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PERSPECTIVE

THE LIMITS OF JUDICIAL INDEPENDENCE

OWEN M. FISS*

Two assumptions frequently underlie discussions concerning the transitions from dictatorship to democracy that occurred in Latin America in the 1980s. The first is that the judiciary will have an important role to play in the new democratic regimes, and the second is that every effort must be made to assure the judiciary's independence. I can readily embrace both assumptions, but hesitate because I believe that the concept of judicial independence is far more complex than first appears.

The term "independence" is generally used to characterize the relationship of the judiciary to other institutions or agencies.¹ An independent judge is one who is not under the influence or control of someone else. An element of ambiguity arises, however, because

* Sterling Professor of Law, Yale University. I wish to thank Terence Anderson, Eric Beckman, Eric Bentley, Jr., Marcel Bryar, Rodrigo P. Correa, Steve Diamond, Kenneth Held, Elizabeth Iglesias, Stanley Katz, Jonathan Miller, Maxwell Peltz, Keith Rosenn, Pablo Ruiz-Tagle, Kevin Russell, Irwin Stotzky, and Olivier Sultan for commenting on this paper and giving me the benefit of their thoughts. An earlier version of this paper was presented at a conference held at the University of Miami in March 1992, and later published in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* (Irwin P. Stotzky ed., 1993).

1. Independence is an essential attribute of good judging, but it is not the only one, and nothing is gained by letting it stand for all the judicial virtues. I therefore take exception to Professor Kahn's broadening of the notion of judicial independence to include "independence from ideology." Paul W. Kahn, *Independence and Responsibility in the Judicial Role*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 73 (Irwin P. Stotzky ed., 1993); see also Jorge Correa Sutil, *The Judiciary and Political System in Chile: The Dilemmas of Judicial Independence During the Transition*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY*, *supra*, at 89. Judges can be independent, yet fail in discharging their most elemental duties because they do not understand the issues before them, lack courage, or are captured by an outworn and antiquated philosophy.

there are several different kinds of institutions or agencies from which the judge is to be independent. Judges are supposed to be independent, but from whom?

One notion of independence—I will call it “party detachment”—requires the judge to be independent from the parties in the litigation, not to be related to them or in any way under their control or influence. This aspect of independence is rooted in the idea of impartiality and is uncompromising in its demands—the more detachment from the parties the better. The bribe is, of course, the extreme example of a violation of this demand. But a less blatant link to one of the parties, such as a cultural tie that could cause the judge to identify with one party more than the other, may also count as a transgression.

Another form of independence—“individual autonomy”—concerns collegial relationships or the power of one judge over another. In common law systems, judges feel the pressure of other judges through the doctrine of *stare decisis*. Also, in both common and civil law countries, higher court judges exercise control over their lower court colleagues through regular appellate procedures. These traditional forms of collegial control do not threaten the independence that rightly belongs to a judge. But more bureaucratic forms of control, such as those recently instituted in the United States through the Judicial Councils Reform Act of 1980,² may threaten a judge’s independence, or more specifically the judge’s claim for individual autonomy. That Act gives the judicial councils of the circuit courts power to investigate complaints against trial judges and to take disciplinary action that the judicial council deems appropriate.³ It thereby allows one group of judges, acting through an organization rather than the traditional appellate procedures, to review the work of an individual judge and discipline him or her.

Such bureaucratic controls may be commonplace in civil law

2. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 § 3, 28 U.S.C. § 372(c)(6)(B) (1989).

3. Section 3 of the Act provides a partial catalogue of “appropriate” sanctions: (1) certifying the disability of a judge; (2) requesting that a judge voluntarily retire; (3) ordering temporarily that new cases be assigned to a judge; and (4) reprimanding a judge, either publicly or privately. *Id.* § 372(c)(6)(B). In addition, the judicial council may refer any complaint to the Judicial Conference of the United States, which may, if it determines that impeachment may be warranted, refer the matter to the House of Representatives. *Id.* § 372(c)(7). See generally Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1445 (1983).

countries, where the judiciary is treated as a branch of the civil service and lawyers enter the service at an early point of their careers, but the introduction of these controls into United States practice has alarmed some.⁴ In part, this concern is based on specific cultural norms of the United States (its rampant individualism) and stems from the tradition, most prevalent in the federal courts, of recruiting judges laterally. Someone who becomes a judge after a long and successful career in a profession or politics is likely to expect a greater measure of individual autonomy than the person who moves through the ranks of a professional corps. The distrust of such bureaucratic forms of control in the United States is not, however, entirely cultural specific, and may well have a more theoretical basis.

The power of judges is both limited and legitimated by the processes by which they exercise power—the need to listen to all the relevant parties and to justify their decisions in terms of publicly acceptable reasons.⁵ These limits are fully respected when higher court judges supervise other judges through the ordinary appellate procedures, but not when they act bureaucratically, for example, through judicial councils. Then the higher court judges act as managers, not judges. Of course, some forms of misconduct—bribery, for instance—may not be controllable through the ordinary appellate procedures, but in that case recourse should be had to impeachment and removal procedures. The impeachment and removal procedures are in the control of legislators rather than judges, and thus do not call upon judges to act in ways that are inconsistent with the limits on their power.

A third form of independence—the most difficult to understand and the focus of this essay—concerns what I will call “political insularity.” It requires that the judiciary be independent of political institutions and the public in general. This form of independence overlaps with party detachment whenever one of the litigants before the court happens to be another branch of the state (say the executive), but it is required even when a case is wholly between private parties and thus should be seen as a separate requirement. It stems from the very nature of the judicial function and the obligation of the judges to decide what is just, not

4. See generally Lynn A. Baker, Note, *Unnecessary and Improper: The Judicial Council Reforms and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117 (1985).

5. See Fiss, *supra* note 3, at 1443; Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

to choose the best public policy nor the course of action most desired by the public. The moral authority of the judiciary depends not solely on the dialogic processes through which judges exercise power, that is, listening to arguments and giving justification, but also on whether they are free from any political influence. The greater the insularity from political control, the more likely judges are to do what is just rather than what is politic.

While political insularity can thus be seen as one of the foundations of judicial authority, it is also true that this dimension of independence, in contrast to party detachment, is not unrelenting in its demands. We aspire only for a limited measure of insularity. In fact, our quest to insulate the judiciary from political control is qualified by two distinct kinds of limits, and my principal purpose here is to identify those limits. One arises from our democratic commitments to majority rule. Political insularity may be necessary to do justice, but removing the judiciary from popular control might well interfere with democratic values. For that very reason, the political insularity of judges within a democratic order is not and should not be complete.

A second limit derives from the fact that independence is regime relative. One regime need not respect the independence of the judiciary established by a previous regime, anymore than one nation is obliged to respect the independence of the judiciary of another. While the first kind of limit on the demand for insularity will be illustrated by reference to the experience in the United States, often thought to possess the most independent judiciary, the second is revealed by reference to the transition to democracy that occurred in Argentina and Chile in the 1980s.

I.

While state and local courts are essential elements of the United States judicial system, the federal courts are the more celebrated division of that system. They are treated as the fullest embodiment of the ideal of judicial independence. We boast of the political insularity of the federal courts and point to Article III of the Constitution, providing life tenure and protection against diminution of pay, as the essential guarantor of independence.⁶ In the

6. Article III provides in pertinent part: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance

same spirit, we explain how the work of the federal judiciary is protected against easy revision by the political branches. The Supreme Court's interpretations of the Constitution can be revised only by the cumbersome amendment process, which requires special majorities in each house of Congress, and approval by three-fourths of the states.⁷

Some of the constitutional protections of independence have been reinforced by the evolution of broad cultural understandings that further insulate the judiciary from political control. A case in point concerns the impeachment power. The Constitution vests this power in Congress but does not specify the permissible grounds of impeachment. Article III speaks only in the most general terms, providing that judges "shall hold their Offices during good Behaviour." Another provision provides for impeachment of all civil officers of the United States for "high Crimes and Misdemeanors."⁸ In the early history of the nation, the power of impeachment was in fact used to express strong disagreement with judicial decisions.⁹ However, no judge has ever been removed for that reason, and with the exception of an attack on Justice Douglas in the late 1960s by then Representative Gerald Ford,¹⁰ an understanding has evolved under which a judge can be impeached and removed only for violation of the most elemental duties of office, such as corruption or conviction of a crime—not because the legislature disagrees with the judge on the merits of some decision.¹¹

in Office." U.S. CONST. art. III, § 1.

7. Article V provides in pertinent part:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress

U.S. CONST. art. V.

8. Article II, section 4 provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4.

9. WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 52-53, 58-60, 74-77, 90-93, 103-05 (1992); *RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 224-51 (Stanley N. Katz ed., 1973).

10. EDWIN P. HOYT, WILLIAM O. DOUGLAS 149-51 (1979).

11. In recent years, federal judges have been impeached for tax fraud, bribery, and perjury. Mark A. Hutchison, *Maintaining Public Confidence in the Integrity of the Judiciary*:

This mythic picture of the political independence of the federal judiciary is often buttressed with references to some of the more dramatic instances in which the Supreme Court defied the executive or legislature. Celebrated examples include the decision of the Court requiring President Nixon to surrender secret tapes of his conversations;¹² the one declaring illegal President Truman's seizure of the nation's steel mills during the Korean War;¹³ and the order of the Court requiring Congress to seat a newly-reelected Adam Clayton Powell.¹⁴ The truth, however, is more complex than this one-sided telling of victorious moments may convey. While the Constitution creates a measure of political insularity for the federal judiciary, a number of other factors—some also rooted in the Constitution—bring the judiciary to some extent under the sway of one or the other of the political branches.

The first and most obvious concerns the method of selection. In the United States, a large number of state court judges are elected, making them directly accountable to a majority of their constituents. Federal judges are appointed rather than elected, and thus we tend to think of them as more independent of politics than state court judges, but the fact of the matter is that they are appointed by a political officer, the President. Presumably, the President will not choose someone to do his bidding, and recognizes that the judge's job is law, not politics. This limit on the discretion of the President is reinforced by the expectations of the public and the bar. Nonetheless, the President is likely to appoint someone whose concept of justice approximates his own and who is likely to further rather than impede the policies of his administration. The Senate must confirm the appointment, but it too is a political body—sometimes driven by a different agenda and responsive to a different constituency than the President, but a political body

State Bar of Nevada v. Claiborne, 1989 B.Y.U. L. REV. 283, 283-84; *see also* IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS, PROCEEDINGS OF THE U.S. SENATE IN THE IMPEACHMENT TRIAL OF ALCEE L. HASTINGS, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, S. DOC. NO. 18, 101st Cong., 1st Sess. (1989); S. REP. NO. 164, 101st Cong., 1st Sess. 4 (1989) (concerning the impeachment of Judge Walter L. Nixon, Jr., of Mississippi). The Supreme Court ultimately rejected Judge Nixon's challenge to the procedures used in his impeachment. *Nixon v. United States*, 113 S. Ct. 732 (1993) (holding that the Senate has sole discretion to choose impeachment procedures, and thus Judge Nixon's challenge of those procedures was nonjusticiable). Following that decision, a similar challenge by Judge Hastings, another impeached federal judge, was also rejected. *Hastings v. United States*, 837 F. Supp. 3 (D.D.C. 1993).

12. *United States v. Nixon*, 418 U.S. 683 (1974).

13. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

14. *Powell v. McCormack*, 395 U.S. 486 (1969).

nonetheless.

Financial need may also increase the political vulnerability of the judiciary. The protection against diminution of salary is an important bulwark against political control. It is qualified, however, because it leaves judges subject to inflationary pressure: a decision by Congress or the President to hold judicial salaries constant in the face of spiraling inflation can act as a severe sanction.¹⁵ Mindful of congressional and executive control over their salaries, judges trying to keep up with inflation may well tailor their actions in such a way as to win the good will of these branches. The judiciary's attachment to the incidental emoluments of office, such as secretaries, law clerks, and chauffeurs, can have a like effect, for these too are within the control of Congress and the President.

In addition to their power over finances, Congress and the President may also try to exercise power over the judiciary by specifically reversing judicial decisions. While it is true that a constitutional ruling cannot be altered by simple legislative enactment, Congress, with the concurrence of the President, can reverse a statutory interpretation by a simple majority.¹⁶ Moreover, the political branches wield significant power over the jurisdiction of the federal courts, especially the lower ones. In the past, particularly controversial decisions have led to proposals to deprive the federal courts of jurisdiction over select subject matters as a way of curbing judicial power.¹⁷ Few such measures have been enacted, but the threats of such action and the formulation and announcement of concrete

15. See *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978) (holding that Congress had not violated the Article III Compensation Clause by failing to raise judicial salaries an amount equivalent to the rate of inflation). *But see* *United States v. Will*, 449 U.S. 200 (1980) (finding that Congress had violated Article III in passing legislation which repealed a salary increase already in effect and thus "diminished" the compensation of federal judges).

16. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

17. For example, see the Norris-La Guardia Act, 29 U.S.C. §§ 101-115 (1989), a federal statute restricting the use of injunctions by federal courts in labor disputes. In the early 1980s, legislation was introduced to limit lower federal court jurisdiction over state anti-abortion laws. *See, e.g.*, S. 158, 97th Cong., 1st Sess. (1981); H.R. 3225, 97th Cong., 1st Sess. (1981); H.R. 900, 97th Cong., 1st Sess. (1981). Bills were also introduced to limit federal court powers to order school busing. *See, e.g.*, S. 1147, 97th Cong., 1st Sess. (1981); S. 1005, 97th Cong., 1st Sess. (1981); H.R. 3332, 97th Cong., 1st Sess. (1981); H.R. 1180, 97th Cong., 1st Sess. (1981). For a general discussion of Congressional attempts to limit federal jurisdiction, see Lawrence G. Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 17-20 (1981).

plans to actualize those threats remind the judiciary of the limits of its power.

Finally, some consideration must be given to the needs of enforcement. Judges speak the law and hope that there will be voluntary compliance with all that they command, but are always mindful that resistance may well be encountered. They know that requiring the release of a prisoner or the desegregation of the schools may provoke sharp and passionate reactions.¹⁸ Judges may be sovereign in articulating rights, but not in enforcing them. The coercive machinery of the state—the sword—is in the immediate control of the executive, and the purse strings are in the hands of the legislature and executive.

For these reasons, the federal judiciary often finds itself dependent on the other branches of government and thus less insulated from politics than is ordinarily assumed. Of course, one must be careful not to overstate the degree of dependence. For example, while vesting the power of appointment in the President necessarily introduces a political element, a difference in the terms of office—the President serves for four years, or possibly eight if re-elected, while a federal judge has life tenure—tends to attenuate the tie between the two. In the past, Supreme Court Justices often served as informal advisers of the President, but this practice has come under increasing attack and is now generally frowned upon.

In addition, an informal understanding—stemming largely from President Roosevelt's fight over court-packing—limits the process by which new judgeships are created and thus the President's influence on the composition of the judiciary. Frustrated by a series of Supreme Court decisions invalidating various New Deal measures, President Roosevelt sought to exploit a lacuna in the Constitution, the failure to specify the number of justices, and proposed creating new justiceships—one for each justice over seventy.¹⁹ This proposal engendered great hostility in Congress and

18. See Fiss, *supra* note 5.

19. WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 219-34 (1987); WILLIAM E. LEUCHTENBURG, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347. Executive interference with the judiciary had an early start in United States history. Under President Thomas Jefferson, Republican frustration towards the Federalist judiciary led to the initial refusal to issue commissions to certain judges President Adams had appointed, measures to repeal the Judiciary Act of 1801 (thereby abolishing the positions to which these new judges had been appointed), and legislation in 1802 which recessed the Supreme Court for fourteen months. In 1804, Jefferson engineered impeachment proceedings against one Supreme Court Justice, and by 1808 he had expanded

the bar, forcing its withdrawal, and even more significantly, leaving us with the understanding that the number of judges cannot be increased solely to enhance the President's opportunity to make appointments and shape the Court.

In light of all this, one cannot deny that federal judges enjoy a hefty measure of political independence, but still it is important to recognize that the mythic account of independence of the federal judiciary in the United States is somewhat misleading. Political insularity is an ideal of the federal judiciary, and its appeal seems to be growing over time, but it does not entail or presuppose a complete separation of the judiciary from the political branches of government. Even in the United States, we recognize that there must be some limits to political insularity.

Initially, the qualified nature of our commitment to political insularity might seem puzzling since, as I have acknowledged, it is one of the foundations of the judiciary's authority. But it is less of a puzzle when we place the judiciary within a democratic framework and realize that an independent judiciary can interfere with democratic processes. A judiciary that is insulated from the popularly controlled institutions of government—the legislative and executive branches—has the power to curb the actions or decisions of those institutions and thus to frustrate the will of the people.

Admittedly, an independent judiciary may sometimes use its power to further the power of the electorate—for example, by protecting the integrity of the electoral process or political freedoms. Even then, however, the tension between judicial independence and democracy is not altogether absent, since undemocratic means are being used to protect democratic ends. Granted, only an institution that is free of political control can serve as an effective watchdog of the political process. Yet there is no guarantee that the judicial power will be used to enhance rather than constrict the power or political freedom of the electorate. In some instances, an independent judiciary may be no more committed to the preservation of free and open debate than military officers who are similarly insulated from politics.

An even more fundamental tension between democracy and

the Court from five members to seven, filling each new vacancy with a Republican. 2 GEORGE L. HASKINS & HERBERT A. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815*, at 136-245 (Paul A. Freund ed., 1981).

judicial independence arises when, as is often the case, the judiciary goes beyond protecting the electoral process or political freedoms and sets aside an executive or legislative act that could not possibly be said to interfere with or undermine the representational process. Typically, those seeking to justify judicial independence and to lessen this conflict expand upon the notion of democracy and insist that it does not require a complete surrender to the demands of the present electorate.²⁰ Democracy is presented as a nuanced theory of governance that requires the state to be responsive both to preferences and principles: the democratic state must respond to both the occurrent demands of the electorate and to certain transcendent values, such as the protection of human rights, or to core principles embodied in a constitution. Within this scheme, the judiciary appears as the privileged guardian of these core principles or transcendent values, not least because it is insulated from popular control and generally sequestered from politics. Independence allows the judiciary to take the long view.

Such interpretations of democracy, distinguishing it from an insistent populism and tying it to such notions as "constitutionalism" or the "rule of law," are commonplace today in both the United States and elsewhere. They account for much of the appeal of the ideal of political insularity, for insularity enhances an institution's capacity to make objective judgments. Yet the fact remains that these more transcendent notions only justify a commitment to a limited degree of independence. Democracy may be a combination of principle and preference, but the proportion of each is never specified. Moreover, while political insularity may put the judiciary, as compared to the legislature or executive, in a privileged position to speak authoritatively on questions of principle, there is no guarantee that what it says will be correct. A politically neutral interpretation is not necessarily a correct one.²¹

Thus, although independence is assumed to be one of the cardinal virtues of the judiciary, it is also true that too much independence may be a bad thing. We want to insulate the judiciary from the more popularly controlled institutions, but at the same time recognize that some elements of political control should remain. We must accommodate two values—not just judicial legitimacy, but popular sovereignty as well—and this requires us to optimize,

20. See e.g., BRUCE ACKERMAN, *WE THE PEOPLE* (1991); Fiss, *supra* note 5.

21. See Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739, 744, 748-49 (1982).

rather than to maximize, this form of independence. In contrast to party detachment, it is simply not true that in a democracy the more political insularity the better. What we need is just the right degree of insularity.

II.

The republics of Latin America subscribe to notions of judicial independence that are not radically different from those which govern the federal judiciary of the United States. In all these countries—including Chile and Argentina—political insularity is considered a virtue, although it is also understood that the separation between political institutions and the judiciary is, and should always remain, less than absolute.

Sometimes the political insularity of the judiciary is greater in the Latin American republics than in the United States. In Chile, for example, where judging is a separate career line and a form of civil service, Supreme Court Justices play an important role in selecting lower court judges and choosing their own successors.²² There, the Justices create a short list of nominees for the Supreme Court and court of appeals from which the President makes a selection. In a similar vein, the provision in the Argentine Constitution protecting against the diminution of pay, though in words identical to that found in Article III of the United States Constitution, has been interpreted more broadly to protect against diminution of pay through inflation, on the theory that it is concerned with real, not just nominal, income.²³

In other ways, of course, the tie between political institutions and the judiciary has been considerably stronger in some Latin American countries than in the United States. While consultation between the President and the judiciary is exceptional in the United States, and today is frowned upon, it is commonplace in Argentina. President Alfonsín engaged in it, as does President

22. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE art. 75 (1980) [hereinafter CHILE CONST.], translated in JAY A. SIGLER ET. AL., 4 CONSTITUTION OF THE COUNTRIES OF THE WORLD: CHILE (Albert P. Blaustein & Gisbert H. Flanz eds., 1991); Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 19-21 (1987).

23. *Bonorino Perú v. Estado Nacional*, Supreme Court of Argentina, November 15, 1985, 116 E.D. 321 (1985) and decisions of December 4, 1985 and April 4, 1986 [1986-II] J.A. 376, 377; Rosenn, *supra* note 22, at 29-30. *But see id.* at 17 n.48 (noting the decreasing percentage of the Argentine national budget devoted to the federal judiciary).

Menem. The norm against court-packing also seems distinctly less robust. In 1990, for example, President Menem proposed legislation increasing the number of Justices from five to nine, and as soon as that legislation was enacted, he proceeded to fill the newly created vacancies with candidates of his own choosing.²⁴ All this was done in a context where Menem's party controlled the Senate (which must confirm the appointments) and where party loyalty was essentially taken for granted. To make matters worse, President Menem had allegedly earlier offered inducements in the form of ambassadorships to encourage his predecessor's appointees to resign.

In all these controversies, the background assumption is similar to that present in our analysis of judicial independence in the United States. It is assumed that we are dealing with a continuous democratic regime and that the need is to find the proper measure of political insularity, one that accommodates both the needs of judicial authority and popular sovereignty. But recent Latin American experience, in particular the transitions from authoritarianism to democracy that Argentina and Chile underwent in the 1980s, requires us to consider a different situation—that of a transitional, as opposed to a continuous, democracy. In such situations, the ideal of judicial independence is further limited: not only is independence an ideal that must be optimized rather than maximized, but it is also regime relative. We seem to agree that the judiciary should be politically insulated from the regime of which it is a part; but should the judiciary of one regime be insulated from the successor regime?

The regime-relative nature of independence can be illustrated by another reference to Argentina. In that country, a military dictatorship seized power in 1976 and governed until 1983, at which time the junta called for elections. Raúl Alfonsín was elected President and undertook to restore constitutional government, even to the point of prosecuting the junta for human rights violations.²⁵ In the period from 1976 to 1983, the junta utilized pre-existing institutions, including the courts, to govern; but it did not use those

24. *Argentina: Controversy Surrounding the Judiciary*, 45 INT'L COMMISSION JURISTS REV. 1, 4 (1990).

25. For a general discussion of Argentina's recent political history, see Irwin P. Stotzky, *The Fragile Bloom of Democracy*, 44 U. MIAMI L. REV. 105, 109-14 (1989); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2622-23 (1991).

institutions according to the norms established by the Constitution. For the most part, the junta left the lower courts alone, but appointed its own Supreme Court.²⁶

When the transition occurred in 1983, the Supreme Court Justices appointed by the dictatorship tendered their resignations, as indeed was customary in Argentina in such circumstances.²⁷ I would argue, however, that even if they had not been so accommodating, President Alfonsín could have demanded their resignations and tried to remove them through the impeachment process. As a practical matter, he may not have had the political power to do so, but for our purposes what is important is that he had the moral authority to do so; the norm of independence did not constrain him. Alfonsín should not have been required to respect the independence of the Justices appointed by the previous regime, not merely because the previous regime was nondemocratic, but more fundamentally and more simply because it was another regime. Independence does not require one regime to accept the judges empowered by another.

Of course, if we had a situation where a democratic regime were overthrown by a dictatorship, and the transition thus worked in another direction, we may well want the dictators to leave in office the justices appointed by the previous, democratic government. These Justices could act as a countervailing force. But it seems to me that the desire to leave them in office derives not from the ideal of judicial independence, but rather from a number of other factors—our commitment to the democratic nature of the old government, the view that the claim to power of the incumbent justices is more legitimate than the usurper's, or simply from the hope that the incumbent justices will use their power to check the power of the dictator. These factors are considerable and may well supply the basis for an asymmetrical rule—one that would force dictators to respect democracy's judges, but allow democrats to free themselves of the dictator's judges—but it is hard to see how such a rule might be properly grounded on the claim for independence that stems from the very nature of the judicial function. Imagine for a moment that one dictatorship overthrew another, and

26. Alejandro M. Garro, *The Role of the Argentine Judiciary in Controlling Governmental Action Under a State of Siege*, 4 HUM. RTS. L.J. 311, 314-15 (1983).

27. *Argentina: Controversy Surrounding the Judiciary*, *supra* note 24, at 2. But see Rosenn, *supra* note 22, at 27 (describing court changes prior to 1976 as dismissals); Garro, *supra* note 26, at 314 (describing these changes as purges).

thus none of the factors relating to the democratic character of the prior regime were present. Would we insist that the new dictator has an obligation to respect the judges of the previous regime? I doubt it.

Obviously, the qualification I am proposing to the ideal of independence makes crucial the scope one assigns to the notion of a regime-shift—a subject that requires further investigation and elaboration. At this juncture, however, it should be emphasized that more than an ordinary change of administrations is required; there has to be a decisive break with the past, almost a constitutional change. The shift from Alfonsín to Menem in 1989 was simply a change in administration; the transfer of power from the junta to Alfonsín in 1983 was a regime shift. Admittedly, in other cases—for example, Chile in 1989—it will be much harder to ascertain whether or not there has been a regime shift. Yet even there, the framework I am proposing, which conceives independence as a regime relative virtue, may be helpful in understanding the strategies properly available to a new government.

In 1973, General Augusto Pinochet seized power from the government of Salvador Allende.²⁸ From that time until 1980, Pinochet claimed that he ruled according to the Chilean Constitution of 1925, but that claim was a farce. He assumed the presidency through force, Congress was dissolved, generals were placed in control of civilian agencies, and though the courts continued to function, the writ of *habeas corpus* was effectively suspended.²⁹ In 1980, Pinochet proposed a new Constitution, which was then adopted by a plebiscite conducted without free and open debate. The new Constitution radically revised and supplemented the 1925 Constitution, introducing a number of authoritarian elements.

The 1980 Constitution retained the presidential system, but restructured Congress and put off congressional elections until 1989. It further provided that Pinochet would retain the presidency until March 1989.³⁰ A plebiscite would be held prior to that

28. For a review of Chile's recent past, see SIGLER ET AL., *supra* note 22, at 15-36.

29. Historical legal constraints were avoided by military trials which often involved summary proceedings and the violation of due process. Hugo Frühling, *Repressive Policies and Legal Dissent in Authoritarian Regimes: Chile 1973-81*, 12 INT'L J. Soc. L. 351, 354 (1984). The Supreme Court of Chile rejected writs of *habeas corpus* on the grounds that the Code of Military Justice did not allow the courts to intervene in martial law cases. *Id.* at 363-64, 370.

30. CHILE CONST. transitory provision 14, discussed in SIGLER ET AL., *supra* note 22, at 28-29.

date to determine whether the General would remain in office for another eight years. If he lost, elections would promptly be held to determine who would replace him as President. (Regardless of the outcome, Pinochet would remain Commander-in-Chief of the Army until 1997.) Beginning in 1983, the reign of terror lessened, and the political climate in Chile improved, but it was still something of a miracle when the opposition defeated Pinochet in the October 1988 plebiscite, and again when Patricio Aylwin defeated Pinochet's candidate in the presidential election of December 1989.³¹ Aylwin is a Christian Democrat, but he was supported in that election by a coalition of some seventeen parties.

President Aylwin took office in March 1990, and served a four-year term prescribed by the Constitution. The overriding purpose of his administration was to effectuate a smooth and durable transition to democracy. He governed with a broad political base, but always within the terms of the 1980 Constitution—even though that document was adopted during a reign of terror which of course cast a cloud over its validity. In July 1989, the newly elected Congress amended the Constitution to remove some of its more draconian provisions,³² but the amendment process was extremely cumbersome, and no further amendments were adopted. Crucial provisions can only be amended by a three-fifths vote of both houses,³³ and nine of the forty-seven Senators are appointed rather than elected. As the 1980 Constitution provided, two of the nine were directly appointed by Pinochet (acting as President), and the remaining seven were appointed by institutions controlled by Pinochet—the National Security Council (which appointed four) and the Supreme Court (which appointed three).³⁴

It should also be emphasized that throughout the Aylwin years Pinochet had control of the army and presumably was prepared to use that power to protect his Constitution. Indeed, in May 1993 Pinochet staged an electrifying display of military force in downtown Santiago. His purpose was to demonstrate his displeasure with how the President was handling certain matters that affected the army, including the investigation of the military for human

31. See MARK FALCOFF, *MODERN CHILE 1970-1989: A CRITICAL HISTORY* 311-12 (1989).

32. For an analysis of one such provision, the notorious Article 8, see Pablo Ruiz-Tagle, *Debate Publico Restringido en Chile (1980-1988)*, 16 *REVISTA CHILENA DE DERECHO* 111 (1989).

33. CHILE CONST. art. 63, translated in SIGLER ET. AL., *supra* note 22, at 55.

34. CHILE CONST. art. 45 (as amended), translated in SIGLER ET. AL., *supra* note 22, at 50.

rights abuses during the dictatorship.

Not only was Aylwin encumbered by the 1980 Constitution and the military might lying behind it, but he inherited a Supreme Court that was largely molded by Pinochet. When the General seized power in 1973, he dissolved Congress, but left the Supreme Court—no friend of Allende—in power.³⁵ The President of the Court, Enrique Urratia Manzano, placed the “presidential band” on the General and proudly declared, “I put the judiciary in your hands.” Unlike the Argentine junta, Pinochet did not replace the individual justices when he came to power—there was no need to—and for the most part, the rulings of the Supreme Court supported or strengthened Pinochet’s reign. The 1980 Constitution left the personnel and structure of the Supreme Court unchanged, with only one exception. While retirement at seventy-five became a constitutional requirement (previously it was an administrative regulation, but was breached during the Pinochet years), an exception was made for the incumbent justices.³⁶ They could serve for life.

In 1973, the Supreme Court consisted of twelve justices. Under Pinochet, the Court was expanded so that by 1988 it had seventeen members. Between 1973 and 1988, five of the twelve original seats on the Court became vacant and were filled by Pinochet, which meant that at the time of the October 1988 plebiscite, ten of the seventeen justices were Pinochet appointees. Moreover, immediately after the plebiscite but before the December 1989 election, two pre-Pinochet justices left the Court (one died and one retired), and Pinochet offered the aging justices who remained generous pensions, so-called “golden parachutes.”³⁷ Six accepted this offer—two of whom were appointed before 1973—and Pinochet filled these vacancies too. By the time Aylwin took office in March 1990, he confronted a Supreme Court consisting of a total of fourteen Pinochet appointees, some newly appointed. The other three were not appointed by Pinochet—one was appointed by Allende in 1971, and the two others were appointed in the mid-1960s by Eduardo Frei, a Christian Demo-

35. One of the primary justifications for the military takeover was the restoration of constitutional order. Rosenn, *supra* note 22, at 30-31. The Allende government had refused to enforce Supreme Court decisions ordering the return of illegally occupied land and illegally seized factories. Eugenio Velasco, *The Allende Regime in Chile: An Historical and Legal Analysis (Part II)*, 9 *LOV. L.A. L. REV.* 711, 725-27 (1976).

36. CHILE CONST. transitory provision 8.

37. Letter from Rodrigo P. Correa to Owen M. Fiss (Oct. 19, 1992) (on file with author).

crat—but all served during the dictatorship. The new President therefore had to face the question—only hypothetical in the case of Alfonsín in Argentina—whether he had to respect the independence of those justices who were either appointed by the dictator or who had served him during his regime.³⁸ What could Aylwin have done legitimately to control the Court?

In addressing this question, it is important to acknowledge the special and complex situation that Aylwin faced. On the one hand, he derived his power from the 1980 Constitution and thus was not altogether free from the constraints it lays down. On the other hand, given the non-democratic elements of the 1980 Constitution, the circumstances surrounding its adoption, and Aylwin's repudiation of Pinochet's dictatorial policies, Aylwin's administration could well be understood as a partial break with the predecessor regime—a relation one might call a “partial regime-shift.” Aylwin's Chile, in this regard, fell somewhere between Alfonsín's Argentina and the Argentina of Menem—between a sharp regime shift and a simple change of administrations. In such an in-between situation, in-between remedies may be appropriate.

One such remedy might be court-packing—increasing the size of the Supreme Court so as to enable the President to make new appointments. This idea was discussed in the early days of the Aylwin administration, and though the need for such a remedy became less urgent over time, as vacancies were created by retirements and even a death of a justice,³⁹ in 1993 a proposal to add

38. The sensitivity of the Supreme Court to the limits of its power was revealed in its handling of a controversy involving Carlos Cerda, a court of appeals judge greatly admired by human rights groups in Chile. The controversy began in the mid-1980s, before President Aylwin came to power, when Cerda undertook an investigation of the disappearance in 1976 of thirteen members of the Communist Party. The persons accused of this crime claimed that the investigation was barred by the 1978 amnesty law, and the Supreme Court agreed and ordered Cerda to desist from his investigation. When he refused, the Supreme Court suspended him for two months. That occurred in 1986. In 1990, after the plebiscite ousting Pinochet and after the election of Aylwin, Cerda resumed the investigation and the Supreme Court then responded by reaffirming its previous order requiring him to desist. Cerda stopped the proceedings but refused to dismiss the case altogether, and then the Supreme Court entered an order in effect requiring the President to remove Cerda from office. There was an immediate and enormous public uproar over this order, and following a formal request for reconsideration by Cerda, the Supreme Court backed down. Nevertheless, Cerda did ultimately close the case in August 1990. Despite his compliance with the Supreme Court's order, the Supreme Court disciplined Cerda in January 1991 by suspending him for two months on half salary. For Cerda's distinctive conception of judicial independence, what I have called “individual autonomy,” see Pablo Ruiz-Tagle, *Análisis Comparado de la Función Judicial*, 39 REVISTA DE ESTUDIOS PÚBLICO 131, 154-58 (1990).

39. One vacancy arose from the death of a justice appointed by Pinochet shortly before

four new justices to the Supreme Court was put before Congress. Such a proposal is obviously two sided: It accepts the authority of the justices in office, but seeks to dilute their power by adding new ones. It weakens the stranglehold of the past, but does not break from it altogether. Even nominal adherence to the norm of political insularity could be achieved if the increase in the size of the Court could be justified in terms of increased caseloads or new needs for expertise. Not surprisingly, Aylwin's proposal to increase the size of the Supreme Court was joined with a number of other reform measures, including one that would add new specialized panels (or "salas") to the Court.

In the hands of President Roosevelt, court-packing was justly regarded as an improper assault on an independent judiciary, and ever since, a strong tradition has existed against it in the United States. But this tradition actually depends on certain background assumptions about the terms and conditions under which the power of the administration has been acquired. The United States stance on court-packing has been forged in the context of a continuous democracy—two hundred years of a shifting, but generally stable government—and has only limited applicability to a transitional democracy. True, the 1930s in the United States was a turbulent period in constitutional history, but no one would claim that there had been a transformation in governmental structure that could be characterized as a regime shift, partial or otherwise.⁴⁰

The same is true of the Menem administration in Argentina and thus it should have respected the same norm against court-packing. Menem acquired power through the constitutionally prescribed mechanisms, and though he instituted a new economic policy and abandoned, or perhaps even reversed, Alfonsín's human rights policy, these changes were within the framework of normal politics. Menem's Argentina was not a transitional democracy. Aylwin's Chile was different. Aylwin obtained power through the constitutionally prescribed process, but nonetheless sufficiently broke with the past so as to permit him to pursue alternatives that otherwise seemed forbidden in a continuous democracy.

the election, and four other vacancies arose from retirements. Some retirements were facilitated by the enactment in July 1992 of a law that, in effect, continued in force the generous retirement program Pinochet had established in 1989. It applied to those justices over seventy and who held office at the time the law was passed.

40. Bruce Ackerman does not regard the New Deal as a regime shift, but describes it as a decisive moment in American history "at which deep changes in popular opinion gained authoritative constitutional recognition." ACKERMAN, *supra* note 20, at 41, 47-50.

Although Aylwin's effort to increase the size of the Supreme Court came to naught, oddly enough, a more troublesome remedy—impeachment—proved more viable. In January 1993, the Chamber of Deputies impeached three justices of the Supreme Court, and ten days later the Senate voted to remove one of them, Hernan Cerceda Bravo, from office. All three justices were members of a single panel of the Supreme Court that had decided a few months before to transfer jurisdiction of a human rights case from a civilian to a military tribunal—a decision which, in effect, brought the prosecution to an end. The first, and by all accounts, principal count of the impeachment focused on the merits of this particular decision. It was claimed that the decision to transfer the jurisdiction to the military court was arbitrary and contrary to Chile's obligations under international agreements.

The other two counts of the impeachment involved prosecutions that had been brought against opponents of the Pinochet regime charged with attempting to assassinate the General and with murdering and kidnapping military personnel. One of those counts charged the justices of improperly collaborating with the auditor general of the army, who was acting as a prosecutor in the criminal proceedings arising from attacks on the military. Another focused on the delay of the Supreme Court in rendering a decision in an appeal filed by two persons charged with kidnapping military personnel. Chilean law and the Court's own rules require that such appeals be decided within 15 days, yet the panel took over five months to render its decision. During all this time, two persons accused of the kidnapping remained in jail.

The Chamber of Deputies voted 66 to 39 (with one abstention) to impeach all three justices on all three counts.⁴¹ However, the Senate voted, 25 to 20, only to convict and remove Cerceda from office, and based its decision solely on the third count: the one charging the justices with improper delay in rendering their decision. The decision to remove Cerceda critically depended on the support of three senators from a conservative faction and obviously rested on the narrowest and most technical of all the charges. Note should be taken of the fact that Cerceda was widely disliked and that he had tried to cover up the delay in the decision by altering dates on court documents. But the wider implication of the entire impeachment proceeding was not lost on the public nor on the

41. The Chamber of Deputies also impeached the auditor general of the army on all three counts, but he was not removed by the Senate.

Court. In essence, Congress was expressing its strong disapproval of a Supreme Court decision, and due to the exigencies of politics or the simple fact that Cerceda was the senior justice on the panel, Congress took out its wrath on him. No one can prove with absolute certainty that this was the basis of Congress's decision—proof of that character is never available in impeachment proceedings—but it is a likely scenario, and that fact alone is reason for concern on the part of those committed to the independence of the judiciary and the view that it be insulated from politics.

In considering the possibility of court-packing, I argued against the automatic transfer to a transitional democracy of the rules and norms established in a continuous democracy such as the United States. This same perspective should govern any evaluation of the use of the impeachment power; as I argued in the case of Alfonsín's Argentina, the impeachment power should be able to accommodate regime shifts and allow a new regime to remove from office those judges who were placed in office by the previous regime or who willingly served that regime. The situation in Aylwin's Chile was somewhat more complex, however, because, as I argued, that was not a complete but a partial regime shift, calling for intermediate remedies. While court-packing seems such a remedy, I have doubts about the use of the impeachment power during the Aylwin years.

It is true that the impeachment power was used on an individualized basis. There was no effort to impeach or remove all the justices who served under the Pinochet regime. Charges were brought against only three, and only one was removed. It is also true that, as in the case of court-packing, the President was not entirely free to fill the new vacancy with someone entirely of his own choosing; he had to choose from the short list submitted by the Supreme Court. Yet impeachment from office, unlike court-packing, put the political branches of government into the business of second-guessing the Court on the merits of its decisions. It thus struck at the heart of the values that the norm of political insularity seeks to further: a commitment to justice, not politics. Of course, efforts will be made to limit this use of the impeachment power to especially egregious errors of the judiciary, but everyone knows how easily those labels are manipulated. Once unleashed, this use of the impeachment power is likely to make the judiciary more responsive to political forces and thus less able to claim the full measure of its authority.