Judith Resnik

*Interdependent federal judiciar*ies: *puzzling about why & how to value the independence of which judges*

Judicial independence is a norm presumed to have been settled upon at the founding of the United States.[1] Yet the authority accorded to judges has been a hauntingly provocative topic since the country's inception. Article III of the U.S. Constitution institutionalized the federal judiciary and gave its judges two forms of protection: they can neither be fired nor have their salaries cut. In theory, such insulation from the two other branches of government leaves judges free from political constraints that could undermine their willingness to render impartial judgments based on the merits of each case.

But which cases do judges get to decide? And what remedies do they have the power to order? How are they funded, and how many are needed to make meaningful the notion that the judiciary is one of three branches of government? The Constitution left to the other branches the decisions about the number of federal judges and levels of courts. Furthermore, the Constitution makes no mention of budgets, and its provisions relating to jurisdiction are ambiguous. Thus, concerns are raised perennially that judicial independence – as well as the court system that it has helped to spawn – is either overvalued or at risk.

One burden of this essay is to contrast the *thinness* of the constitutional protections with innovations of the twentieth century that have demonstrated a *thick* political commitment to the deployment of judges in service of national norm enforcement. The federal judiciary as it functions today is a relatively recent invention, which has been endowed over the course of the last century by Congress and the executive with expanded jurisdictional authority and institutional girth.

The federal courts have obtained stature through the joint venturing of all

Judith Resnik, a Fellow of the American Academy since 2001, is the Arthur Liman Professor of Law at Yale Law School. Her recent essays include "Representing Justice: From Renaissance Iconography to Twenty-First Century Courts" (with Dennis E. Curtis; "Proceedings of the American Philosophical Society," vol. 151, 2007) and "Law as Affiliation: 'Foreign' Law, Democratic Federalism, and the Sovereigntism of the Nation-State" ("I-CON, the International Journal of Constitutional Law," vol. 6, 2008).

1 This essay expands on remarks given at the 1870th Stated Meeting of the American Academy of Arts and Sciences held on May 15, 2003, in Washington, D.C.

three branches of government, responding to public and private demands for adjudication. Given that attention is easily drawn to examples of conflicts among the branches of the federal government, narratives about judicial authority often overlook the cooperative effort that has produced the contemporary federal judicial system. On many metrics, the interdependent judiciary has flourished by virtue of support from its sibling branches that regularly rely on judges to implement their agendas.

My second purpose is to reflect on how some of the twentieth-century innovations that can be understood to have been sensible adjustments aimed at equipping the administrative state with judicial resources have, nevertheless, undermined practices supportive of judicial independence. Reflected in this essay's title by the pluralization of "judiciar*ies*" is the point that the federal system ought not to be considered in the singular. Over the last several decades, Congress has invented new kinds of federal judges ("non-Article III judges") lacking life tenure; their dockets are often filled with the neediest of litigants, some of whom challenge governmental action. Yet these lower echelon jurists wielding federal adjudicatory power outside the parameters of Article III are vulnerable to incursions from all quarters.

Congress has also created new modes and venues for adjudication that shift decisions from public to private processes in both courts and agencies. Revisions of rules within courts, coupled with the outsourcing of cases to administrative agencies and requirements that litigants use private dispute resolution systems, make public access difficult or impossible. Discussions of judicial independence have not paid much attention to the role played by the public dimension of adjudication that (to borrow from Jeremy Bentham) is the "soul of justice" that puts judges who preside at trial themselves on trial.[2]

What Bentham in 1843 described as desirable "publicity" subsequently became the constitutional *right* to attend court proceedings. Bentham argued the utilities of the public aspects of adjudication in terms of the production of more accurate outcomes, but he did not focus on how adjudication can itself be a democratic activity. When rules of litigation provide participatory parity, disputants are forced to treat each other as equals. Even the government can be compelled to answer its adversaries. Through public display, observers can watch adjudication's processes, debate its outputs, and either approve or seek to revise the governing legal norms. The reasons for wanting judges to be independent from coercion are thus in plain view, helping to maintain cultural and legal commitments to this insulation for judges.

The devolution of decision-making to non-Article III judges and the privatization of adjudication are not the only developments of the twentieth century that raise questions about how to sustain support for judicial independence. When the Constitution was written, the executive and legislative branches of government were perceived to be the principal sources of threats to judges. But today, the media, repeat-player liti-

2 See Jeremy Bentham, "Chapter X 'Of Publicity and Privacy, as Applied to Judicature in General, and to the Collection of the Evidence in Particular,'" *The Works of Jeremy Bentham*, Vol. 6 (London: Simpkin, Marshall, 1843), 355 (reprinting Jeremy Bentham, *Rationale of Judicial Evidence*, Vol. 1 [1827]); see also Judith Resnik and Dennis E. Curtis, "From 'Rites' to 'Rights' of Audience: The Utilities and Contingencies of the Public's Role in Court-Based Processes," in *Representations of Justice*, ed. Antoine Masson and Kevin O'Connor (Brussels: P. I. E. Peter Lang, 2007), 195–236.

gants, and political candidates need to be taken into account as either friends or foes. These actors play vivid roles in those state courts that select or retain judges through elections but also are relevant on the federal side, where media and political campaigns funded by organizations seeking to shape outcomes in cases through judicial selection similarly aim for judges of a certain stripe. Thus far, the Supreme Court has been unwilling to regulate such efforts, framing them as protected First Amendment activity rather than as encroachments on the norm of judicial independence.[3]

Actions of the judiciary itself also need to be brought into the narration of contemporary challenges to judicial independence. Over the last several decades, as the federal judiciary gained its own administrative structure and rule-making authority, it has used its corporate voice to take an active role in policymaking. In the 1990s, official spokespersons for the federal courts issued a long range plan, recommending that Congress provide less access to the federal courts. By functioning as what political theorists might style a rent-seeking agency, advancing its leadership's understanding of the desirable boundaries of federal adjudication, the judiciary undercuts one of the rationales for judicial independence – that judges stand outside the ordinary fray of politics as they mediate between special interests and render decisions.[4]

In short, the constitutional provisions for judicial independence set forth at the founding of the United States have proved to be sparse and ambiguous. They are capacious enough to support enormous growth as well as to tolerate radical reconfigurations of adjudication. The topic of judicial independence returns so often to legal and popular consciousness because questions abound about whether and how to generate practices justifying remarkably unusual roles for those government employees we call "judges."

Conversations about judicial independence in the federal courts have tended to take one of three forms. The first provides generalities praising the importance of an independent judiciary and delighting in the American example, centered on that portion of the U.S. Constitution providing the outlines for federal courts. The text of Article III, Section 1 is worth revisiting:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. 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 in Office.

The words about holding office "during good Behaviour" have been translated to mean life tenure.[5] Because such constitutional judges can neither be fired nor lose their salaries, Article III can be read as insulation from the other branches of the federal government. A distinct concern (sometimes couched as "accountability") is how to be loyal to judicial freedom while imposing codes of con-

3 See *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

4 See Judith Resnik, "Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III," *Harvard Law Review* 113 (2000): 924 – 1037.

5 Alternative readings are argued by Saikrishna Prakash and Steven D. Smith, "How to Remove a Federal Judge," *Yale Law Journal* 116 (2006): 72 – 137.

duct and disciplinary mechanisms on judges.[6]

A second strain of conversation raises questions about the value of judicial independence, the degree of autonomy appropriate for judges, and the wisdom of life tenure. Some critics complain about jurists holding too much authority and having too few checks. Some locate adjudication itself as a counter-majoritarian democratic problem and propose either that judges abjure from certain decisions or that legislatures take cases away from them. Other times, attacks are leveled at particular judges, with calls for impeachment.

During the last decade, the system of life tenure has come under renewed scrutiny. The system in the United States is anomalous in that other democracies, also committed to judicial independence, require either fixed terms of office or mandatory retirement. Furthermore, while at the country's inception, life-tenured lower-court judges served on average about fourteen to sixteen years, but more recently, they have averaged about twenty-four years. Given the concentration of power in a small number of persons for such a long period of time,[7] a spate of proposals has been put forth to provide (either through constitutional interpretation or amendment) term limits in general or fixed terms for Supreme Court justices, including the chief justice.[8]

The third sort of discussion about judicial independence praises the idea but is less than sanguine about its instantiation. Actions by the other two branches of government are seen as threatening or undermining judicial independence.[9] Several distinct problems – from judicial selection through confirmation, jurisdiction, and remedies – can be tracked by reference to different pieces of constitutional text.

One concern about how to pick judges comes from a focus on Article II, Section 2, Clause 2, which provides that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States." How does this constitutional commitment giving the two elected branches the power of selection affect

6 For example, when in 1980 Congress created a procedure for complaints about judges to be brought confidentially to the chief judges of each federal circuit, judges subjected to it argued (unsuccessfully) that it violated the Constitution. More recently, in the wake of criticism of the administration of that system, the chief justice of the United States appointed a committee chaired by Justice Stephen Breyer to evaluate the process. See Judicial Conduct and Disability Act Study Committee (Breyer Committee), Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice (September 2006); available at http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf. In April 2008, revised rules went into effect. See Judicial Conference Committee on Judicial Conduct and Disability, Rules for the Judicial-Conduct and Judicial-Disability Proceedings (March 2008); available at http://www.uscourts.gov/library/judicialmisconduct/jud_conduct_and_disability_308_app_B_rev.pdf.

7 See Judith Resnik, "Judicial Selection and Democratic Theory: Demand, Supply, and Life-Tenure," *Cardozo Law Review* 26 (2005): 579–658.

8 See Paul D. Carrington and Roger C. Cramton, eds., *Reforming the Court: Term Limits for Supreme Court Justices* (Durham: Carolina Academic Press, 2006); Stephen G. Calabresi and James Lindgren, "Term Limits for the Supreme Court: Life Tenure Reconsidered," *Harvard Journal of Law & Public Policy* 29 (2006): 769–877.

9 See generally Charles Gardner Geyh, *When Courts & Congress Collide: The Struggle for Control of America's Judicial System* (Ann Arbor: University of Michigan Press, 2006).

judicial independence? Some argue that if judicial selection is "political" in the sense of seeking individuals aiming to shape law, then independence is at risk; choosing nominees according to a "litmus test" results in judges who will follow a party line. Others insist that the constitutional authorization that the majoritarian branches select judges permits efforts to seek to entrench particular visions through identifying judges whose mindsets match their agendas. Given life tenure, this popular check, *ex ante*, is part of how judgments are legitimated, *ex post*.[10]

Whichever interpretation one adopts, another question is how to understand the constitutional allocation of power *between* the president holding the power to nominate and the Senate serving as the gatekeeper of confirmation. What degree of deference ought the Senate accord to presidential nominees? The answer for some is that senatorial deference ought to depend on the kind of process used for selection. If the president relies on bipartisan merit commissions and professional bodies' appraisals of the qualification of lawyers as well as a good deal of consultation in advance with senators, then a presumption of confirmation should result. Others see the choice as within the president's exclusive purview, while yet others believe the Senate is constitutionally positioned to exercise its own independent assessments of candidates.

Once nominees are put forth, another issue is whether values of judicial independence ought to be reflected in the process used by the Senate when considering confirmation. One hears periodically that the Senate either is not living up to or is overstepping its mandate, with complaints about a "crisis" of vacancies due to senatorial delays as well as objections of presidential "court packing."

Of particular relevance to judicial independence is the use of public hearings, which some commentators commend and others bemoan. Over the last several decades, hearings on Supreme Court nominees have enabled us to see what legal precepts are so settled as to be unquestioned and which propositions remain contested. In response to inquiries, nominees insist on their attachment to, skepticism about, or silence on certain understandings of law, such as whether the Fourteenth Amendment's guarantee of "equal protection of the laws" applies to women, whether abortion is protected by the Constitution, and whether judges may learn from foreign law when interpreting the U.S. Constitution.[11]

Confirmation hearings thus provide insights into what is at stake when judges are selected and what laws are under siege. But critics argue that the process has become dysfunctional, either because it is too slow, too intrusive, or too much show and too little substance. Part of the divide comes from differing assessments of the value of the resources spent on nominations and the attention paid to appointments against the backdrop that, once a person's nomination is presented to the Senate, confirmation is very likely. During the last decades,

10 See generally Stephen B. Burbank and Barry Friedman, eds., *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Thousand Oaks, Calif.: Sage Publications, 2002); see also Jack M. Balkin and Sanford Levinson, "The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State," *Fordham Law Review* 75 (2006): 489–535.

11 I explore the norm generativity of confirmation hearings in "Judicial Selection and Democratic Theory," cited above.

lower-court judges have been confirmed more than 90 percent of the time. Eight Supreme Court positions have been filled since 1986 with the Senate rejecting one nominee, while a few others have been named but withdrawn.

Another set of questions arises in relationship to the jurisdictional authority of federal courts. A different part of Article III – Section 2 – becomes relevant, for it specifies a set of cases to which the "judicial Power shall extend." Included are those arising under federal law or involving subject matters such as admiralty and maritime as well as cases predicated on the status of a party (for example, public ministers, states, or citizens coming from different states). Yet, by also providing that the Congress "may from time to time ordain and establish" the lower courts, the Constitution could be read to make the very existence of those courts as well as their jurisdictional reach utterly dependent on the grace of Congress. Further, while stipulating that the Supreme Court exists and has original jurisdiction over a few specified cases, the Constitution also provides that, as to its appellate jurisdiction, Congress has the power to make "exceptions and regulations." Legions of law review articles parse these provisions as their authors argue about whether Article III requires Congress to vest jurisdiction in federal courts and the degree of control Congress has to divest courts of power once cases have been assigned to them.[12]

That literature in turn has been sparked by congressional threats to enact legislation limiting access to the federal courts, a practice that objectors label "jurisdiction stripping." While proposals have been made to do so for decades, only in the 1990s did several become law, as Congress cut back on access for immigrants, prisoners, and, in the wake of 9/11, detainees at Guantánamo Bay and elsewhere. The narrowed access to courts for those in custody brings into play other parts of the Constitution, including constraints on suspending the writ of habeas corpus, which is directly protected under Article I.[13]

Judicial independence is also implicated in less dramatic moments, such as when Congress channels disputants away from life-tenured judges and into administrative agencies (like the Social Security Administration) or to specialized courts (for bankruptcy, contract claims against the government, or tax disputes). And sometimes, when Congress "federalizes" rights and removes jurisdiction from state courts, questions are raised about whether such actions not only violate federalism principles but also undermine the independence of state judges.

Another way in which Congress can encroach on judicial decision-making is in the area of remedies. Congress has sometimes prioritized remedies, but in other instances Congress has gone further, for example mandating that decrees involving conditions of confinement for prisoners expire unless new wrongdoings are proven. On the criminal side of the docket, when Congress imposes mandatory minimum sentences for certain kinds of crimes, it constrains the power of judges to make individualized sentencing decisions.

12 This debate is tracked in a book used both for teaching and as a kind of encyclopedia of the law of the federal courts. See Richard H. Fallon, Jr., Daniel Meltzer, and David Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System*, 5th ed. (New York: Foundation Press, 2003).

13 The specific provision, Article I, Section 9, Clause 2, is known as the Suspension Clause. In June 2008, the Supreme Court relied on this clause when finding unconstitutional provi-

This overview of the classic constitutional questions (whether discussed in a celebratory, skeptical, or anxious mode) circles around problems of potential incursions on the judiciary by the executive and Congress. Those fears are grounded in experiences that predated the drafting of the U.S. Constitution, for in seventeenth-century England judges' commissions ended along with that of a king's reign. The 1701 Act of Settlement marked the beginning of the independence of judges from the crown, but the colonialists still worried about the power of the monarch over American judges, "dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries."[14] Article III aimed to fix what the founders saw to be problems. In many respects they succeeded.

But Congress has been much more than minimally respectful, for it has repeatedly turned to the federal courts to enforce new rights and endowed the courts with significant resources to do so. Reflective of these commitments is the phrase in popular culture "don't make a federal case out of it," a sentence that was not a part of common parlance until the 1950s. Moreover, working in conjunction with life-tenured judges, Congress has also manufactured whole new sets of federal judges and empowered them to decide hundreds of thousands of claims. These federal judiciaries came into being through a rereading of the constitutional text of Article III that rendered legal the adjudicatory authority of federal judges who lack what is there stipulated: life tenure and protected salaries.

Below, a few charts map the growth of diverse kinds of federal judges. Chart 1 shows that, about a hundred years ago, some seventy trial judges were dispersed across the United States. In several states – such as Maryland, Indiana, and Massachusetts – a single district judge presided. In contrast, by 2001, more than 665 judgeships existed, and fifteen more district-court judgeships were chartered in 2003. Chart 1 also makes plain that, in 1901, the appellate courts were staffed by fewer than thirty authorized judgeships; today some 180 positions are provided.

The growth in the number of judges reflects the expansion of their jurisdiction. During the twentieth century, Congress created several bodies of new law ranging from securities to the environment, from civil rights to consumer law. By one count, between the 1970s and the 1990s, Congress authorized more than four hundred new federal causes of action.[15] Because of this production, we are all federal rights holders, subject to laws that affect our lives in various ways, from taxes and pensions to the water we drink and the money we invest.

The power of the federal judiciary does not come from its size and docket alone. During the second half of the twentieth century, life-tenured judges (constitutional judges) gained the authority to appoint other judges – the statutorily chartered magistrate and bankruptcy judges serving fixed and renewable terms. In 1968, when Congress created the position of federal magistrate, the job was conceived to be primarily part-time, as Chart 2 illustrates.

sions of the Military Commissions Act of 2006 that limited access to courts for aliens deemed by the executive to be "enemy combatants." See *Boumediene v. Bush*, 128 S.Ct. 2229, 2262 – 2274 (2008), discussed below.

14 The Declaration of Independence, para. 11 (U.S. 1776).

15 Administrative Office of the U.S. Courts, Revision of List of Statutes Enlarging Federal Court Workload (September 18, 1998) (memorandum).

Chart 1
Article III Authorized Judgeships: District, Circuit, and Supreme Courts, 1901, 1950, 2001

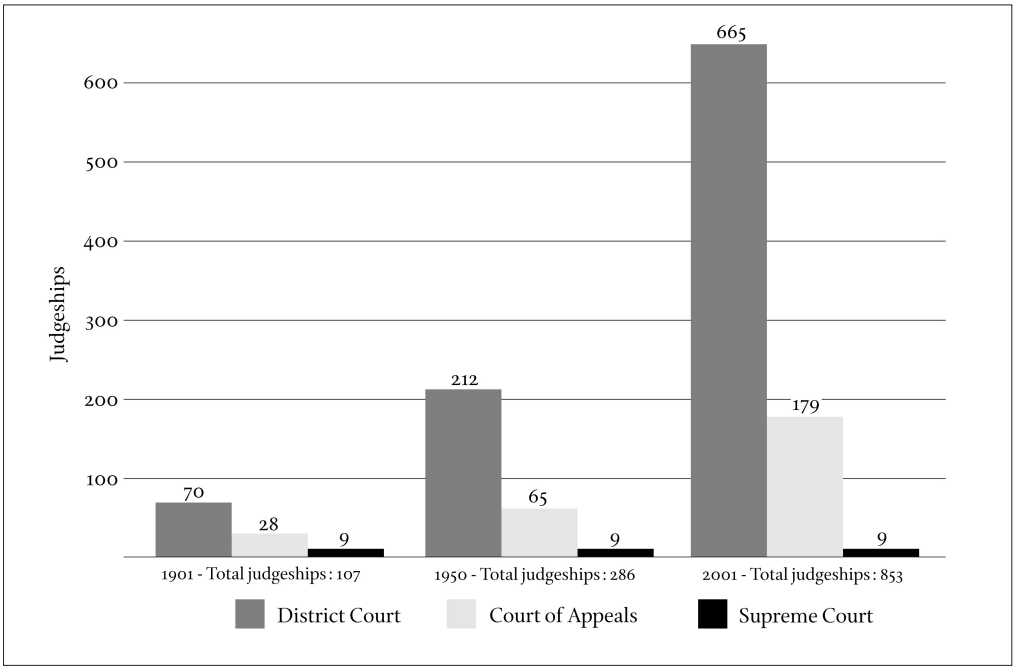
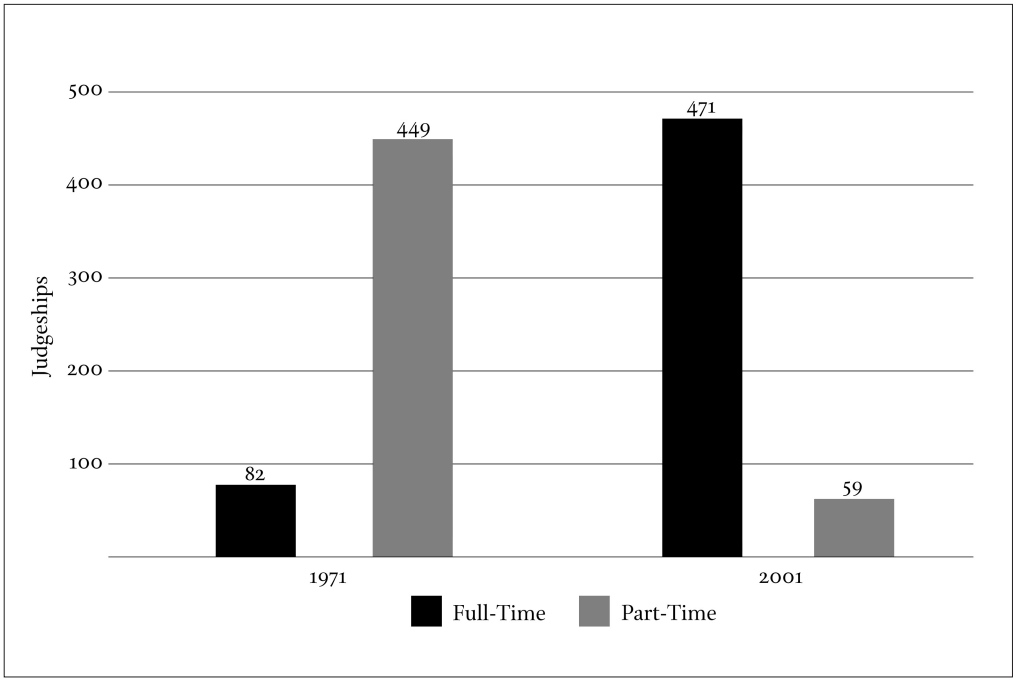


Chart 2
Authorized Magistrate Judgeships: 1971 and 2001



In 1971, about 450 such positions existed. Within short order, the job became full-time and, by 2001, more than 470 magistrate judgeships were chartered. That group joins another set of non-Article III jurists – bankruptcy judges – first authorized in 1984 and now numbering more than 330, as Chart 3 details. Magistrate and bankruptcy judges serve for fixed and renewable terms of eight and fourteen years, respectively.

Unlike Article III judges who have life tenure and protected salaries, the jobs of statutory judges can be abolished and their salaries cut. But consistent with the narrative of the cooperative expansion of the judicial system, those prospects are unlikely. These jurists are both central to the functioning of the courts and literally built into the system, with courtrooms dedicated to their use in more than five hundred federal courthouses around the United States. Much of their work is akin to that done by life-tenured judges. For example, if parties (or their lawyers) consent, magistrate judges can preside at civil trials, and both magistrate and bankruptcy judges have the power of contempt. Bankruptcy judges in turn can sit on appellate panels reviewing decisions made by their colleagues. Chart 4, which brings these positions together, shows all of the authorized trial judgeships in federal courthouses around the United States; those without life tenure outnumber those with life tenure.[16]

For constitutional theorists, these facts present a puzzle: Article III's text makes no mention of "federal judicial power" vesting in judges lacking the constitutionally stipulated attributes of life tenure and protected salaries. As a consequence, in the early part of the twentieth century, the Supreme Court was loath to permit too much devolution of what the Court called the "essential attributes of judicial power"[17] to decision-makers outside those parameters. By century's end, however, the Court had reread Article III to enable the shift of significant amounts of federal adjudicatory power to non-Article III judges.[18]

Various justifications underlie that doctrinal shift. One idea is that when Congress creates statutory (or "public") rights, it can shape an adjudicatory system to administer them. Further, some of the disputes are styled "non-adversarial" in that the government is presumed committed to providing relief if mandated by statute. Another proposition is that a proliferation of subordinate judges within the Article III branch raises no questions of judicial independence because the sub-judges are under the wing of the life-tenured.

Such interpretations enable the selection and appointment of scores of new judges outside the process stipulated for life-tenured judges, who must be nominated by the president and confirmed by the Senate. The innovative reading has thus facilitated the expansion of federal judicial capacity without the political burdens imposed by the Constitution.

This approach to the Constitution also supports the authority of another cohort of statutory judges, called Administra-

16 The actual number of judges in each position does not match the number of judgeships authorized because life-tenured judges can take "senior status" and continue to work while opening up a vacancy to be filled through the appointment process. Magistrate and bankruptcy judges can also be "recalled" to serve.

17 See *Crowell v. Benson*, 285 U.S. 22 (1932).

18 That transition is mapped and analyzed in Judith Resnik, "'Uncle Sam Modernizes His Justice': Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation," *Georgetown Law Journal* 90 (1998): 607 – 684.

Chart 3
Authorized Bankruptcy Judgeships: 1984, 1991, 2001

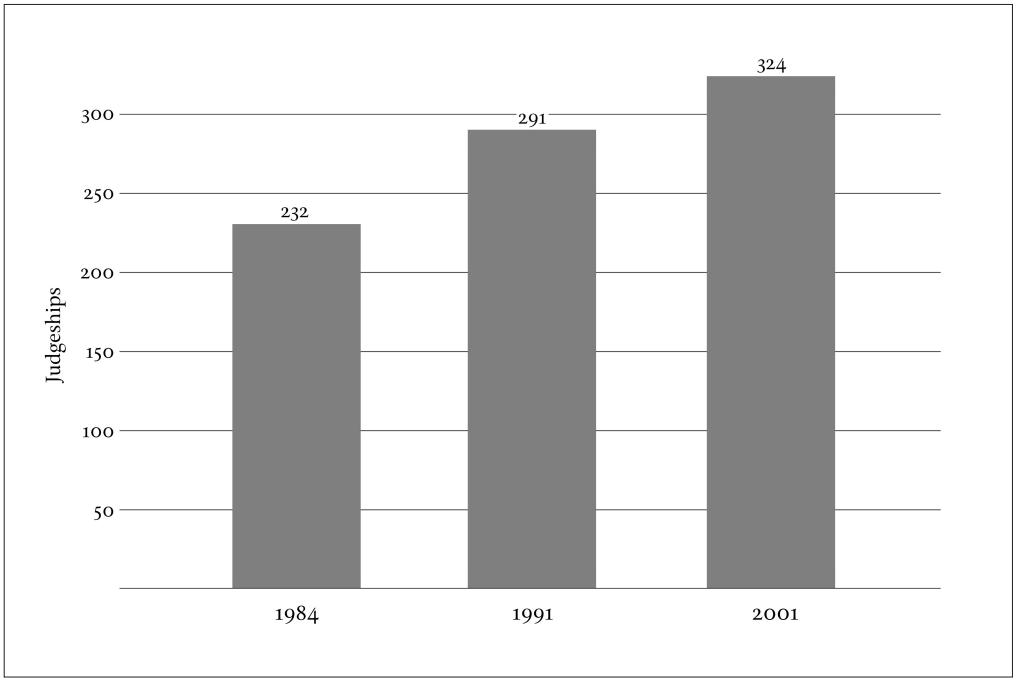
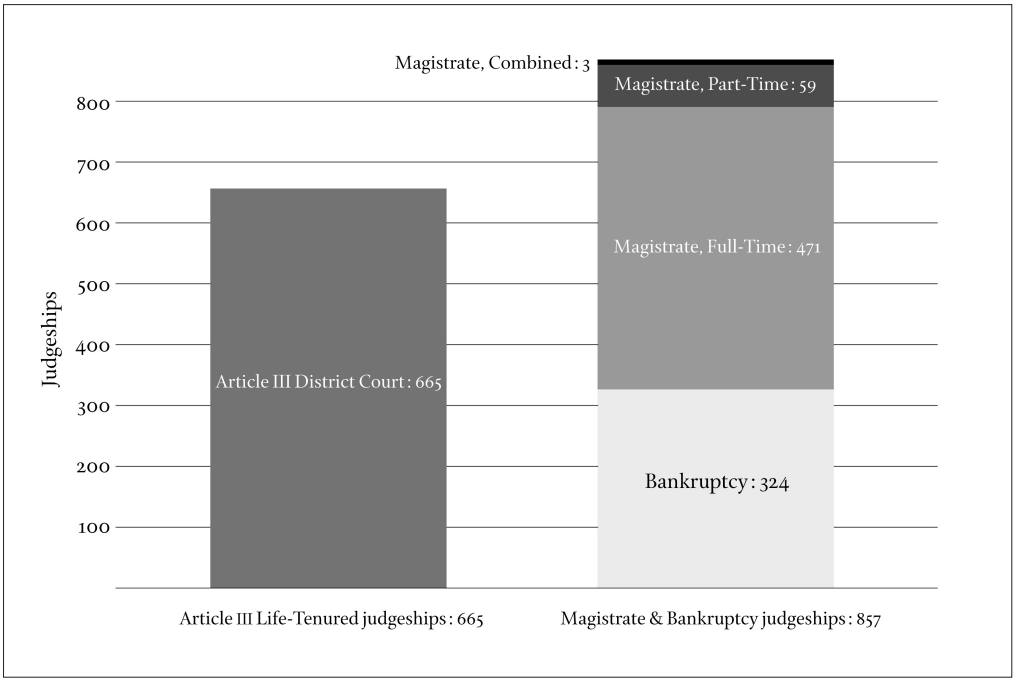


Chart 4
Authorized Trial-Level Judgeships in Federal Courts (nationwide, 2001)



tive Law Judges (ALJs), brought into being via the 1946 Administrative Procedure Act (APA). As Chart 5 details, ALJs number about 1,400; they make hundreds of thousands of adjudicatory decisions in federal agencies such as the Social Security Administration. Moreover, as Chart 6 portrays, while trials are vanishing in federal courts, about seven hundred thousand evidentiary hearings (which include not only trials but whenever a witness testifies) occur in the four federal agencies with substantial dockets. In contrast, about one hundred thousand hearings involving the taking of testimony occur before either constitutional or statutory judges in federal courthouses. Thus, much of federal adjudication happens outside buildings labeled federal courthouses, and hundreds of judges rendering judgments of great import to claimants do not have life tenure.

Further, as one can see by looking again at Chart 5, in addition to the judges chartered under the APA and therefore protected through special selection and dismissal provisions, hundreds of others – presiding officers, administrative judges, hearing officers, examiners (constituting what Professor Paul Verkuil has called "the real hidden judiciary"[19]) – are line agency employees who decide thousands of cases but do so without the protections that the APA provides to both ALJs and disputants. The estimates are that more than 3,300 such non-APA judges can be found in the federal system, and some hold exceedingly important powers. For example, persons called "immigration judges" work for the Department of Justice and, as Chart 6 indicates, decide thousands of cases a year. These "immigration judges" can be (and some have been) reassigned to other positions at the direction of the attorney general.

This enormous expansion of judicial resources came about through reliance on goodwill among all three branches. Dozens of shared initiatives produced the current landscape, with hundreds of federal facilities, more than three hundred thousand annual civil and criminal filings, and more than a million bankruptcy filings in the federal courts, as well as tens of thousands more in federal agencies, resulting in decisions articulating the meaning of and enforcing rights under federal law. The cooperative work of Congress, the courts, and the executive has equipped this nation with several thousand judicial officers in a hierarchy that has life-tenured Article III judges at its top.

What is the relationship between this broadening of judicial capacity and the norm of judicial independence? While popular understandings imagine three robust branches of government, powers significantly separated, and judges able to make rulings on the merits of cases without fear of losing their jobs or their resources, the constitutional text says less than might be expected.

Article III applies to only a subset of federal judges, and even for those constitutionally protected, Article III misses completely the idea of salary-setting independent of Congress as well as financing the institutional needs of a judiciary servicing millions of litigants. While salaries cannot be diminished, the text provides neither for raises, cost-of-living adjustments, funds for facilities and securities, nor for paying subordinate judges, other staff, jurors, librarians, clerks, probation officers, public defenders, or other auxiliary service providers.

19 Paul R. Verkuil, "Reflections Upon the Federal Administrative Judiciary," *UCLA Law Review* 39 (1992): 1341 – 1363.

Chart 5
Authorized Judgeships in Federal Courts and in Federal Agencies (as of 2001)

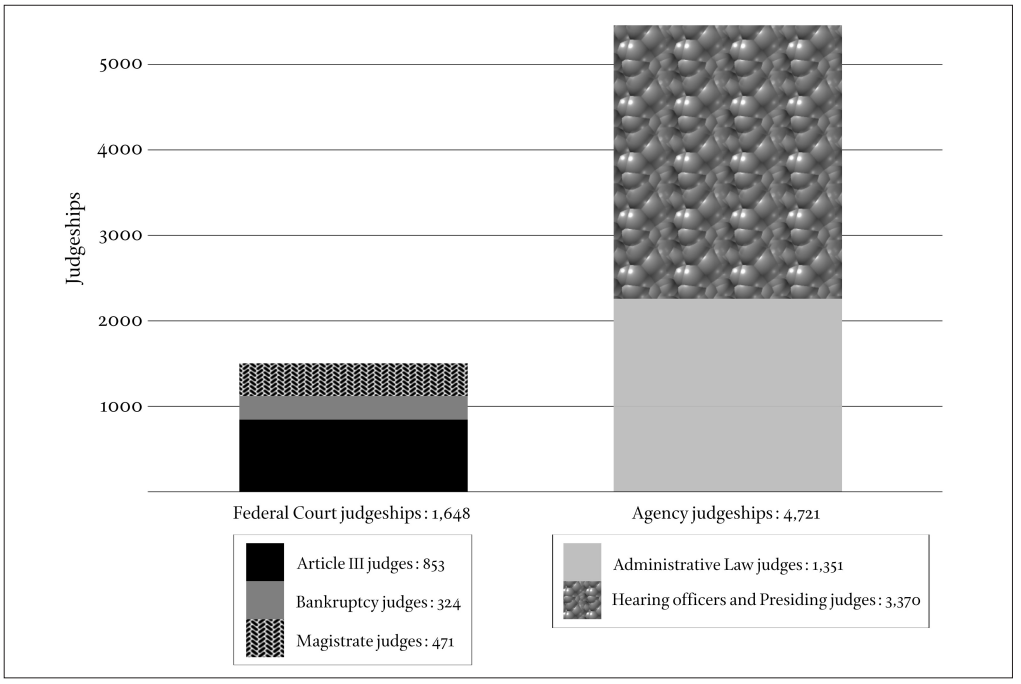
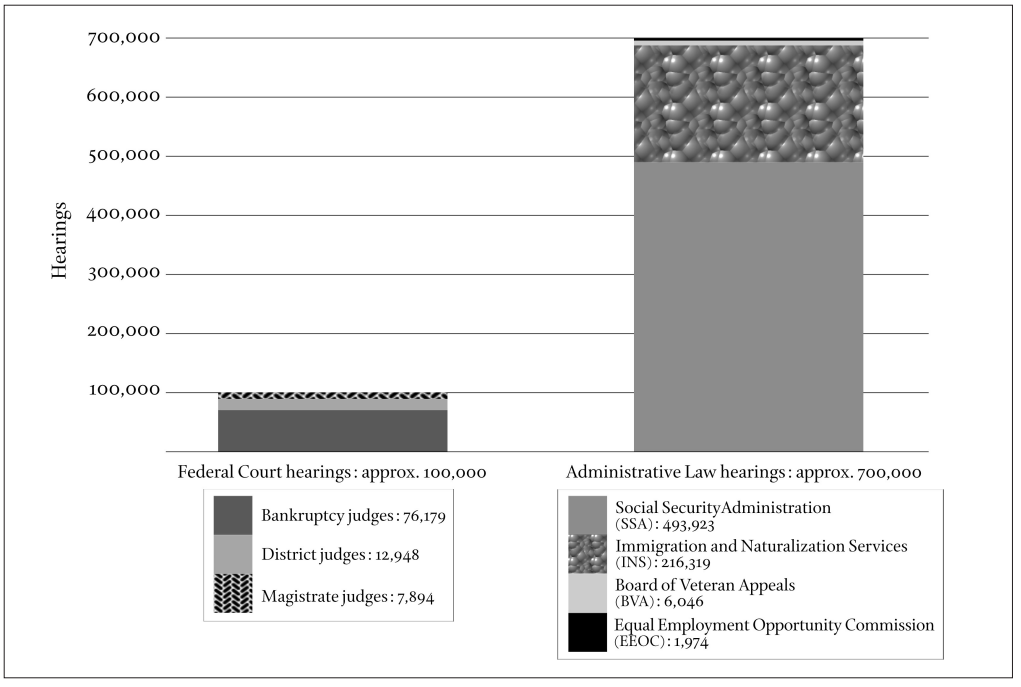


Chart 6
Estimate of Evidentiary Hearings in Federal Courts and in Four Federal Agencies (2001)



The problem of resources is not theoretical. Throughout the twentieth century, members of the judiciary have objected that Congress had set their salaries too low to maintain excellence and had budgeted too little for court facilities, staff, and security. While members of Congress have questioned the need for new buildings, a broad group supports improved salaries. In addition, some federal judges have filed lawsuits arguing that the failure to give cost-of-living adjustments violated the constitutional guarantee against salary diminution. Within two years of assuming his post, Chief Justice John Roberts devoted his "state of the judiciary" address in its entirety to the problem of the lagging salaries of federal judges.[20]

In contrast to the current jurisprudence in the federal system of the United States, other democracies (as well as some state courts within this country) have interpreted mandates for judicial independence and separation of powers to include economic support for the judicial branch. For example, a 1997 decision of the Supreme Court of Canada dealt with the question of salaries for provincial court judges.[21] Reasoning that judicial independence depended on "security of tenure, financial security, and administrative independence," the Court concluded that support for the judiciary ought not put judges in the position of supplicants seeking funds from the legislature. Rather, a depoliticized process "free from political interference through economic manipulation by the other branches of government" was required. The Canadian Supreme Court held that judicial independence required salary setting by an independent body, making non-binding recommendations that could not be set aside unless justified; moreover, those explanations were themselves to be subjected to judicial review.

Turning to the "other" federal judges sitting outside Article III, the vulnerability of those working in administrative agencies was made plain in the 1990s when Congress stopped funding the Administrative Conference of the United States (ACUS), an institution that had been dedicated to research about and support of ALJs. Of equal concern are incursions from the executive, sometimes pressuring judges to conserve resources as they rule on claims against the government. Further, because ALJs have statutory protections against discharges, some agencies have tried to avoid using them by turning instead to line employees to serve as their judges.

Controversy emerged, for example, when a former attorney general asserted his authority to reassign persons working as "immigration judges" as he thought appropriate – and, as others thought, motivated by dislike of their judgments. Moreover, the inadequacies of decision-making in immigration cases have been detailed in several appellate courts criticizing the absence of evidentiary support for judgments, the unfair treatment of claimants, and the failures of internal administrative review by the Bureau of Immigration Appeals (BIA). One extensive empirical review of asylum claims documented that those seeking relief from deportation can expect radically different outcomes depending on the place in which the request is filed. "[A] Chinese asylum seeker unlucky enough to have her case heard before the Atlanta Immigration Court had a 7% chance of success on her asylum claim,

20 John G. Roberts, Jr., 2006 Year-End Report on the Federal Judiciary (2007).

21 *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* [1997] 3 S.C.R. 3 (Canada).

as compared to 47% nationwide. Moreover, if this same asylum seeker had presented her claim 400 miles to the south, before the Orlando Immigration Court, she would have had a 76% chance of winning asylum, over ten times the Atlanta grant rate."[22]

This example demonstrates how the constitutional doctrine developed by life-tenured judges to welcome administrative adjudication has left some of the most vulnerable litigants to do battle against the United States before judges more dependent on the government than others. Further, even while critical of decision-making by the BIA, life-tenured judges do not require (or often advocate) that such cases come, at first instance, either before them or before judges with structural protections paralleling those of Article III. The devolution of judicial power has not been accompanied by an insistence on the devolution of structural guarantees of judicial independence.

Another administrative-like system for individuals alleged to be "enemy combatants" has also come under criticism. After the attacks of 9/11, the president rejected the use of extant judicial systems (including military courts operating to try U.S. soldiers). The executive asserted the right to detain and to decide the fates of such individuals free from the Article III judiciary and, initially, free from constraints imposed by the Due Process Clause of the Constitution.

In 2004, the Supreme Court disagreed, at least as to U.S. citizens, by holding that federal-court review was available and due process constrained the executive.[23] The Department of Defense then created proceedings that in some respects resemble administrative adjudication to classify detainees. Some information (which, if the government claims national security requires confidentiality, is not disclosed to the accused) is presented to military personnel empowered to make decisions about detention. Further, "military commissions" were authorized to try individuals and to impose sentences from long-term incarceration to death. Protests have ensued, including from some members of the military who have described the proceedings as fundamentally unfair.[24]

In 2005, Congress enacted the Detainee Treatment Act, stating rights to be free from torture and from degrading and inhuman treatment but precluding detainees from enforcing them in Article III courts. Rebuffed again in some respects in 2006,[25] Congress responded in the Military Commissions Act of 2006 that provided narrow opportunities for life-tenured judges to consider some claims of alien detainees deemed to be "enemy combatants." In 2008, five members of the Supreme Court held that those constraints violated the Constitution's requirement that the privilege of habeas corpus not be suspended without the provision of an adequate substi-

22 Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," *Stanford Law Review* 60 (2007): 295–412; 329–330. Also documented are significant disparities for those coming from other countries as well as significant variations in the reversal rates of such decisions by life-tenured judges sitting in different appellate courts; ibid., 328–339; 363–372.

23 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); see also *Rasul v. Bush*, 542 U.S. 466 (2004).

24 See, for example, Morris D. Davis, "AWOL Military Justice," *Los Angeles Times*, December 10, 2007; available at http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story?coll=la-opinion-rightrail.

25 *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

tute and that Congress had not provided sufficient procedures as an alternative.[26]

As suggested above, cutting off access to life-tenured judges is not only taking place in the context of 9/11 – as was reflected in the argument by the Department of Defense that its classification regime for detainees resembled the decisional processes of other agencies. Indeed, when initially closing off public access to these "combatant status review tribunals," the Department of Defense labeled that work as "administrative." Furthermore, over the last fifteen years, Congress has divested federal courts of forms of authority over cases involving aliens and ordinary prisoners, and limited redress for civil litigants, such as those claiming violations of federal securities law.

Moreover, administrative judges are not the only ones who can be subject to oversight. Recall from the charts on magistrate and bankruptcy judges that hundreds of these judges work within Article III courts but lack Article III protections. The constitutionality of such judges was affirmed by life-tenured judges who reasoned that no threats to judicial independence could come from within the judicial branch. Yet, magistrate and bankruptcy judges owe their positions to the life-tenured judges who appoint them. Thus far, a distinguished group of individuals has been selected, and they play important roles that have only expanded since the positions were first established. The system has also become something of a training ground, as several have become life-tenured judges.

But we have not come to grips with two issues: whether a significant proportion of federal judges should be selected with little democratic input, and whether they should then be reappointed through the same process. Finding justifications for life-tenured judges to have the singular authority to appoint hundreds of other jurists is difficult. While being a federal judge oneself may be helpful in understanding the qualities needed to do the job well, the grant of life tenure is predicated on the obligation to render judgments – not to become a source of patronage for others to gain jobs. Furthermore, to subject magistrate and bankruptcy judges to review for reappointment renders them dependent on their superiors for the continuation of their jobs. (When one bankruptcy judge was not renewed, he filed a lawsuit and argued that the process of reconsideration was unfair.) Given that judicial independence is premised on creating the freedom not to have to please others, the statutes ought to be rewritten either to turn the positions into life-tenured ones (as was proposed for bankruptcy judges in the 1980s) or to provide different selection mechanisms and non-renewable terms.

In sum, while the joint venture of the three branches of government has produced a host of new judgeships, the devolution of adjudicatory power to such judges has not been accompanied by an insistence that they share forms of insulation that inscribe the norm of independence. Developments of the last century have generated hundreds of federal judges who lack sufficient structural protection against aggressive efforts, whether they emanate from the media, litigants, the executive, Congress, or even Article III judges.

Life-tenured judges have not only gained the ability to clone themselves. They have also reconfigured their own

26 *Boumediene v. Bush*, 128 S.Ct. 2229 (2008); see also *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007), vacated and remanded in light of *Boumediene v. Bush*, 128 S.Ct. 2960 (2008).

roles and the institutional structures that envelop them, and, again, many of these developments sit uneasily within the rationales for judicial independence.

To understand how a programmatic judiciary developed and its relevance to judicial independence, a quick summary of the infrastructure of the federal courts is necessary. The charts above showed some hundred life-tenured judges in 1901. At that time, they were not only few in number but also had little institutional means of talking with each other, let alone to anyone else. The attorney general gave Congress reports on the federal courts and asked Congress for the judiciary's funds. As Chief Justice William Howard Taft put it, each judge had "to paddle his own canoe."[27] Furthermore, before the 1930s, federal trial judges followed the local practices of the state in which they sat. But in 1934, Congress licensed the federal judiciary to make procedural rules that spanned the nation. The first set of civil rules, promulgated in 1938, helped to shape the identity of federal judges as a united cadre sharing uniform practices that at a daily level brought them into common cause with colleagues thousands of miles away.

Rules of court embody normative premises, and the federal judiciary's initial efforts aimed to ease access to courts and to simplify proceedings while expanding investigatory capacities of litigants through creating new rights to discovery of information. Revisions in the 1960s provided for class action remedies, to enable large groups of people to pursue rights through combining forces. But during the second half of the twentieth century, as they faced rising caseloads born in part from these new procedural opportunities, federal judges began to worry that their rules made access too available, to be exploited by lawyers. Judges seized on judicial case management as a way to cope with their workloads and reframed the rules, as well as doctrine, to raise more barriers to entry.

Under current provisions, managerial judges press for dispositions without adjudication, either through settlement or alternative forms of dispute resolution. The enthusiastic promotion of these alternatives relies heavily on anti-adjudicatory rhetoric, instructing litigants and their lawyers that trial is a disfavored mode of decision-making. Interacting with many other factors (including the high cost of lawyer services), these efforts have affected rates of trials, which have declined dramatically over the last several decades. By 2002, of one hundred civil cases filed, fewer than two started a trial – prompting lawyers and judges to worry about what has come to be called "the vanishing trial"[28] and members of Congress to pause when asked by judges for more courthouses. As judges shift away from adjudication and toward mediation, and as they press for resolutions without public process, one justification for independence – rendering public judgment without fear or favor – weakens.

This privatization of adjudication at the trial level is paralleled by the transformation of processes for appeal. Many cases are disposed of without oral arguments and without published decisions. If arguments are had, they may be as brief as ten minutes per side. Further, even if decisions are available to read, some circuit courts stipulate that their judgments cannot be relied upon by

27 William Howard Taft, "Possible and Needed Reforms in Administration of Justice in Federal Courts," *ABA Journal* 8 (1922): 601 – 607; 602.

28 See Marc Galanter, "The Hundred-Year Decline of Trials and the Thirty Years War," *Stanford Law Review* 57 (2005): 1255 – 1274.

other litigants as precedents. A 2004 review reported that almost 80 percent of appellate court opinions were neither published nor to be used as authority.[29]

Moving from the reconfiguration of procedures for decision-making in individual cases to the infrastructure, over the past few decades the judiciary has emerged as a spokesperson in various public debates other than those related to resources sufficient to discharge its obligations. The ability to do so stems again from the efforts of William Howard Taft, who insisted on the need for organization. He succeeded in the 1920s when Congress created an official policy-making body of judges, now called the Judicial Conference of the United States. Comprised today of twenty-seven judges (the chief judge from each appellate circuit, whose positions come from seniority, and one district judge selected from each of the circuits), the Conference is chaired by the Supreme Court's chief justice. That body adopts official policy positions through the votes of its members. Staff support is provided by the Administrative Office of the United States Courts, chartered in 1939 to take over tasks from the Department of Justice. That office collects data, submits budgets, and oversees facilities for the federal court system. In 1967, Congress added resources through establishing a Federal Judicial Center to focus on education and research.

In the early days, the Judicial Conference avoided taking positions on matters of what it termed "legislative policy," such as whether Congress should create new federal rights. Beginning in the 1950s, under Chief Justice Earl Warren, the Conference occasionally raised questions about some federal jurisdictional provisions but often demurred on the grounds that such issues were matters for Congress. In the 1960s, the federal judiciary took up another task: teaching judges through educational programs that aimed to train judges to be better handlers of their dockets. As case loads grew and data collection methods improved, the judiciary's leadership focused on the volume of tasks assigned to it.

Beginning during Warren Burger's tenure, chief justices began to make "state of the judiciary" speeches; his annual addresses reflected some of his views about the desirability of limiting federal adjudication through deference to states and the development of other means for resolving disputes. Under the leadership of Chief Justice William Rehnquist and via a "futures planning process," the Judicial Conference approved ninety-three recommendations made to Congress as part of an official document, entitled the *Long Range Plan for the Federal Courts*, issued in 1995. There, the Judicial Conference stated its commitment to judicial independence while arguing for limited growth in the number of life-tenured judges, for greater reliance on adjudication by judges lacking life tenure, for less federal jurisdiction, and for a presumption against creation of federal rights if enforced in federal court.[30]

For example, the Judicial Conference told Congress – while legislation was pending – that it should not create new rights enforceable in federal courts if computers crashed in Y2K, that Congress should not give veterans access to

29 Penelope E. Pether, "Inequitable Injunctions: The Scandal of Private Judging in U.S. Courts," *Stanford Law Review* 56 (2004): 1465–1580; 1465.

30 In 2008, an assessment of the impact of that plan was issued. See Administrative Office of the U.S. Courts, Implementation of the Long Range Plan for the Federal Courts: Status Report (April 2008).

life-tenured judges to challenge benefit awards, and that, if it created federal rights to health care, Congress should not vest jurisdiction in federal courts for enforcement of such provisions. Moreover, both before and after the passage of the Violence Against Women Act, then-Chief Justice William Rehnquist raised objections to it. Subsequently, in 2000, he wrote the five-person majority opinion in *United States v. Morrison* that held the civil rights remedy within that act to be an unconstitutional exercise of congressional power under the Commerce Clause and the Fourteenth Amendment.[31]

In short, over the last few decades, the federal judiciary as a corporate entity has taken on the roles of education, planning, and lobbying about the shape, nature, and future of judging and the role of federal law. These new roles leave the judiciary open to forms of politicization, as insiders understand that the judiciary is an organization that takes positions in Congress. Sophisticated repeat players (such as the government, insurance companies, corporations, and civil rights groups) attempt to lobby the judiciary to adopt certain stances.

As the judiciary adopts a collective voice to opine on theories of jurisdiction and to support or oppose access for certain kinds of rights to be pursued in federal court, the more it seems to function as other federal agencies do, participating in politics to advance its own agendas. Holding aside questions of how the judiciary operates internally such that the leadership can claim to represent the hundreds of life-tenured judges on behalf of whom it purports to speak, the position-taking puts the judiciary into politics rather than functioning as the adjudicator of other "interested" parties' claims.

I began this essay by outlining the constitutional ambiguities surrounding judicial independence. I then described how a dynamic of cooperation produced the important federal judicial system that is familiar today. But I have also analyzed how the inventions of the last century, all plausible responses to pressing needs readily explained by reference to political economy, have resulted in new sets of judges more vulnerable than the iconic judges found within the U.S. Constitution and in institutional practices that put pressure on the rationales for judicial independence.

But as I argued, Article III – our emblem of judicial independence – does not in its own terms explain the contemporary configuration of the federal judiciaries. Those developments move beyond the sparse textual provisions and rest on history, practices, and cultural understandings of the desirability of judicial action and its appropriate boundaries. Further, I have shown how dynamic the system is, as statutes, rules, and decisions by the judiciary innovatively respond to problems. As a consequence, practices that seemed unimaginable only decades ago (from the mundane examples of the relatively new reliance on court-based settlement programs and administrative adjudication to the stunning assertions by the U.S. government of the legitimacy of according little or no procedural rights to individuals at Guantánamo Bay and elsewhere) are now parts of our collective landscape.

Given these transformations, one ought not to assume the stability of the norm of judicial independence. Yet there are good reasons to seek to reinscribe its importance. While the United States was once at the fore in proclaiming such

31 *United States v. Morrison*, 529 U.S. 598 (2000).

a commitment in the constitutional text of 1789, it has now been joined by a worldwide chorus that an independent judiciary is a *sine qua non* of democracies. That proposition can be found in many countries' constitutions, as well as in transnational conventions such as the Covenant on Civil and Political Rights and the UN-promulgated principles on the judiciary.[32] Indeed, the recent efforts by the executive in the United States to try to escape decision-making in open court by life-tenured judges are testaments to the promise of transparent adjudication.

But perpetuating a commitment to judicial *independence* requires recognizing judicial *interdependence* on other branches of government, litigants, the media, and on the public itself. Needed is a culture that cherishes judging, respects individual judgments when rendered after deliberation, obliges judges to take responsibility for their decisions through explanation and publication, and constrains judges when they move outside their role as adjudicators. To shape that culture requires revamping some of what has come to seem normal as a result of the innovations of the twentieth century.

Key to refocusing on adjudication's contributions to the workings of democracies are public processes, an aspect of adjudication that is only mentioned in Article III in a little read provision: Section 3, Clause 1, requiring that no one can be convicted of treason "unless on the Testimony of two Witnesses . . . or on Confession in open Court." The more general proposition that the public has rights of access to civil and criminal proceedings stems from a long tradition in the common law. During the twentieth century, the Supreme Court relied on those customs coupled with the First Amendment guarantees of the right to petition for redress, the Sixth Amendment guarantee of criminal defendants' rights to "a speedy and public trial," and Fifth and Fourteenth Amendment due process protections to insist that, as a matter of constitutional right, court proceedings and dockets have to be open to the public. The European Convention on Human Rights includes a similar proposition, as its Article 6 requires "a fair and public hearing" and that judgments are to be "pronounced publicly."[33]

What is the relationship between commitments to judicial independence and the public processes of adjudication? Litigation forces dialogue upon the unwilling (including the government) and momentarily alters configurations of authority. When cases do proceed in public before independent judges, courts institutionalize democracy's claim that it imposes constraints on state power, jurists included if they are required to explain why their power is used. In addition to undermining the

32 See, for example, International Covenant on Civil and Political Rights, adopted December 19, 1966, art. 14, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force March 23, 1976) ("everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"); Basic Principles on the Independence of the Judiciary art. 1, G.A. Res. 40/32, U.N. Doc. A/RES/40/32 (November 29, 1985); G.A. Res. 40/146, U.N. Doc. A/RES/40/146 (December 13, 1985), available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm. ("The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country.")

33 Convention for the Protection of Human Rights and Fundamental Freedoms, article 6, opened for signature November 4, 1950, 213 U.N.T.S. 221 (entered into force September 3, 1953).

state's monopoly on power, forging community ownership of norms, demonstrating inter-litigant obligations, and equalizing the field of exchange, open courts can express another of democracy's promises – that rules can change because of popular input. The public and the immediate participants see that law varies by contexts, decision-makers, litigants, and facts, and they gain a chance to argue that the governing rules or their applications are wrong. Through such democratic iterations, norms can be reconfigured.

Judicial independence is an instrumental value, and we who value it need to insist on repeated examples of its utility in ordinary as well as extraordinary moments so as to generate a widespread understanding of how judges contribute to a democratic polity. Constitutional texts alone cannot do this work. All of us within the constitutional polity need to appreciate our own dependence on thriving judiciaries that, in turn, must make their processes and decisions publicly accessible.