


FAIR & IMPARTIAL
JUDICIARY
Symposium

“WHAT ARE THE CHALLENGES TO JUDICIAL INDEPENDENCE”

Professor Charles Geyh, Indiana University Maurer School of Law

Summary: Professor Charles Geyh of the Indiana University School of Law traces the development of the notion of judicial independence from the founding of our republic to the present. His discussion references how the sparse language of Article III of the U.S. Constitution has been amended over time by various conventions to promote the independence of a fair and impartial judiciary, and he examines how threats to such independence have arisen over time.

1. Professor Charles Geyh identifies two major threats to judicial independence as the possibility a president would: a.) refuse to comply with a court order; or b.) seek to de-legitimize the courts. He notes that President Abraham Lincoln did the former, while President Franklin D. Roosevelt engaged in the latter. Do you think there is a conflict between the actions of these presidents and the fact that both Lincoln and F.D.R. are routinely rated as two of our greatest presidents?
2. President Donald Trump has attacked the decisions of several federal judges, arguing that their biases influenced them. Additionally, he has considered adding a citizenship question to the 2020 U.S. census despite the Supreme Court having ruled that this was beyond his power. Do you think that either of these actions threaten judicial independence? Do you think they are improper? Do you think they differ from the earlier actions of either Lincoln or Roosevelt, and if so, how?
3. Article III of the U.S. Constitution, which establishes the three branches of the federal government, is by far the briefest of the articles. This causes some to think it might have been an afterthought of the Framers! Despite this, Professor Geyh argues several conventions have developed that secure judicial

independence. What are these conventions and how have they been implemented?

4. The rule of law paradigm rested on the assumption that the role of a judge is to apply the law impartially. During the twentieth century, students of the courts – guided by law professors subscribing to the *school of legal realism* and *attitudinal* political scientists – challenged this belief by arguing/demonstrating that judges’ backgrounds, *e.g.*, gender, race, religion, party affiliation, etc. influenced their decisions. Professor Geyh argues that the rule of law paradigm no longer suffices in justifying judicial independence. Rather, he believes it should be replaced by a legal culture paradigm that is premised upon the ability of judges to regulate themselves and to sanction judges whose behavior violate the norms of judicial fairness and impartiality. Do you think this is possible?
5. Attacks on judicial independence have surfaced at different times in American history. Professor Geyh notes that this likely is triggered by dramatic changes in who controls the national government and cites examples such as the election of Thomas Jefferson and the demise of the previously dominant Federalist party; the election of Abraham Lincoln in 1860; and the coming of the New Deal and Franklin Roosevelt in 1932. Discuss how each of these elections affected the judiciary.
6. Professor Geyh sees the election of Donald Trump, and what he characterizes as a populist surge, as being a similar scenario. Do you agree or disagree with this characterization? Why?
7. The U.S. Constitution provides Congress with the power to: remove judges by impeachment and trial; change the numbers of judges; and control the appellate jurisdiction of the Courts of Appeal and the Supreme Court. How do these powers square with the concept of judicial independence?
8. When Republican House Minority Leader Gerald Ford led an effort to remove Justice William O. Douglas from the U.S. Supreme Court, he defined an

impeachable offense as anything that could muster the votes of a majority of the House of Representatives and two thirds of the Senate? Do you agree?

9. Professor Geyh predicts that the process of judicial nominations and confirmations will become even more political if/when Democrats assume leadership in the U.S. Senate, and he expects that they will adopt many of the same tactics used by the current Republican majority. What are the tactics currently used by the Senate majority with respect to judicial nominations/confirmations? Do you agree/disagree with them? In addition, Professor Geyh thinks these partisan tactics will be short-lived and both parties will eventually realize that employing such measures is destructive for the country. Therefore, he believes some sort of truce will be reached. Do you agree/disagree with his theory? Why?