

## An Independence Dependent on Others

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

Recent Senate inaction (the failure last year to consider President Obama’s Supreme Court nominee) and Senate actions (the political maneuvering over President Trump’s nominee, now-Justice Neil Gorsuch) underscore the extent to which – for better or for worse – the Constitution’s framers left the independence and reputation of the federal judiciary up to the judgment and discretion of national political leaders.

The framers clearly intended a strongly independent judiciary. Article III of the Constitution gives federal judges life tenure – a longevity and independence that’s envied by judges in the American states and the rest of the world. The ever-practical framers also protected federal judges against punitive salary cuts. To constitutional architect Alexander Hamilton, judicial independence was crucial to protecting property and other rights, curbing governmental power abuse, and preserving the rule of law.

Still, whether by design or omission, the framers left the federal judiciary significantly dependent on support – or at least the lack of prolonged outright hostility -- from other officials.

High on the list of ways the Constitution lets Congress and the president affect judicial power and independence are the following:

--*Federal-court jurisdiction*: The Constitution specifies the *potential* reach of federal-court power. But legislation must turn this potential jurisdiction into actuality. A particularly vexing (and still unresolved) issue is whether Congress can use its express constitutional power to make “Exceptions” to the Supreme Court’s appellate jurisdiction to zone certain controversial subjects out of the Court’s purview. (For example, 2004 House-passed legislation would have stripped federal-court jurisdiction over challenges to the constitutionality of the words “Under God” in the Pledge of Allegiance.)

--*The size, term and procedures used by the Supreme and lower courts*. The Constitution doesn’t specify the number of Supreme Court justices, and the size has varied from six to ten over the Court’s history. Congress has legislatively manipulated the number to deny disfavored presidents appointment opportunities, or grant them to favored presidents. President Roosevelt’s attempt to “pack the Court” with supportive justices failed politically, but was arguably constitutional.

Early in the 1800’s, Congress also cancelled an entire term of the Supreme Court. And the number, structure and powers of lower federal courts are largely within congressional and presidential control.

--*Standards for removal.* A general constitutional enigma with special judicial-independence resonance is whether impeachable “High Crimes and misdemeanors” should be defined narrowly (bribery and other criminally indictable activity) or broadly (a pattern of controversial legal interpretations).

Beyond this, in performing their day-to-day duties, Congress and the president have many opportunities to enhance or detract from the respect other officials and the public give to the federal judiciary. The political branches can strongly support judicial holdings. (For example, the post-*Brown v. Board of Education* landscape showed inconsistent compliance until President Eisenhower sent troops to Little Rock to enforce a federal judge’s desegregation order and Congress made receipt of national education funds dependent upon local implementation.) Or Congress and the president can fail to devote significant resources to enforcing judicial rulings. And their badmouthing of federal judges can have a cumulatively corrosive effect.

To circle back to recent appointments experience, this is a key – and largely constitutionally unregulated – area for mischief. If presidential candidates emphasize politics rather than professional qualifications in discussing potential judicial nominees, if Senators refuse on political grounds to hold hearings and vote on judicial nominees, if Senators use or abolish extra-constitutional filibusters to advance short-term partisan ends, this puts at risk the critical perception and reality of federal judges as “above politics.”

In so many ways, then, judicial independence depends on the judgment and discretion of non-judicial actors. Which, in a democracy like ours, means that judicial independence ultimately depends on the willingness of the American people to demand respect and statesmanship from their elected officials!