Empowered and Independent Courts

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Judicial independence has long been considered a critical element in the development of rule of law and the establishment of the political freedoms necessary in a democracy. During the campaign for ratification of the U.S. Constitution, Alexander Hamilton argued, “The complete independence of the courts of justice is peculiarly essential in a limited Constitution.” The concept of separate and limited powers cannot be implemented without three autonomous institutions to defend the boundaries of authority. Judicial independence can only arise in the context of an empowered judiciary.

An independent and empowered court is a necessary cause for the creation and in order to sustain a liberal republican democracy. There are three aspects to a liberal republican democracy. There is democracy itself. Democracy is the political right of citizens to participate in the collective decisions of a society, particularly to determine its governmental...
leadership. Second is liberalism, which is a limitation on pure democratic control and insists on protecting certain rights and freedoms of the citizens. The third aspect is republicanism, the concept that no person is above the law; the law applies to all, even governmental leaders. In this sense republicanism envelops the concept of rule of law. Therefore the purpose of an empowered and independent judicial branch is to allow the courts to fulfill three important functions within a society: protection of the political rights of the people, protection of their civil freedoms and liberties, and establishing rule of law. The less independent the courts, the weaker the political rights of the people, the fewer civil liberties and the lower the adherence to the principle of rule of law.

Judicial independence and empowerment is a political state and exists in a political context. It is based in the public’s trust and confidence in the courts. If courts are to protect rights and liberties and establish the rule of law, they must do so with general public support and across a broad network of interests. If the public does not support the need for an empowered and independent judicial branch it cannot be achieved. Even in the face of traditions or constitutional structures, without the political support of the general public, traditions and structures can easily be ignored. Therefore, to achieve judicial independence and empowerment courts must have political support. This support is necessary in order to protect civil and political liberties of a society and to make counter-majoritarian decisions. It is necessary in order to restrain other branches of government and the power of elites within society. With political support courts provide the necessary constraint on the powers of government and on majoritarian rule to create the rule of law and protect civil freedoms and political rights. Justice is the tool used to create this support.

A judicial branch with independence is an empowered court. It was the intent of the framers to establish courts with independent authority. However, most thinking about judicial independence has been limited to the concept of insulating judges from governmental, political, and societal pressures. As I discuss in this chapter, insulation is an element of judicial independence but it alone will not establish the independence of the judicial branch. Over the years scholars have conflated the concept of the insulation of the court from outside influences with the concept of judicial independence. This approach fails to recognize the breath of

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judicial independence and the necessity that courts be empowered through the political support of the people to act independently. It is a misunderstanding of the concept and its implication. Illustrative of this is Ramseyer and Rasmusen in their study of judicial independence in Japan.3 They limited the concept of judicial independence to individual judges and the effect on their careers when they ruled contrary to the government in power. They ignored the institutional authority of the courts and all other elements of judicial independence. William Prillaman uses a broader concept that includes separation of powers and independence from other governmental branches in his study of Latin America, but it is still limited to the notion of political insulation.4 While insulation is indeed a critically important component, it is not the only necessary aspect of judicial independence. Much of the difficulty and the resulting lack of clarity with many of the studies addressing judicial independence is that when they attempt to deal with the broader issues that must be considered, these ideas are forced into the narrow concept of social and political insulation. The ideas become muddled and confused. Therefore it is not surprising that Lewis Kornhauser wrote, “[T]he concept of judicial independence does not further the development of normative theories of adjudication, does not advance understanding of the functioning of extant judicial systems, and does not aid in the design (or improvement) of judicial institutions.”5 If the notion of judicial independence relates only to the concept of insulation then his statement could be taken as true, but true independence is the power to act independently and to assert to the proper power of the judicial branch. The approach to judicial independence must be much broader and incorporate not just the concept of insulation but also accountability, utility, efficiency, qualifications, representation, authority, and restraint. By doing so, it will be able to overcome Kornhauser’s objections. Rather than attempting to tilt at windmills and to change how this term is being misused, I instead use the terms “independent” and “empowered” to indicate the broader concept; however, I think it actually redundant.

Courts exist to provide justice. Justice can only be achieved when adjudicative decisions are based on a fair and impartial determination of the facts and a reasonable and consistent application of the law. If the purpose of judicial independence and empowerment is the reasonable and consistent application of the law, then as judicial independence increases so will the application of rule of law. Rule of law has broad application to society. In the context of civil disputes, courts should settle disputes according to the law and the facts, not according to the power or status of the parties. In the context of criminal law, the application of justice ensures the protection of the rights of the innocent and the fair, impartial, and consistent use of punishment. Fairness in all cases requires the application of due process. Justice also requires access to an impartial tribunal. Impartiality insists upon a judicial officer insulated from governmental, political, economic, and societal pressures.

Justice also serves to prevent government from intruding on the rights of individual citizens. Courts use their adjudicative power as a check upon the powers of government and to challenge the authority of the other branches of government. Not all governance structures offer checks and balances. Although a prominent purpose in the American constitutional structure, it is not always present or considered necessary in other forms of government. However, even absent a structural system of checks and balances, judicial independence and empowerment gives the judiciary the ability to protect the political and civil liberties of the people as established under law. Justice is served when the rights of individuals are protected even in the face of pressure from political, social, or economic centers of power. Protection of rights and freedoms and establishment of the rule of law and all that they imply is the purpose of judicial independence and empowerment. Knowing this purpose also allows for the operationalization of the effect of judicial empowerment and an efficient method of comparison across cases.

What are the factors necessary to establish an empowered and independent judiciary? My original research had led me to understand that there were eight separate factors that created judicial independence. The first, of course, was insulation of the judiciary from the other branches of government and outside pressure. Second was accountability, the other side of the coin of insulation; these two clearly related factors may seem to be opposed, but they are not mutually exclusive. Next was the utility of the courts or their effectiveness from the standpoint of parties and
society; that factor goes hand in hand with the fourth factor, efficiency. To establish judicial independence courts need to be both efficient and effective. The fifth factor relates to the authority of the courts. Courts need to protect their jurisdiction and enforce their orders; otherwise they are a meaningless institution. At the same time, they have to be respectful of the constitutional powers and jurisdiction of the other branches; therefore comity or restraint is the sixth factor. Judges must not legislate from the bench and must act with restraint when they can do so within the context of their adjudicative role in order to remain independent. The seventh factor is that courts need to look like the people they serve in terms of gender, race, and ethnicity in order to gain the trust and confidence of the people necessary to sustain judicial independence. The final factor relates to the quality of judicial officers. The courts must have the most qualified people on the bench and staffing the courts; incompetence will quickly breed distrust. These are the eight factors that must all be strong and present in order to have an empowered and independent judiciary.

Having established these eight factors as critical to the establishment of judicial independence, I came upon Daniel Carpenter’s theory of bureaucratic autonomy. This theory has broad application to the creation of judicial independence and could be used to form a strong organizing principle for the eight factors. Carpenter explains that autonomy exists when executive branch agencies are able to act on their own wishes without being checked or reversed by elected authorities, organized interests, or courts. Carpenter has defined the three elements of bureaucratic autonomy this way:

- Autonomous bureaucracies are politically differentiated from the actors who seek to control them. They have unique preferences, interests, and ideologies, which diverge from those of politicians and organized interests.
- Bureaucratic autonomy requires the development of unique organizational capacities—capacities to analyze, to create new programs, to solve problems, to plan, to administer programs with efficiency, and to ward off corruption. Autonomous

7. Id.
8. Id.
agencies must have the ability to act upon their unique preferences with efficacy and to innovate. They must have bureaucratic entrepreneurs.

- Bureaucratic autonomy requires political legitimacy, or strong organizational reputations embedded in an independent power base. Autonomy first requires demonstrated capacity, the belief by political authorities and citizens that agencies can provide benefits, plans, and solutions to national problems found nowhere else in the régime. These beliefs must also be grounded in multiple networks to which agency entrepreneurs can build program coalitions around the policies they favor.

Similarly, judicial independence and empowerment exists when courts are able to act within their sphere of influence to duly and fairly administer justice, protect the civil and political rights of citizens, and enforce the rule of law without being checked or reversed by elected authorities, organized interests, or the economic, religious, or cultural powers of the society. Carpenter makes clear that autonomy is "politically forged." It should be no different when applied to the judiciary as to a bureaucracy of the state. Judicial independence is likewise politically forged. As former Chief Justice Francis Nyalali of Tanzania pointed out, "[T]he ultimate safeguard is really public opinion. . . . The people have to value an independent judiciary and be willing to defend it." The greater the public trust and confidence in the courts is the greater will be their independence and empowerment.

Carpenter’s theory has clear application to judicial power. These three unique requirements provide an excellent road map to the necessary elements of judicial independence and empowerment. Analysis of prior theories in light of Carpenter’s shows that most theories of judicial independence focus only on political differentiation and do not fully address organizational capacity or political legitimacy as separate concepts. These additional elements must be present because many studies have found that the insulation of judges alone does not and cannot lead to institutional autonomy. Carpenter illustrates that these other elements are necessary. However, his theory is not directly adaptable to the courts but is a strong organizing concept if modified in part to fit the judicial

9. Id.
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branch’s unique situation. Clearly judicial empowerment and independence is made up of the components of differentiation, organizational capacity, and legitimacy within the context of the judicial branch as an institution of the courts rather than bureaucracy. The concept of separation of powers embodied in the U.S. Constitution creates the need for such independence and empowerment that is absent in the bureaucratic structure.

Six of those eight factors that I considered necessary for judicial independence are subsumed within Carpenter’s elements. Insulation and accountability establish political differentiation. Utility and efficiency are certainly parts of the concept of organizational capacity and authority and restraint are elements of political legitimacy. However, to these three elements a fourth must be added: political competence, including the factors of representative and qualified judicial officers. The addition of political competence includes an important element not a part of Carpenter’s original study. His theory was developed out of a study of bureaucratic entities in the first half of the 20th century. As the body politic excluded or limited the involvement of women and minorities, this issue would not have been as salient as it is today. The application of bureaucratic theory to a separate branch of government requires this addition as well.

In order for the judicial branch to be independent and empowered, the four elements of political differentiation, organizational capacity, political competence, and political legitimacy must all be present. Each of these elements is made up of two complementary factors or components that must be present, relatively strong, and in balance. The components are paired into these four elements. The paired concepts within the institutional differentiation element are insulation and accountability. Utility and efficiency are the component parts of organizational capacity. Qualifications and representation are the components of political competence. The components authority and restraint comprise institutional legitimacy. The dynamic tension between the components that comprise each element serves to enhance the strength of that element. The structure of this model illustrates the distinction between the components and highlights the consequences of focusing on one component to the exclusion of the other. It helps to resolve some of the inherent conflict within some of the concepts such as insulation and accountability. Although set out as separate and distinct concepts, it is important to recognize that

each of these elements and the component parts can be, and often are, inextricably intertwined with the others. Therefore it is possible that certain indicators may offer evidence of multiple components.

Each of these four elements is present in any system to a greater or lesser extent. If any two elements are weak or absent, judicial independence and empowerment will be compromised. The stronger each of these elements is and the better balance between each pair of components, the stronger is judicial independence. When the pairs of components are out of balance with each other the strength of that element may be jeopardized. For example, strong levels of insulation without corresponding strength in accountability can lead to an isolated, out-of-touch judiciary. In such an insular environment there would be no consequences to ignoring or giving extreme or inconsistent interpretations of the law. This would soon erode public trust and confidence and eventually all political support for the courts. On the other hand, a system with strong accountability but little insulation may make the courts subject to the political whims of the other branches or voters in general. The lack of insulation could prevent members of a court from asserting constitutional or other limitations on majoritarian, executive, or legislative power. It is the balance between the components that builds public trust and confidence. Each of these four elements and the factors that comprise them are discussed more fully below.

**POLITICAL DIFFERENTIATION**

The first pair of components is a balance of insulation and accountability. Together these components can establish the institutional differentiation of the courts. Political differentiation means that an institution is in fact a separate branch of government and has its own goals, preferences, and ideological underpinnings that may be different from the outside actors and institutions that wish to control it. To help create that independence, the drafters of the U.S. Constitution set up the judiciary as a separate branch of government. Separation of powers attempts to create institutional differentiation within the structure of government. Political differentiation clearly relates to the traditional notion of judicial independence: insulation from other political forces and also all other actors within a society that would attempt to control them. A constitutional

12. *Id.*
structure with separation of powers alone will not establish institutional differentiation. Recent history in Eastern Europe and Latin America abounds with examples of constitutional guarantees being virtually ignored by powerful executives or the legislative branch. Judicial empowerment, separation of powers, and institutional differentiation can only be achieved in practice. There needs to be a system for insulating judges from improper influences. However, insulation alone will not establish differentiation. A system of accountability forecloses the need for external control especially from the other branches of government and therefore contributes to institutional differentiation.

**Insulation**

Courts must be insulated from the politics of the executive, the legislature, and political parties. Courts should not be influenced by social, political, and economic power. Such influence is hard to avoid. In the U.S. federal system, judges are insulated with lifetime appointments and a guaranteed salary but also a very weak system of discipline. American political parties are not particularly strong as compared to parliamentary systems, and typically they do not have a large influence on decision making unless a judge is interested in advancement. Those judges interested in appointment to a higher bench must still be concerned that they align with the policies of a party in order to have a chance at a nomination.\(^\text{13}\) It appears that some do so. In many other countries political parties have a stronger degree of influence. In Argentina, Rebecca Chavez found that monolithic party control of provincial government eroded the insulation of the courts and, consequently, judicial independence. Where party competition was more balanced, courts could remain insulated and independent.\(^\text{14}\)

A number of approaches are used to insulate the courts. One is the protection of the salary of the judge. The U.S. Constitution, like most state constitutions, provides that the salary of a judge cannot be reduced during the judge’s term in office. This protects the judge from retaliation by the legislature or executive branch due to a judge’s ruling in a case. However, this does not necessarily protect the budget of the court. Legislatures have attempted to reduce the budget for court operations and staff to indicate their displeasure at rulings of the courts.

\(^\text{13}\) Laurence Baum, The Supreme Court (9th ed. 2007).

The term of office also helps protect the judge; the longer the term, the greater the insulation. The federal bench and a few states offer lifetime appointment; however, the typical term of a jurist is between four and six years. Another way states insulate the judiciary is by providing judges with judicial immunity that protects them from being sued for the conduct of their official duties.

Security for judges and sometimes for their family can be an important aspect of insulation. Judges must feel safe and should not rule from a position of fear. The judge and the personnel of the court should also be secure in their personal information as well as the records of the court. All forms of attempted intimidation must be muted.

Elections provide some insulation from the other branches, as the judges are answerable to the people, but that of course diminishes the insulation the courts have from the electorate. Campaign regulations and limits to the size of donations attempt to insulate judges from undue influence. However, in most states judges running for election become unduly dependent on attorneys for campaign contributions. Merit selection or other selection methods can also insulate the judiciary from the electorate.

Judicial ethics are the primary method used to insulate the judiciary.¹⁵ The Model Code of Judicial Conduct contains many provisions that attempt to prevent outside influence. Most importantly, Canon 2 Rule 2.4 provides: “(A) A judge shall not be swayed by public clamor or fear of criticism. (B) A judge shall not permit family, social, political, financial or other interests or relationships to influence the judge’s conduct or judgment.”¹⁶ Rules also require a judge to avoid impropriety and the appearance of impropriety, to act without bias or prejudice, and to be faithful to the law. The rules define when a judge should be disqualified from hearing a case. They prevent improper ex-parte communication. The rules create a barrier between the bench and bar and the bench and the public.

**Accountability**

Along with insulation it is important that courts have some form of accountability. Accountability assures the public that the courts are

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acting within their mandate and are properly using those resources allocated to it. There are many forms of accountability in the state and federal judicial systems. While the ethical code provides insulation, the discipline systems allows for accountability within the institution. The Model Code of Judicial Conduct holds judicial officers to a high level of integrity and avoidance of any appearance of impropriety. The code will provide insulation for judges from outside influences, but only if it is enforced. If that discipline is imposed by the judicial branch itself, it can help to consolidate authority within the judiciary. If it is imposed by an independent agency, there can be greater trust and confidence in the enforcement of the rules. However, when discipline is imposed from the executive or legislative branch it may result in an erosion of insulation. The U.S. federal system, while allowing for oversight in the decision-making process, allows for little internal discipline with regard to the performance of judges and their demeanor on the bench. The lack of accountability in the face of extreme or abusive behavior by a judge can erode the public support for the courts. It encourages the other political branches to attempt exercise some control over the courts to compensate for the lack of accountability.

Accountability protects against isolationist tendencies. There are different types of accountability and multiple ways to achieve it. For example, to establish rule of law courts must reasonably apply the law passed by the legislature and approved by the executive. Much accountability to the law is achieved through a system of appellate review. It assures that the lower courts are properly applying the law and not usurping the authority of higher courts. Transparency allows greater accountability. Court proceedings are open to the public as are most court records unless a reason has been articulated by the court or the legislature for closing them. Opinions, especially of the appellate courts, are published to allow members of the profession and the public to scrutinize the reasoning of the court. Transparency is also enhanced by the jury system that allows citizens to be a part of the decision-making process and observe the workings of the court.

There are other methods for creating accountability, such as the direct election or retention elections for judges. The election of judges creates a higher level of accountability to the electorate. Illustrating the tension between dialectic pairs, judicial elections necessarily reduce political

insulation. Nonpartisan elections keep much of the accountability and increase insulation from political parties when compared to partisan elections. A degree of accountability may be achieved through transparency or the use of a jury system.

Courts are adopting performance measures across a wide range of issues including cost control, timeliness, access, and fairness. The National Center for State Courts (NCSC) encourages trial courts to adopt ten key measures. First is a measure of access and fairness through surveys of people who use the courts. There are four measures of case management: clearance rates, time to disposition, age of pending caseload, and trial date certainty. The NCSC also urges measuring the reliability and integrity of casefile, the collection of monetary penalties, the effective use of jurors, and employee satisfaction. The final measure is cost per case and is an indicator of how well the court is using its resources. By collecting these data and making the information public, the courts reassure the citizens that they are properly operating and serving the public, that they are good stewards of public funds. These measures give the public and the other branches a yardstick to measure how well the courts are operating and can help identify areas where the courts are lacking or need improvement.

A number of states have begun to create judicial conduct commissions that evaluate the performance of judges. In Colorado, for example, lawyers, witnesses, parties, other judges and jurors are surveyed to determine how well each judge is performing in the areas of case management, application and knowledge of the law, fairness, communication, demeanor, and diligence. The reports are available to the public and are provided in the years the judge is up for retention elections.

Insulation and accountability are not mutually exclusive; both can and should exist to help establish the independence of the courts. When both insulation and accountability are strong there will be institutional and political differentiation. In effect this establishes the political separation of the courts from the other branches of government.

ORGANIZATIONAL CAPACITY

The second pair of components, utility and efficiency, relate to the element of court performance or organizational capacity. Courts must develop unique organizational capacities and establish the ability to perform the functions assigned to them in order to establish independence.
For courts, organizational capacity is the ability to serve all citizens in solving problems, protecting political and civil rights, punishing crime, resolving disputes, and administering justice with efficiency and integrity. The insight of Chief Justice Nyalali is illustrative: “The courts must work. People must feel they can resolve disputes satisfactorily and in a reasonable amount of time. If they do, then the people will support us. You see, it really is the quality of justice that determines whether we remain independent.” This requires a judiciary that throughout the system acts consistently, intelligently, and professionally. Organizational capacity is enhanced by the expertise of those who lead the organization. The quality of administration will affect judicial independence. Russell Wheeler states: “Judicial administration contributes to judicial independence to the degree that it helps foster the reality and thus the image of a public service agency that works well, that does its job that meets the purposes that the citizens expect of it.” The organizational capacity of a court is judged by both the court’s efficiency and its usefulness.

Courts, unlike other branches, are open to individuals as opposed to the collective determinations of the legislative and executive authority. This gives courts a unique role in the lives of citizens and the ability to directly influence the political empowerment of courts. Scholars’ analysis of judicial power most often focuses on the highest courts. This focus, while important, misses the strong supporting role that trial and intermediate courts must necessarily provide. In the judicial system it is important that not only those sitting at the highest court have the necessary levels of expertise and professionalism, but also those judges sitting throughout the system and court staff, who for many citizens are the face of the judicial system. For courts to forge the political support necessary for judicial independence and empowerment, they must do so at those instances where citizens have contact with the judiciary or are denied access. Citizens interact with the courts most often at the lowest levels not at the highest. The more useful these lower courts are to people in

18. Widner, supra note 10, at 36.
general for the resolution of disputes and protection of rights, the greater the organizational capacity of the courts.

Utility

Courts must be useful to society. The highest utility of the judicial branch is the belief by political authorities and citizens that the courts can fairly punish crime, protect civil liberties and political rights, and justly resolve disputes. Due process is the cornerstone of utility. Due process requires that parties to a dispute have an opportunity to be heard in a reasonable manner in a reasonable time and place. That place must provide security for the litigants and witnesses. If parties are not allowed a meaningful opportunity to be heard, there is little utility. Another important aspect of utility is access. If parties cannot reach the tribunal, then the tribunal has no effect and cannot engender public support. William Prillaman found in his studies in Latin America that as accessibility increases, so does understanding of the rule of law and support for the judiciary.22 However, again illustrating the dialectic relationship of the components, limiting access may increase the efficiency with regard to the cases before the tribunal. In the U.S. federal courts the minimum jurisdiction for suits based on diversity of citizenship was increased to $75,000. This had the effect of decreasing caseload, allowing for the more efficient handling of the other cases filed. However, setting jurisdiction at an amount nearly double the medium income of all Americans certainly makes the federal courts less useful to ordinary citizens.

Fairness is another cornerstone of utility. Courts must be seen as fair and impartial: treating all parties equally, no matter their situation or status. Courts must follow and apply the law in the same manner to whom-ever appears before it in order to be effective. They must also act without bias or prejudice. While we are aware that all people hold certain implicit biases that may affect their judgment even if not intended, courts must be seen as being aware of such tendencies and addressing these biases and attempting to negate their effect.

As the needs of the community change, the courts must be able to respond. Carpenter recognizes the need for entrepreneurs within an organization to be able to respond.23 Even though the courts are conservative institutions that are slow to change, they must be able to modify

practices to effectively serve the community. For example, the courts in some states were overwhelmed by the flood of foreclosure suits in 2009–2010 without a way to respond. Greater trust would be placed in the courts if they could quickly adjust to meet these challenges without compromising due process.

Efficiency

Organizational capacity requires efficiency, because waste and delay cause political support to diminish. Inefficiency reduces the ability of the courts to pursue their function. Courts must be public stewards of the resources they are allocated and be able to show that they are being used effectively in order to sustain the flow of those resources. Inefficiency can cause delay and also lead to the denial of access. If inefficiency causes the time of a hearing to be delayed, a party’s rights may substantively denied and due process lost. The impact of excessive delay hurts both litigants and the public support for courts. Case management tools and practices are proven to allow the court to be more effective in disposing cases in a timely manner. Courts need to keep their dockets moving using the least amount of resources necessary to do so. This is not to argue that faster is better. Burbank and Friedman argue that environmental factors such as the level of caseload can have an effect upon a judge’s decision in a case.24 The mere desire to move on to the next matter and not get caught in delay may cause a judge to miss important evidence. In such a case the court loses its utility.

In addition courts need to appropriately manage both their use of jurors and the jury trial. Judges must be able to manage both jury and bench trials so that once they begin they finish in the most efficient manner. Wasting the time and effort of parties, lawyers, jurors, and potential jurors will send a message within the community that the courts are not strong managers of their resources.

Courts manage information, be it in the form of documents, testimony, or a record of court events. Therefore they need to embrace information management technology that can make them more efficient. While there have been leaders in this area, for the most part courts have been slow to do so. Courts have a duty to the public to manage court operation in the

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most cost-effective way that does not interfere with its ability to effective resolve case and disputes.

Corruption is the highest form of inefficiency. Courts have little utility if they are corrupt. Courts must guard against corruption and vigilant in pursuing and eliminating any possible problems. Corruption is invasive and it will not only destroy organizational capacity abut all four element of judicial independence.

The quality of justice, including how effectively and efficiently the courts are run, enhances public trust and confidence and will help keep the courts empowered. As Russell Wheeler argues, “Judicial administration cannot only help the courts to master their own operation. It can also protect the courts, in some very specific ways, from outside efforts to make the judicial function unduly dependent on improper forces.”

POLITICAL COMPETENCE

The third element, political competence, is made up of the components of qualification and representation. Political competence is about gaining the peoples’ trust and confidence in officers and leadership of the court. This can only happen in an environment where the members of the judiciary and the institution itself are highly respected. The higher-quality and more professional the judges at the trial court level, the more effective and efficient the administration of justice, the greater the perception of organizational capacity will reside in the body politic.

Qualifications

The more highly qualified people should become judges, but there are few standards that potential jurists must meet. Many states have only minimal requirements for judges. Judges on courts of general jurisdiction typically have to be lawyers and have practiced for at least ten years prior to their elevation to the bench. In an appointive system it may be easier to select those with the most distinguished careers to the bench, but even in those states where judges are elected the most common campaign theme is who is most qualified. Qualifications include the judge’s knowledge of the law, illustrated by the judge’s education, scholarship, and continuing legal or judicial education. Experience is another

important aspect of qualification. What experience does the judge have in handling cases and trials? Does the judge have experience as an organizational leader that can oversee courthouse operations?

Even the most experienced lawyer who comes to the bench will not have training in trial management and caseflow management. The change from advocate to judge, from presenting evidence to determining its admissibility and weight, is profound. Judging is a skill and therefore people can be trained in it to improve their performance. Courts must be dedicated to training both their judicial officers and staff and to life-long learning to attain and maintain their competence.

Attracting a qualified bench requires that judicial compensation be at level to attract those who have successful practices. While compensation will never achieve the level that some very successful lawyers earn, it should not be a burden to leave practice. In the State of New York, judges have not received a cost-of-living raise in 12 years, causing more and more experienced judges to leave the bench and move into private practice.

Representative

If the bench, no matter how qualified, is seen by the public as only being made up of a narrow group of elites, there will be less respect for the judiciary and its decision no matter how well qualified they may be. Diversity can be achieved across a wide range of areas including gender, race, ethnicity, and religion, but can also include age and geographical location. Diversity in experience is also welcomed so that a court is not dominated by former prosecutors, for example. A diverse bench assures the public that there will be an understanding of the community values, especially within minority communities. Decisions that may be against the interests of a certain community may be better accepted if a member of that community is involved in the decision-making process. In the U.S. Supreme Court today we see both diversity and extremely high qualifications, there are three women, an African American, and a Hispanic member. All members attended either Harvard or Yale law school and eight were court of appeals judges prior to their appointment. A majority were law professors at one time. The bench is highly diverse and qualified. There is an East Coast bias and an absence of Christian Protestants on the court, but with only nine members it is difficult to balance all demographics as it is in larger court systems. However, other courts may not have attained this balance.
Qualifications do not have to be lowered for the sake of broader representation. If representation is limited even where the qualifications of the members of the bench are high, the court will not be viewed as politically competent. In addition it is not only judicial officers but also staff that should be highly qualified and representative of the community. While parties may appear before a judge from time to time, the public deals with staff directly and typically more often. Their impression of staff will reflect on the judicial branch as a whole. Diversity, qualifications, and training all lead to stronger political competence and broader support from the public.

POLITICAL LEGITIMACY

The fourth pair of components, authority and comity or restraint, relate to the power of the courts. They comprise the element of institutional legitimacy. Carpenter indicates that institutional legitimacy is an independent power base, built on the organization’s reputation. Gibbons defines legitimacy as an institution “acting appropriately and correctly within its mandate.” Carpenter’s broader concept is more appropriate for the establishment of judicial independence. It may appear that the institutional legitimacy of the courts is embedded in the structure of government. The constitutional structure of government typically establishes courts, defines their mandate, and gives them exclusive responsibilities. As a result, courts have constitutional or structural legitimacy. However, the structural element does not in any way guarantee institutional legitimacy. Courts must create institutional legitimacy in practice through the institution’s reputation to firmly establish its position within the structure of government as an independent branch. Martin Shapiro notes, “The basic social logic, or perceived legitimacy of the courts rests on the mutual consent of two persons in conflict to refer that conflict to a third for resolution.” The judicial authority is often the mere right to decide disputes; the measure of institutional legitimacy is the extent to which parties and governmental powers consent to the authority of the court. This broad consent represents the independent power base of the

judiciary. Courts must act to protect their jurisdiction and to enforce the decisions that they have made in a case.

Courts also often rely on the consent of other branches of government to enforce their decisions. If parties or the executive authority can ignore the decisions of the court, the court has no institutional legitimacy. This damages the reputation of the institution. A judge may have life tenure and be insulated from political and societal pressures, but if the judge’s decisions are ignored, institutional differentiation is meaningless. Courts must hold true judicial authority. While the legislature and the executive may bridle at the limits placed on their own power, placing the power of dispute resolution into a separate judicial authority actually enhances the power of all governmental entities with in society. As Alec Stone Sweet explains, the incorporation of judicial authority in fact stabilizes and makes other institutions more resilient. An independent institution, with the power to find acts of the legislature and executive illegitimate, strengthens the authority of those branches each time it determines acts are legitimate.

**Authority**

While courts must be self-restrained, they must also act vigorously to protect their authority. Citizens must believe that the services cannot be found anywhere else in the regime. If the courts are unwilling to resolve important disputes, citizens may turn to other methods or institutions for such services. With consent for dispute resolution by citizens to other third parties also goes the authority to do so. Other governmental powers attempts to bypass the courts as arbiters of decisions also undermine the courts’ authority. To the extent that this authority is dispersed, so will be the institutional legitimacy of the courts. Therefore the judicial authority of the state must reside exclusively within the courts in order for the courts to keep their empowerment.

Once court orders are issued, courts do not often make certain that they are followed. In the past, courts allowed parties to manage the case-load of the court and determine when matters should move forward and when they were ready for trial. Modern caseflow management has recognized that it is the court’s responsibility to manage cases. When the court does so, matters move more promptly and consistently through the

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system. Courts, however, still mainly allow parties to control the enforcement of orders and judgments. Like caseflow management, the court should monitor and manage enforcement of its orders. This will make the court more legitimate and respected and build public confidence in the courts.

**Restraint**

Courts must have self-imposed limits on the ability to act. Courts must be self-restrained. In many ways restraint by the courts are a mere practical consideration. No executive or legislature would long permit limitations upon their powers in the face of an unrestrained court system. Institutional capital must not be spent where it will be wasted. Courts must refrain from acting if their decisions will not be enforced or if making a decision will impact its own reputation. Institutional legitimacy of the courts may be enhanced by the refusal to become embroiled in the politics of the day. Restraint in the exercise of otherwise legitimate authority over political questions keeps the courts out of the political fray and protects their organizational reputation. The U.S. Supreme Court saw a dramatic drop in its reputation when it became involved in the 2000 *Bush v. Gore*\(^{30}\) election dispute. Restraint preserves the reputation and hence authority.

The U.S. Supreme Court established the standard for judicial review in *Marbury v. Madison*.\(^{31}\) Often overlooked is the equally important doctrine of judicial restraint established in that case as well. In *Marbury v. Madison*, John Marshall established the court’s power of judiciary to determine the constitutionality of a legislative act by recognizing restraints on the power of the judiciary itself. The chief justice ruled that the Constitution limited the original jurisdiction of the Supreme Court and the legislature could not expand it. The doctrines of judicial review and restraint have simultaneously been developed throughout the history of the court. “Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function . . .”\(^{32}\) In *Ashwander v. Tennessee Valley Authority*, Justice Brandeis lists seven informal rules that the court has used and continues

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31. 5 U.S. 137 (1803).
to use to avoid having to pass on the constitutionality of any act of Congress. The act of restraint makes the exercise of authority, when it is deemed absolutely necessary, more effective. It is part of the reason why “the U.S. Supreme Court is among the most legitimate judicial institutions in the world.”

CONCLUSION

A judicial branch that has attained sufficient levels of institutional differentiation by balancing insulation and accountability; that has exhibited organizational capacity by having high levels of utility and works efficiently; that is viewed as politically competent through the strength of the qualifications and diversity of the bench; and that is institutionally legitimate by virtue of its exercise of the judicial authority of the state and by its willingness to restrain the exercise of authority to develop comity between the branches will in fact be an empowered court. It will be able to operate with judicial independence and will enjoy the public’s trust and confidence. This theory of judicial independence gives courts a road map on how to increase the public trust and confidence necessary to establish judicial independence.

34. Gibson, supra note 27, at 7.