

The Nation; Judges: Conferring A Lifetime of Ideology

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AS President Bush submits his first judicial nominees to the Senate, all signs indicate another round in the struggle over the composition of the federal bench is about to start. Republicans seem poised to renew their campaign to remake the federal judiciary in a conservative image. Senate Democrats still resent the long procedural delays that Republicans imposed on President Clinton's nominees, and threaten to follow suit if the Bush appointments prove too conservative.

Outside Congress, advocacy groups are mobilizing. Liberals tar the Federalist Society, the conservative legal group advising the White House, as the Black Hand of judicial politics, much as conservatives have portrayed the American Civil Liberties Union or NOW.

No one can be surprised by the intensity of this struggle, or that it extends beyond appointments to the Supreme Court. Since the 1960's, some of the hottest hot-button issues of American politics have become primarily matters of judicial resolution: school integration, abortion, affirmative action, environmental regulation. Even after the Supreme Court lays down controlling doctrines in these areas, district and appellate courts retain substantial discretion to resolve the ordinary disputes that come before them.

Nor does it matter that presidents themselves may feel little real concern about the tenor of constitutional law. Both parties have energized constituencies that care passionately about judicial appointments. Republicans have been railing against activist judges for a generation, while many Democrats are waiting to see whether their senators have the same spine that Republicans displayed when obstructing Clinton nominees.

But amid these disputes, a more troubling question has been ignored. The idea of judicial independence, embodied in the life tenure that federal judges enjoy under Article III of the Constitution, is a core concept of American law. It is a foundation of America's distinctive theory of judicial review, which makes judges the final arbiters of the meaning of the Constitution. But what happens to that concept when the appointments process becomes an extension of ideological politics by judicial means? Can life tenure be a sufficient measure of independence, when other criteria than a distinguished legal career or judicial temperament dictate the character of appointments?

By coincidence, this is an appropriate time to consider the question, because it marks the tri- and bicentennials of two key moments in the development of the American notion of an independent judiciary.

In was in 1701 that the British Parliament passed the Act of Settlement, allowing royal judges to serve during good behavior -- meaning as long as they behave responsibly -- rather than at the pleasure of the crown. The independence judges then acquired had, by current norms, a limited meaning. But the Act of 1701 had a broader purpose: to arrange

the peaceful transfer of the British crown from Queen Anne, the last of the Stuart dynasty, to the House of Hanover.

A century later, the Judiciary Act passed by Congress marked a different change of dynasties: from the Federalist administrations of George Washington and John Adams to the four decades of Democratic-Republican hegemony that began with Thomas Jefferson.

THE American understanding of judicial independence had evolved radically in the intervening century. One key shift came with the publication of Montesquieu's "The Spirit of the Laws" in 1748. Montesquieu was the first to classify the powers of government into the modern trinity of legislative, executive and judicial. His identification of the judiciary as a third independent department deeply influenced the American revolutionaries of 1776.

Over the next quarter-century, four significant developments gave the American concept of judicial independence its essential form. First, Americans came to regard their constitutions as supreme law, and as such, enforceable by courts.

Second, the most advanced American thinkers -- including the authors of "The Federalist," James Madison, Alexander Hamilton and John Jay -- identified the legislature as the most dangerous branch of government, and sought to insulate judges from legislative control, the better to enable them to check its excesses. Third, the framers of the Constitution concluded that the judiciary was the department best situated to resolve disputes that would inevitably arise from its messy division of power between the Union and the states.

To secure these ends, granting judges tenure during good behavior was "the best expedient which can be devised," Hamilton observed. By allowing the president to nominate judges, the framers hoped that judicial appointees would have due respect for the authority of the national government. But confirmation by the Senate, originally elected by the state legislatures, would provide a corresponding degree of respect for the states. Once insulated from improper political influence, judges would, at least in principle, decide each case "impartially," Madison predicted, their independent judgment secured by the "most effectual precautions."

It was a nice thought, but Madison privately doubted whether federal judges would have the nerve and will to carry out these tasks. The events of the 1790's offered further reason to wonder about the impartiality of federal judges and the uses of life tenure. Here lie the sources of our fourth development: the adoption of the Judiciary Act of 1801.

George Washington had nominated the first federal judges on the basis of their loyalty to the Constitution. But that loyalty increasingly meant support for the controversial policies followed by his administration and those of his Federalist successor, John Adams -- even when it meant enforcing a constitutionally dubious measure like the Sedition Act of 1798. When the Federalists lost control of Congress and the presidency in 1800, they used the lame-duck Congressional session of 1801 to adopt a Judiciary Act creating a new raft of

judgeships to which loyal partisans were hastily appointed and confirmed. John Marshall's appointment as chief justice was designed, in part, to prevent Jefferson from making that nomination. The goal was to entrench Federalist partisans in the one department they could still control, as a means of preserving their ideology.

Though the incoming party repealed the Judiciary Act of 1801 only two years later, its adoption reveals as much about the real meaning of the Constitution as the concept of an independent judiciary describes its ideal aspiration. At times when the Constitution is not a subject of controversy, or the two parties view each other in benign terms, judicial appointments may work as the framers hoped. Considerations of professional reputation, a record of public service and senatorial privilege will operate to produce a reasonably balanced and moderate corps of judges.

BUT for the past three decades, the politics of judicial appointments has been more impassioned. Constitutional interpretation has become a matter of sharp political conflict and sometimes bitter controversy, as measured in several confirmation battles over the Supreme Court. And with an electorate as closely divided as America's now is, and an era when control of the political branches is so precarious, the opportunity to entrench one's ideology through the advantages of life tenure in the judiciary is a powerful temptation. Under these conditions, judicial appointments become a continuation of politics by other means, made compelling by the entrenched advantages life tenure bestows.

Whether this meets Madison's ideal of an impartial, independent judiciary, though, is another matter.

Photo: Senator Orrin Hatch of Utah, left, the chairman of the Judiciary Committee, and Senator Patrick Leahy of Vermont, the ranking Democrat, at the White House. The President announced 11 nominees for judgeships. (Reuters)

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