Perspective on Judicial Independence

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Note: This paper begins with a couple of long citations from *The Wall Street Journal* and *Legal Times* which set the stage for the article that follows but are not critical to it.

Perspective on Judicial Independence

Consider the following observations from an article by Sandra Day O'Connor that appeared in the November 15, 2007 issue of *The Wall Street Journal*:

> Judicial elections, which occur in some form in 39 states, are receiving growing attention from those who seek to influence them. In fact, motivated interest groups are pouring money into judicial elections in record amounts. Whether or not they succeed in their attempts to sway the voters, these efforts threaten the integrity of judicial selection and compromise public perception of judicial decisions….
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> The final four candidates running for open seats on the Supreme Court of Pennsylvania raised more than $5.4 million combined in 2007….. As interest-group spending rises, public confidence in the judiciary declines. Nine out of 10 Pennsylvanians regard judicial fund raising as evidence that justice is for sale, and many judges agree. According to a nationwide survey by the Annenberg Public Policy Institute, partisan judicial elections decrease public confidence that courts are fair, impartial and operating in the best interest of the American people….
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> Special interest appeals to emotion and policy preferences tempt voters to join efforts to control the decisions of judges…. If states aren't willing to do away with partisan elections of judges, they should at least make a concerted effort to educate the voting public about the importance of judicial independence…In the long term, a commitment to *judicial independence* will only come from robust civics education. Today, only a little more than one-third of Americans can name the three branches of government--much less explain the balance of power among them. If we lose appreciation for our government's structure and the role of the judiciary within it, it is only a matter of time before the judicial branch becomes just another political arm of the government.

Meanwhile, consider the following observations from another article, "State Chief Justices Sound Alarm on Judicial Elections," by Tony Mauro that appeared in the 8/23/06 issue of *Legal Times***:**

> The nation's state chief justices are launching a campaign to remind voters of what used to be obvious: Judicial elections are different from those for other offices. Voicing "grave concern" over increasingly partisan and costly campaigns, the Conference of Chief Justices -- representing the top jurists in all 50 states -- voted on measures to emphasize the "unique nature" of judicial elections. At least some of the judges in 39 states are elected.
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> "It's the money, it's the judicial questionnaires, it's a whole constellation of things happening now that don't advance the public's confidence in the courts," says Indiana Supreme Court Chief Justice Randall Shepard
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> Though concern has been building for years about the increase in campaign spending and partisanship in what used to be sedate judicial campaigns, the main impetus for the latest effort by the chief justices is the fallout from a 2002 U.S. Supreme Court decision, *Republican Party of Minnesota v. White*.

> That ruling struck down, on First Amendment grounds, a Minnesota canon of judicial ethics that barred candidates from announcing their views on disputed legal or political issues. Several lower federal courts have responded to the decision by striking down other state canons and rules aimed at keeping judicial candidates from making campaign promises and partisan statements that may compromise the substance and appearance of impartiality once they are elected.
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> For example, Kansas Federal District Judge Julie Robinson cited the *White* ruling when she enjoined enforcement of that state's canon barring candidates from making promises about positions they will take on the bench.
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> The *White* decision's main effect has been to encourage interest groups to ply judicial candidates with questionnaires demanding that they take positions on controversial issues, says Georgetown University Law Center professor Roy Schotland.
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> At a symposium on the impact of the *White* decision at the National Judicial College in Reno, Nev., last year, participants called on the chief justices to move aggressively to change the "culture" of judicial elections.
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> A "call to action" endorsed by the participants at the Reno conference urged, "Very high priority must be given to reducing the aspects of judicial elections that jeopardize public confidence in our courts -- our state courts directly, but unquestionably all our courts."

Note that the 2002 case, *Republican Party of Minnesota v. White*, that prevents state judicial candidates from announcing their views on disputed legal or political issues was decided in a 5/4 decision of the U.S. Supreme Court. *Justice O'Connor* was joined in the majority by four other Republican appointees: Rhenquist, Scalia, Thomas and Kennedy.

Comment on the Above State of Affairs:

In theory, judicial independence requires that a judge interpret the law objectively and without personal bias. Instead, he is expected to look only at the (frequently) imprecise language of the constitution (or a given statue) and determine its lawful interpretation and/or applicability to the unique facts of a case. The complexity of this assignment is indicated by the fact that our 14 page Federal Constitution has required 140,000+ pages of interpretation, about which there have been profound and lasting disagreements.

Ideally, when interpreting the law a judge will ignore his own sense of right and wrong and/or his personal beliefs. This is because the sworn duty of a judge is to apply the law as it was intended to be construed by the majority in the legislature that adopted it.

Thus, in theory, it does not matter if the judge is a Democrat, Republican, Baptist, Catholic, Muslim or Jew; or if he believes the creeds underlying his religion embody moral certitude or not. Moreover, it matters little if the judge personally approves of capital punishment, contraception, abortion, school prayer, marijuana, homosexual activity or gay marriage to name a few issues before the courts

Realistically, then, we must conclude that "judicial independence" is a utopian ideal because so few judges can rise to the “purely objective state" that the goal of blind (independent) justice aspires to. Indeed, the inherent vagueness of certain words and phrases embedded in the Constitution, or legislation, virtually require a judge to rely on his own philosophical views or moral outlook. For example, consider such phrases as “due process of law,” “equal protection,” “cruel and unusual,” “compelling state interest,” unreasonable,” “excessive” etc.

Finally, if the ideal of judicial independence is difficult to achieve in the lower courts how much more so in state and federal Supreme Courts where decisions are both open-ended (i.e., unconstrained) and irreversible. The concept of stare decisis (to stand by things decided) is compelling but by no means binding on a Supreme Court justice.

Summary

Judicial independence can be looked at in either of two ways. In one sense it denotes a judge’s lack of any personal interest, or sense of indebtedness, to a particular point of view (or outcome) – especially to financial or personal supporters -- in cases before him.

In still another sense, judicial independence is the ability of a judge to act and think as if he has no moral compass of his own but has to interpret the law based on a correct reading of its language in order to produce the result intended by the legislative majority that adopted it. In a word, it simply doesn’t matter whether the judge personally agrees with the common sense or moral purpose underlying a given law or constitutional provision.

Given the lack of specifics and chronically fuzzy phrases that the Constitution and numerous legislative statues embrace, is it any wonder that this second type of judicial independence is a utopian ideal or that closely divided Supreme Court decisions are so commonplace?

The polite way of explaining these disagreements among judges is to attribute them to differences in “judicial philosophy” and to act as if personal values or moral preferences (including a judge’s. political ideology) had nothing to do with it.

Needless to say, this is one of the most contested propositions in politics -- if not in behavioral psychology.

Implications

The 5/4 decision in *White* is fascinating in many respects. Thus,

Justice O’Connor voted with the majority but now seems to be having buyer’s remorse. Alternatively, she may still agree with the decision as a matter of constitutional interpretation but is in favor of doing whatever can be done to blunt its impact.

What explains the sharp 5/4 (“conservative vs. liberal”) split in the decision?

The majority in *White* decided that the First Amendment's freedom of speech protected the right of judicial candidates who want to make their positions known on controversial issues that might come before them. The minority on the other hand, thought there was a "compelling state interest" in preserving the appearance (and hopefully the reality) of judicial independence that justified overriding these first amendment rights.

As it turns out, federal confirmation hearings for a Supreme Court nominee entail many of the issues addressed in *White*. Thus, as a practical matter, to earn a favorable vote from many members of the Senate, a nominee must demonstrate an "appropriate" value system and/or "judicial philosophy" (approach to interpreting the Constitution) that is compatible with the Senator's own perspective.

The classic example of an extremely competent lawyer, and appeals court judge, who failed this test (in the eyes of Democrats) was the ultra-conservative Robert Bork. For the same reasons, if Republicans controlled 58 seats in the Senate an ultra-liberal Justice Ginsburg clone could not win confirmation in today's political climate.

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Federal Supreme Court confirmation hearings are similar in many respects to the *election* of a state Supreme Court judge. Thus, the purpose of confirmation hearings is two-fold: First to determine if the nominee is an outstanding lawyer (or lower court judge) and secondly to determine how he/she is likely to decide on cases of greatest concern to individual Senators. The President, or his agents, go through a similar process when vetting candidates for nomination.

Nominees to the Supreme Court go to great length to avoid "tipping their hand" about how they would vote on specific (and especially controversial) issues that might come before them in court if they are confirmed. This is always done in the interest of maintaining their "judicial independence" – the same objective that was swept under the rug in *Republican Party of Minnesota v. White.*

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In her remarks about judicial independence that were published in *The Wall Street Journal*, Justice O'Connor seemed to be concerned about the loss of "independence" that results when candidates pander to the ideology, or preferences, of voters. This, in turn, could result in a non-judicial bias when making decisions or in the perception of bias where none exists.

Another way in which judicial independence can be comprised, however, is when a judge tilts toward his personal philosophical or moral perspective because a statue's wording (or a constitutional provision) is vague or imprecise enough to accommodate multiple interpretations. In certain respects, this type of bias is "built into the system" while it is also a contributing factor to the concept of judicial activism.

Consider, for example, the Second Amendment which reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Volumes have been written on whether the right to bear arms represents an "individual" or "collective" right. Recently, the Supreme Court agreed to decide whether a local government can pass a statue that forbids ordinary (non-military) citizens from owning handguns to protect themselves.

Needless to say, there are plenty of lawyers/judges who could very persuasively argue a "legally correct" position on either side of the case or argue their personal point of view on the issue which might be the exact opposite. In any event, disentangling the two, for an outside observer, can prove virtually impossible.

Thus, trying to predict how the Supreme Court's will decide this case is akin to playing "Supreme Court Poker" A game in which innumerable chance events have determined the court's current membership and the distribution of judicial philosophies and personal ideologies among the Justices.

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This concludes our discussion of judicial independence. A related paper on the subject, "Are Supreme Court Judges Just Umpires," (to paraphrase Chief Justice Roberts) appears below It addresses the relevance of the judicial philosophy and political ideology of Supreme Court Justices from a slightly different perspective.

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Are Supreme Court Justices Just Umpires?

In his opening remarks to the Senate Judiciary Committee last September John Roberts had this to say about the role of judges in relation to umpires:

> …..Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.
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> .....I will decide every case based on the record, *according to the rule of law*, without fear or favor, to the best of my ability. And I will remember that it's my job to call balls and strikes and not to pitch or bat.

What justice Roberts has just described is a Platonic Ideal. No doubt it is one to which he also aspires. But clearly, there are multiple problems with this analogy from the standpoint of the how constitutional cases are actually decided and the type of judicial problems Supreme Court Justices confront. To begin, if judging is just a matter of calling balls and strikes, why do so many cases that are of vast importance to the liberty interests of 300 million Americans end up as 5/4 split decisions?

We think a recent article in The New Republic by Andrew Siegel clarifies the situation extremely well:

> .....the individual predilections and judgments of jurists have a substantial effect on the direction of U.S. constitutional law. While many legal questions can be resolved through a relatively straightforward application of reason to the relevant legal texts, most of the controversial constitutional questions that reach the Court are not susceptible to such simple resolution. When confronting such cases, judges are forced back--almost inexorably--to their own, often inchoate, ideas about human behavior, social policy, and the judicial role....these "priors" shape their jurisprudence.....With the opinions of most justices--particularly the savvy--it's hard for a reader to separate the application of legal sources and precedents from individual will. The norms of the legal profession push judges to ground their opinions directly in the legal sources, whatever the wellspring of their decisions. Those who are accomplished at this task have the ability to make even the most controversial result sound inevitable.

Needless to say, if the umpire analogy were true, then neither the judicial philosophy (constructionist, originalist or “other”), nor ideology (conservative, moderate or liberal), of a justice would matter. But it is well known these are the main criteria presidents consider when selecting a nominee to the Court. Hefty credentials are important, of course, but there is an ample supply of brain power on all sides of the judicial philosophy and ideology divides. What matters most to both political parties (whether to presidents on the one hand, or senators on the other) is trying to predict how a

judge will decide critical constitutional issues (in closely divided 5/4 decisions) that matter most to themselves and to party activists/contributors -- e.g., abortion, affirmative action, flag burning, school prayer, doctor assisted suicide, religious displays on government property, the environment, anti-trust, etc.

Of course, the "*rule of law*" that Justice Roberts says he will abide by is one thing for lower court justices (where, still, there is often wide disagreement) but quite another for state and federal Supreme Court Justices who must decide what the vague/abstract words and phrases in their constitutions actually mean and to which all lower court decisions must conform.

Umpires, of course, do not write the rule book by which the game of baseball is played. Or, to put it another way, they do not "legislate from the bench." Once again, however, when one considers the abstract legal principals embedded in the Constitution's language, and the quantity and variety of cases that come before the Court, it's hard to avoid making an analogy between the Supreme Court and a Super Legislature.

Thus the power to interpret the vague guidelines that the Constitution embraces is, for all practical purposes, the power to legislate simply by declaring which laws enacted by Congress, or any of the fifty states, pass Constitutional muster and which ones do not. The legal reasoning that is associated with the broad legal principal(s), or abstract language, at issue (e.g., "due process of law," "equal protection," "interstate commerce," "cruel and unusual," "establishment," "unreasonable," "excessive," "probable" etc.) often reduces to a matter of pure judgment--an elusive entity indeed.

Beyond that, the Court has come up with a number of concepts to assist Justices in determining the constitution's intent that include such subjective criteria as "*strict scrutiny*," "*high scrutiny*," "*compelling state interest*," "*proportionality,*" "*penumbras*," "*emanations,*" "*undue burden*s," etc. that are far more demanding of intellect and judgment than the good eyesight required to call balls and strikes correctly. Indeed, an inexpensive slow motion camera can perform that task perfectly well