to decide issues of exceptional importance involving the state or conflicts between branches of government. In order to resolve these disputes effectively, it is necessary that courts establish a recognized means of reviewing decisions of political sensitivity and significance. The ability of citizens to bring a lawsuit requesting review of governmental decisions is essential to judicial review. As Hamilton intimated, the existence of judicial review does not entail a conclusion that the judiciary is superior to either of the other branches.[8] Rather, judicial review simply permits:

> the power of the people [to be] superior to both [the legislature and the judiciary]; and . . . where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.[9]

II.

This leads to an even more fundamental question. Why should the people trust the judges to check the executive? What is so significant about donning the robe that necessarily proves that judges should trump the views of the people's elected leaders? These leaders can read the Constitution. They are elected by the people, not

Judicial Reform, 18 WIS. INT'L L.J. 353, 353 (2000) ("[C]ourts that are used by political regimes to further partisan or even private ends cannot be thought of as institutions of good governance and as such are illegitimate.").

8. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both . . . .

THE FEDERALIST NO. 78, *supra* note 3, at 229. R

9. *Id.*

appointed. These questions lead to a basic truth: Courts must create trust through judicial activity that warrants trust.

When judicial review is established, the time may come when the possibility of averting a governmental crisis will lie in the hands of the judiciary. Will the government follow a judicial decision that is inconsistent with its position? Without first establishing a history of fairly and judiciously solving similar questions, courts are unlikely to have the political trust necessary to resolve important issues in crisis situations.

One example of this point is illustrated by the constitutional crisis in one country, when, after the President's death, his edict outlawing political parties was challenged by representatives of those not in power. Obviously, the lack of political parties was to the benefit of the then-current government. The Prime Minister deferred to the courts. The supreme court held that the edict was unconstitutional. The result was an election with a change in government. That decision could not have been made, and perhaps would not have been followed, but for the development, at that time, of an accepted independent judiciary.

Similarly, it is incumbent upon us to understand the predicament of judges who do not enjoy independence from the other branches of government. While judges in many countries may rule against the government's position without fear of reprisal, judges in other countries do not share that autonomy. Indeed, we must not cavalierly presume that judicial independence comes at no cost. One author recounts the surprise of newly democratic Albania's legal community upon learning that American judges need not fear retaliation from the President or the military in response to their rulings.[10] In too many countries, members of the judiciary are threatened with political, financial, and even physical harm if they do not follow the directives of powerful political and social groups. For example, between 1982 and 1987, fifty-seven Colombian judges were murdered.[11]

But the threat to judicial independence is not always governmental. The judiciary needs to be concerned about independence not only from the other branches of government, but also from ille-

10. Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 MERCER L. REV. 645, 657–58 (1995).

11. Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 7 (1987).

gitimate sources of power.[12] Judicial independence from other branches of government is crucial, but it is meaningless if judges are instead subjected to other improper influences. Consequently, governments seeking to establish an independent, autonomous judiciary having the respect and trust of the people must take steps to secure the independence of the judiciary from the influence of powerful non-government groups that have an incentive to influence the outcome of adjudications.

When the judiciary is either corrupt or subject to influence or intimidation by corrupt officials, groups, or individuals, the citizens will not trust it, and they will lack confidence that resort to judicial process will achieve a just resolution of their conflicts.[13] Ensuring the safety and security of judges, along with taking steps to insulate them from financial pressures, is critical to the realization of a truly independent and autonomous judiciary, which is, in turn, necessary for the people to legitimate the judiciary as a respected dispute-resolving body.

III.

I point out one final limitation on the ability of courts to perform independently. The best intentions for the establishment of an independent and effective system of judicial review are meaningless without a guaranteed source of funding to carry out those tasks.

A.

The legislature's control over the provision of financial resources to the judiciary prevents the judiciary from being completely independent from the rest of the government.[14] Essentially all of the costs of running the federal judiciary, including payment of employee salaries, payment of jurors, and expenditures for the purchase of supplies, depend upon legislative appropriation of funds.[15] Because budgetary decisions are usually made by the political branches of government, it is essential that the budget not be used as a means to undermine the independence of the judiciary. It has been suggested that the political branches' financial influence over the judiciary could be reduced by making judicial budg-

12. *See* Dakolias & Thachuk, *supra* note 7, at 358–60, 362 (describing how judges in many countries are subject to extortion, bribery, and intimidation by criminal organizations). R

13. *See id.* at 364–65.

14. *Id.* at 363.

15. L. Ralph Mecham, *Introduction to* Mercer Law Review *Symposium on Federal Judicial Independence*, 46 MERCER L. REV. 637, 640 (1995).

ets some "fixed percentage[ ] of the state budget."[16] This certainly would provide at least a partial solution to the political branches' ability to exert influence over the judiciary.

In a recent comparison of the judicial systems of Japan and China, one of the main factors identified as an obstacle to the achievement of judicial independence in China, as compared to Japan, where such independence has been realized, was the Chinese judiciary's financial dependence on the other branches of government.[17] In Japan, the budget of the court system is independent.[18] The President of the supreme court submits a budget estimate to the cabinet, which then incorporates the report into the state budget, assuring the courts' financial independence.[19] Because Chinese judges remain dependent for financing on administrative organizations, there is no similar financial independence in China.[20]

Although some revenue could be generated by the courts themselves through the charging of fees, this approach is unlikely to raise sufficient funds to operate an entire court system. In addition, such fees create significant barriers to access to the courts by the poor, thereby favoring some members of society over others. Such an approach would deny access to, and the benefits of, justice to those people who often need it most, and therefore seems unlikely to inspire the people to demand such reforms, even if so doing would hasten the arrival of an independent judiciary. The people must desire judicial independence because of the benefits that will enure to them, so reforms designed to secure such independence must be implemented with an eye to improving the quality and quantity of justice to a country's citizens.

B.

Next, to the extent that funds have been earmarked for the judiciary, the most efficient use of those funds is of utmost importance. Often, a judicial structure that has been fashioned after a particular model also incorporates the inefficiencies of that system.

16. Dakolias & Thachuk, *supra* note 7, at 363 (citing Rosenn, *supra* note 11, at 16–17 (describing how some Latin American constitutions reduce the political branches' influence over the judiciary by setting judicial budgets as fixed percentages of the total national budgets)). R

17. Laifan Lin, *Judicial Independence in Japan: A Re-Investigation for China*, 13 COLUM. J. ASIAN L. 185, 191, 198 (1999).

18. *Id.* at 191.

19. *Id.*

20. *Id.* at 198.

A close examination of the needs of each judicial system may unearth significant redundancies or unnecessary elements. These should be eliminated. Significant savings of time and resources may also be obtained by examining the flow of cases through the different levels of the court system.

If the courts can find ways to make their current resources go further, they will take one step toward the goal of greater fiscal independence. There is no one more qualified than the judges who work within the system to seek out inefficiencies, to restructure case flow, and thereby to extract a greater amount of justice from the same amount of funding.

A number of methods have been adopted in the United States to utilize more efficiently the resources allocated to the judicial branch. For example, more effective use of the judicial system has been fostered through case management, mediation, and automation, with training provided to achieve maximum implementation. Many courts are allowed to keep savings below budget for other necessary items not covered in the budget. In the federal system, a Budget Committee of the Judicial Conference of the United States maintains a watchful eye on expenditure requests, aided by an Economy Sub-Committee, the function of which is to reduce requests presently and in the future.

C.

The problems of low salaries and lack of stature of judges in many countries also contribute to a lack of public confidence in the judiciary. The problem of financial influence over judges has long been recognized, as evidenced by Hamilton's argument in *The Federalist Papers* No. 79 that "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*."[21] I was recently in two African countries where judges at the lowest level are paid insufficient wages to feed their families. All are aware that these judges supplement their income through bribes. Justice for sale is the antithesis of judicial independence. The wages of such judges must be increased and judges must be required by enforceable means to conform to ethical conduct.

But this will not solve our basic problem. In the end, judicial advocates need to rely on their powers of persuasion with the politi-

21. THE FEDERALIST NO. 79, at 234 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed., Johns Hopkins Univ. Press 1981) (1961).

cal branches to demonstrate the importance of funding for the courts. Elected officials must be convinced that, in the long run, a strong and independent judiciary is worth the investment of resources necessary to achieve it. Whether one views the benefits in terms of protection of individual rights or the availability of a neutral decision making forum for settling disputes, the social and economic benefits are substantial. This fact has compelled most nations to establish some sort of judicial system.

If, however, the political branches choke the judiciary's voice through budget cuts, its independence will be threatened. In that instance, judges must be prepared to make their case, in some way, to the citizens. After all, it is the citizens who lose if the judiciary becomes a sycophant to the executive branch.

D.

This is not only an issue dealing with the appropriation of sufficient funds from the legislature, but the choice of how the funds are administered. Political interference with the judiciary by the executive is one of the greatest threats to a liberated society. In order to avoid interference from the executive, the judiciary must have its own internal control and administration procedures. This becomes a danger if judicial administration is controlled by the executive through a minister of justice or attorney general. When judges are not internally accountable for their administrative and budget decisions, pressure from the political branches is invited.[22]

IV.

It has often been said that "everyone talks about the weather, but no one does anything about it." Perhaps we, too, are sometimes guilty of the same in relation to judicial independence. I cite, therefore, an example of some judicial leaders who did something about it.

In 1991, the Conference of Chief Justices of Asia and the Pacific began work on stating the principles that are the foundation of independence. Work continued at the 1993 and 1995 Conferences. Then, at the 1997 Conference in Beijing, China, the "Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region" was adopted. It now has been signed by thirty-two chief justices throughout the Asia-Pacific region. Those countries represent about two-thirds of the world's population. The subtopic titles of the statement show the breadth of the document: In-

22. Dakolias & Thachuk, *supra* note 7, at 379. R

dependence of the Judiciary, Objectives of the Judiciary, Appointment of Judges, Tenure, Judicial Conditions, Jurisdiction, Judicial Administration, Relationship with the Executive, Resources, and Emergency.

This remarkable effort raises a question for each judge: In addition to talking about judicial independence, what are we doing about it?

V.

Over two hundred years ago, when the adoption of the United States Constitution was being debated, Alexander Hamilton made an important observation. In *The Federalist Paper* No. 78, he argued that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution."[23] But Hamilton realized that the maintenance of its independence is much more difficult for the judiciary than for the other branches. He referred to courts as "the least dangerous"[24] branch and demonstrated that with the following analysis:

> The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . . .[25]

It is the influence of the judiciary's judgments that ensures independence. If Hamilton is correct, and I think he is, how well a judiciary functions as an objective, non-corrupt, fair, and rational decision-making institution will determine the extent of judicial independence.

If a country's citizens do not believe that the judiciary is independent, but rather perceive it to be influenced by other branches of government or non-government entities, they will not resort to it for dispute resolution. Instead, they will attempt to circumvent the legal process and resort to corruption, bribery, and intimidation. If a government knows that the people want an independent judiciary, it is far more likely that the government will support it. The

23. THE FEDERALIST NO. 78, *supra* note 3, at 228. R
24. *Id.* at 227.
25. *Id.*

people will not want an independent judiciary unless they believe that judicial independence will benefit them by increasing their access to justice.

The first way to promote citizens' desire for an independent judiciary is to create an atmosphere in which the public has confidence in the integrity of judges' decisions. If this is not done, citizens will tolerate more illegality and decreasingly respect their country's laws as they are "increasingly exposed to others' disrespect for the laws."[26] If a country's people are continually exposed to unjust judicial outcomes resulting from political, financial, or other illegitimate influences, they will not expect to be treated fairly when bringing their complaints to the judicial system. Corruption in, and distrust of, the legal system will breed more of the same. When the public perceives that either the government or those individuals or groups who are favored by the government are receiving special treatment from the judiciary, the government and judiciary lose authority.[27] Particularly in a republic, the government is legitimated by the support of its people.[28] A judiciary that does not independently review the actions of the other branches detracts from the people's belief in their government's legitimacy. As Hamilton stated, "where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."[29] The strictures placed on the government by the constitution are meaningless if the branch that is to determine whether actions are within those limits is under the very thumbs of those whose behavior its job is to monitor.

In countries seeking to develop an independent judiciary, the public must be made aware of both the move toward and need for judicial independence. In order to raise public awareness of a newly-independent judiciary, occurrences of the judiciary fairly meting out justice to all who come before it should be publicized. In order to demonstrate that the country's laws apply fairly and equally to all, the public should be informed of the bringing to account of government officials who are corrupt or otherwise violate the law. In addition, this publicity should extend to increasing awareness of the process of rooting out corrupt judges in order to instill in the public confidence not only that the law applies to the

26. Dakolias & Thachuk, *supra* note 7, at 356. R

27. *See id.* at 358.

28. *See id.*

29. THE FEDERALIST NO. 78, *supra* note 3, at 229. R

political branches of government, but also that corruption within the judiciary itself is being monitored and will not be tolerated.

VI.

This leads to the delicate issue of how judicial misconduct should be monitored and corrected. In many countries, this responsibility falls to the Executive.[30] The problem is that all executives will not be angels; thus, there is a threat that the judicial correction process may be used by the government to silence judges with whose views it disagrees. To prevent this obvious threat to judicial independence, the better model is to locate the judicial correction machinery within the judicial branch itself.[31]

Such a process must be fair, effective, and sufficiently transparent that citizens can be assured that misconduct is identified and appropriate action taken. I have written elsewhere on my views on this process.[32]

Thus, to ensure the independence of the judiciary from governmental influences while maintaining its independence of the political branches, it is necessary that a judiciary have an internal monitoring system. Such a system can provide an effective policing mechanism, while not subjecting judges to extra-judicial influences. Federal judges in the United States, for example, are statutorily obligated to recuse themselves from cases where their "impartiality might reasonably be questioned,"[33] where they have a personal bias, were previously involved in the case as a private or government attorney, have a financial interest, or have relatives involved in the case.[34] In addition, federal judges are subject to discipline by a statutory procedure administered by the judges.[35] Federal judges are also required to file financial statements annually. These monitoring systems have effectively policed judicial behavior, while maintaining judicial independence. The implementation of similar systems in countries working toward judicial independence is necessary in order to ensure that independence is accompanied by accountability.

30. *See* J. Clifford Wallace, *Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives*, 28 CAL. W. INT'L L.J. 341, 346–47 (1998).

31. *Id.* at 342–45.

32. *See id. passim.*

33. 28 U.S.C. § 455 (1994).

34. *Id.*

35. *See* 28 U.S.C. § 372(c)(1) (1994); *see also* Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 992–93 (1996).

VII.

Citizens' desire for an independent judiciary will also be heightened if citizens expect timely justice when the judicial process is used to resolve conflicts. Backlog and delay is at epidemic proportion in almost every country in the world. The delays often result in substantial injustice to the litigants, reaching a point at which citizens lose their trust and confidence in the judiciary as a relevant decision-making body. Indeed, the increased expense of trials delayed by backlogs may pressure parties to accept unjust settlements by decreasing the gain of winning and increasing the burden of losing.[36] Some judges believe the problems of backlog and delay should be addressed by the executive and legislative branches, while others respond that more judges are needed. I, however, believe that it is incumbent upon the judiciary itself to take a leadership role in solving the problem. Judicial education can be used to train judges how to process cases more efficiently and effectively, and many innovations, both procedural and technological, can be employed to decrease the time between the filing of a suit and its resolution. Improved case management techniques provide an effective method of achieving a resolution in less time and at a lower cost, while still providing a well-reasoned and just resolution of the suit.

These efficiencies are not limited to the trial court. At the appellate level, management techniques include: grouping identical issues so that they are all placed before the same panel, thereby saving judge time and preventing near-simultaneous inconsistent decisions on the same issue; case weighting by complexity to equalize the work of various panels; pre-argument screening to facilitate summary disposition on jurisdictional or other non-merits issues; the use of unpublished dispositions; and mediation of cases on appeal.

All of these techniques reduce the time judges need to spend on cases by delegating to the appropriate individuals work that court staff members other than judges can competently perform. The increased efficiency that is realized through improved case management techniques will lead to quicker resolution of litigation. Instead of a lawsuit dragging on for many years prior to resolution, litigants will see their cases decided within a much more reasonable time frame. This will result in a more favorable impression of judicial resolution. Citizens will be more interested in

36. *See* Carrie E. Johnson, Comment, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CAL. L. REV. 225, 230–31 (1997).

presenting disputes to the judiciary when they believe those disputes will be promptly resolved, lending increased legitimacy to the judicial process.

Once citizens see the courts as a legitimate problem-solving institution, they will demand that those institutions be free of both corruption and the improper influence of other branches of government; that is, they will then demand that the resolutions also be fair and just.

VIII.

Citizens will also seek independence for the judiciary upon realizing that the subjection of judges to corruption, bias, and outside influence makes the outcome of judicial proceedings unpredictable.[37] When judges are free to decide cases in accordance with their unbiased and uninfluenced interpretations of the law, members of society can expect more predictable decisions and resolutions, because outcomes are not based on the whim of those with money or power enough to sway the judiciary. This allows citizens to make realistic, reasonable predictions about outcomes and order their business affairs accordingly. When citizens realize that consistency in judicial outcomes will permit them to structure their behavior to maximize desired outcomes more efficiently and effectively, they will press the government for judicial independence.

The practical reality of this predictability should not be lost from our view. Many countries need outside investment to raise their standard of living. These investments are much more likely if investors can rely on predictable judicial decisions.

Citizens will also recognize that the absence of arbitrary influences on the judicial process more effectively protects their noneconomic rights. Indeed, as Hamilton so aptly stated, "[c]onsiderate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice by which he may be a gainer today."[38] Ultimately, Hamilton argued that when judges are independent of external influences, yet bound by rules and precedents, the people are maximally protected.[39] He also believed the protections of an independent judici-

37. *See* Dakolias & Thachuk, *supra* note 7, at 364. R

38. THE FEDERALIST NO. 78, *supra* note 3, at 232. R

39. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the

ary to be critical to protect the rights of minorities, stating that "independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves."[40]

The predictability that comes with judicial independence also benefits the political branches of government. A recent article described a study of the English Court of Appeal; the results of the study led the authors to conclude that "an unbiased and independent judiciary is seen as an asset by politicians."[41] The article observed that a statistical analysis of promotions of judges from the English Court of Appeal to the House of Lords supported the theory, first proposed in 1975 by William Landes and Richard Posner,[42] that an independent judiciary facilitates the passage of legislation because interest groups have increased faith in the endurance across administrations of legislation they support and secure when the judiciary is not, as a whole, influenced by changes in power in the government.[43] Thus, not only do the people in general benefit from the increased consistency of enforcement of the laws, but particular interest groups also benefit from the persistence of the policies for which they have worked.

IX.

Judicial independence does not stand alone or in a vacuum. Rather, it is a dynamic principle that interacts with the political branches. Further, the proper functioning of judicial independence is not solely an issue of how the political branches treat the judiciary; the judiciary has a co-equal responsibility to keep its judgments separate from the responsibilities of the political branches except, and only except, when the Constitution requires it to act.

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advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . .

Id. at 232–33.

40. *Id.* at 231.

41. Eli Salzberger & Paul Fenn, *Judicial Independence: Some Evidence from the English Court of Appeal*, 42 J.L. & ECON. 831, 846 (1999).

42. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 878–79 (1975).

43. *Id.* at 878–79, *cited in* Salzberger & Fenn, *supra* note 41, at 846. R

By their nature, the political branches are better equipped to make political decisions; the judiciary merely interprets. When the judgments of the judiciary attempt to invade the province of the political branches by setting social policy under the guise of judicial review, the political branches are similarly invited to invade the judiciary's stronghold: judicial independence.

One important tool that is completely in the hands of judges, and which can be used to preserve judicial independence, is the proper application of the doctrine of judicial restraint. I have argued elsewhere that judicial restraint is fundamental to our form of governance. "Democracy is, I believe, intrinsically and fundamentally valuable. Therefore, judges, mindful of the Constitution, must be extremely cautious in taking decisions away from elected representatives and elected officials."[44] Indeed, judicial restraint is based on the ordinarily accepted premise that liberty is intrinsically valuable.[45] The fundamental qualities of democracy, liberty, and judicial independence are too valuable to gamble with. The risks associated with their loss are so great as to outweigh any perceived benefits to be gained from the quick-fix of judicial activism.

This is not a danger recently realized. Even Hamilton's theories for establishing judicial independence had their detractors. While *The Federalist Papers* trumpeted the importance of judicial independence, a contrary argument warned of what might happen if judicial independence were misused. "Brutus," the Anti-Federalist, argued in *Essay No. XI* that the judges under the proposed Constitution

> are to be rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications.[46]

Brutus warned that the judiciary would be superior to the legislature,[47] would limit the rights and powers of states,[48] and would enlarge its power through its decisions.[49]

44. J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 4 (1981).

45. *Id.*

46. Brutus, *Essay No. XI* (Jan. 31, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST 417, 418 (Herbert J. Storing ed., 1981).

47. Brutus, *Essay No. XV* (Mar. 20, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 46, at 437, 440. R

48. Brutus, *supra* note 46, at 420. R

49. *Id.* at 421–22.

I have concluded that the Federalists were correct in the need for an independent judiciary. Separation of powers offers protection from the tyranny of a single highly powerful branch. An equal and independent judiciary provides us the best hope to protect our fundamental values as expressed in the Constitution. But Brutus's warning that the judicial branch itself has the potential to become tyrannical should be taken seriously.[50]

Thus, judicial restraint is consistent with and encourages judicial independence. In this context, judicial *respect* for the political branches through judicial restraint can guide the judiciary in fostering judicial independence.

X.

Another prerequisite to the people's demand for an independent judiciary is demonstrated integrity and moral leadership by the members of the judiciary. I have previously argued that "judicial independence can be preserved only if judges exert the moral leadership and strength of character required to ensure judicial accountability."[51] The same is true for the development of an independent judiciary in countries lacking one. Arguing in favor of the Constitution's judicial review, judicial independence, and tenure provisions, Hamilton stated that the ranks of potential judges were necessarily small, as "there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges . . . . the number must be still smaller of those who unite the requisite integrity with the requisite knowledge."[52] Justice Stephen Breyer similarly identified the importance of judicial integrity, stating,

> [t]he good that proper adjudication can do for the justice and stability of a country is only attainable . . . if judges actually decide according to law, and are perceived by everyone around them to be deciding according to law, rather than according to their own whim or in compliance with the will of powerful political actors.[53]

Thus, the judiciary must not only be independent from the other branches of government, but also from any other influences,

50. J. Clifford Wallace, *A Two Hundred Year Old Constitution in Modern Society*, Address Before the University of Texas School of Law (Apr. 6, 1983), *in* 61 TEX. L. REV. 1575, 1584 (1983).

51. Wallace, *supra* note 30, at 345. R

52. THE FEDERALIST NO. 78, *supra* note 3, at 233. R

53. Breyer, *supra* note 35, at 996. R

and, most importantly, it must *appear* independent to those who would bring their disputes before it for resolution. Judges must be individuals of the greatest integrity and worthy of the people's greatest confidence. They must be subject to no influence other than that of the force of the law. A judiciary that is independent of the political branches but beholden to private interests or influences, and therefore corrupt, is not truly independent. It is simply dependent on another, non-governmental, entity.

XI.

At bottom, a judiciary becomes independent when the people generally want the judiciary to protect their interests. They will do so as integrity becomes the hallmark of the judiciary, and as judges show judicial respect for the political branches and constantly improve the judicial process; the citizens can then respect the judiciary. It is this good will that will ultimately establish judicial independence. There is much judges can and should do in each of our countries to gain increased confidence of the people. In this respect, judicial independence may be largely in the hands of judges themselves.