History of Judicial Independence in America

The Declaration of Independence lists, among the sins of the British government, a violation of traditional British liberties so well established it had been a cause of revolution a century before: the erasure of judicial independence, that is the freedom of judges to make rulings without fear or pressure from the king or government.

Thus, when the Declaration decried the fact that King George "has made judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries," it was recalling the condemnation made against the Stuart kings who ruled England in the latter half of the 17th century. Their domination over judges and hostility to the rule of law helped contribute to the Glorious Revolution and culminated in the explicit guarantee of English judicial independence in the 1701 Act of Settlement. (Its protections, however, did not apply to the colonies—hence the objection in the Declaration.)

While some state governments operate under the theory that judges should be accountable to voters and thus have judicial elections, the federal judiciary establishes a much stronger level of judicial independence. (Even then, the 19th century justification for elected state judiciaries was that it would give the judges more legitimacy to apply the state constitutions against corrupt legislators and governors, not that judges would rule to curry favor with the public's desires.)

The basic idea behind the federal model of selecting judges is that the judges are chosen and vetted by elected officials—the president and the Senate—to choose competent judges of good character, who are then free to enforce the law rather than popular will. This, according to the theory, ensures the right balance of popular input.

As Alexander Hamilton explained in *Federalist* 78, an independent judiciary is "the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws." Thus, Article III gives judges appointments "during good behavior"—which means, in practice, lifetime appointments, and it also forbids reducing their salaries.

In other words, legislators represent their constituents' wills, but judges are to apply the law impartially, following the law whether popular or not, regardless of who the parties are. That is why statues of Justice are often depicted as blind-folded, the Supreme Court's building says "Equal Justice under Law", and the federal judicial code of conduct says judges should rule "without fear or favor." Judges who feared political repercussions—the loss of their livelihood or other interference from the legislature and executive—would be less likely to fulfil their role in the constitutional order, following the law.

Even the Constitution's critic "Brutus," who feared that the Constitution would create a judiciary so powerful it would soon cease to follow and apply the text of the Constitution and effectively make itself into an aristocracy "independent of every power under heaven", admitted he did not want judges to have their salaries or tenures dependent on pleasing the elected branches (Brutus #11, 12, and 15).

With few exceptions, this idea—that judges should remain insulated in order to enforce the Constitution faithfully, rather than appease the whims of one party or the other-- has remained a strong strand of American thought. While the Constitution allows and Congress has utilized the impeachment of judges, it became very quickly settled that this should not be exercised as a response to even very controversial rulings but reserved for wrong-doing. This became clear when a coalition of moderate Federalist and moderate Jeffersonians blocked the impeachment

of Justice Samuel Chase, who was widely considered to be abusing his office for partisan goals, but had broken no laws. While the Jeffersonians loathed Chase and believed him unfit to be a judge, they recognized that the precedent that would be set, one in which justices were removed for the substance of their rulings and judicial proceedings, could just as easily be turned against constitutionally faithful judges (as they believed their nominees to be).

This is also part of why President William Howard Taft, both a former judge and future Supreme Court justice, initially vetoed Arizona's statehood, since he found that the state's proposed constitution had replaced judicial independence with "legalized terrorism." Arizonans, who were, in many ways, skeptical of the traditional Madisonian system, sought to extend the ability to recall elected officials to apply even to judges; Taft objected that judges would have to bow to public pressure or face recall. (After becoming a state, Arizonans reinserted the provision, but have only ever used it against a regular judge once in history—when the Ku Klux Klan organized an effort to recall a judge for what they viewed as his insufficient zeal for Prohibition.)

A related controversy, technically allowed by the Constitution, but historically rejected as a violation of judicial independence and the separation of powers, is the question of "court-packing," statutorily manipulating the number of justices to ensure rulings favorable to the dominant political party's agenda. (It is worth noting that there is no such norm against adding justices or judges for "good government" reasons, such as when more justices were needed to supervise the newly added western circuits in the 19th century.)

Court-packing has seriously been considered three times in American history.

In 1801, the Federalist Party, amidst several reforms improving the functioning of the judiciary (such as eliminating the hated practice of "circuit riding"—making justices travel the country)—added a provision reducing the number of justices from 6 to 5 whenever the next member left. The clear purpose was to deprive the newly elected President Thomas Jefferson of a nomination and lock in the Federalist majority on the court. But it is worth noting what the Jeffersonians, in undoing that reform, did in response: they did not add more justices to dominate the court themselves, but simply restored the number to the previous one, with many members explicitly criticizing court-packing of the kind the Federalists did and refusing to do the same even when they had the power to do so.

The Civil War and its aftermath marked the one exception of this norm against "court-packing." Republicans angry with Andrew Johnson's hostility to Reconstruction imitated the Federalists and reduced the number of justices, to deprive Johnson of a nomination, undoing this once Grant took office. This established the number at 9.

Probably the most famous example of attempted court-packing was in 1937. Franklin Roosevelt became angry with a Supreme Court that argued much of his New Deal was unconstitutional, exceeding the powers the Constitution granted to the federal government. An irritated Roosevelt latched onto a plan to add more justices—ostensibly for the good government reason of relieving the workload of aging justices, but also because he objected to their reasoning. In one of his fireside chats, he argued, "The Courts ... have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions." He made the case that his plan would "bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our national Constitution from hardening of the judicial arteries."

Roosevelt's proposal was widely considered to be a transparent attempt to remake the Court to suit his preferences and push his agenda through. Even though Roosevelt had overwhelming majorities of both houses of Congress, many of his fellow Democrats balked at the proposal: as Judiciary Chairman Hatton Sumners explained, "Boys, here's where I cash in my chips." Enough Democrats joined the small Republican minority in blocking the proposal as a violation of judicial independence, and the belief of court-packing's incompatibility with judicial independence has held since.

That is not to say the elected branches are powerless against the Court. Impeachment remains a tool, one used occasionally, to remove judges engaging in lawbreaking and other wrong-doing. Abraham Lincoln controversially argued that under some circumstances and in extreme cases, if the Court ruled politically instead of constitutionally, he might refuse to apply its reasoning in other cases even as he implemented its judgement for the specific parties the Court had ruled for. And, although rarely exercised due to similar objections as to court-packing, Congress has utilized its Article III authority to regulate the court's appellate jurisdiction by removing certain types of cases or issues from the Supreme Court's authority altogether. This process is sometimes called "jurisdiction-stripping."