Note on the US Constitution:
Reform of the Federal Judiciary and Public Finance—
And Why They Are Related

The US Constitution, as originally structured, contained weaknesses in two critical areas: first, in public finance and, second, in the federal judiciary. Over the past 90 years, these two weaknesses have merged in a perfect storm that is largely responsible for the current mess that the United States is now in, both politically and financially. In the furor generated by what is now well over 100 decisions by left-leaning district court judges attempting to arrogate to themselves the power to run the executive branch of the federal government, it is easy to overlook the more than $35 trillion debt which now saddles the US and its future generations. But the two problems are closely related.

A. Public Finance

The first structural weakness in the US Constitution may perhaps be explained by the fact that so many of the drafters of the Constitution were lawyers, so public finance was not their forte; or it may simply be explained by the times in which the Constitution was drafted. For the Founders, nations only went into debt to finance wars. Later state constitutions in the US typically contained detailed provisions relating to public finance—many of them devised from the hard lessons learned in the 19th and early 20th Centuries, as state and local governments went bankrupt funding rail, road, power, and other infrastructure. The two greatest lacunae in the realm of public finance—certainly the two that have brought us to our current $35-plus trillion federal debt—are (1) the lack of a requirement for Congress to actually pass a balanced budget in each fiscal period; and (2) the failure to give the president the line item veto. These structural flaws are decried repeatedly by Ronald Reagan in his autobiography, An American Life, where he predicts that, until these two deficiencies are repaired, the endless growth of the federal government we have experienced since the Great Depression would never be brought under control. Nothing has changed since the 1980s. Indeed, an out-of-control, debt-ridden federal government is the defining feature of our times.

This is not what the Founders intended. Our Constitution was designed with a system of "check and balances" in mind. Thus, the executive, legislative, and judicial branches of the federal government are all supposed to play a role in checking the excesses of the other branches. But how does this system play out in public finance? Let us begin with the Congress, since spending bills are supposed to originate in the House, and the two chambers of Congress are supposed to pass a budget each year, based on revenues available and desired spending goals. Yet it has been over two decades since Congress last passed a budget. Instead, they have made do with "continuing resolutions," which simply continue spending levels set in the prior fiscal year. Conveniently, this allows Congress to avoid any need to make hard choices among spending priorities. Congress likes doing business this way. Not only do they avoid hard choices, but they get to indulge in "OPM Syndrome"—that is, the addiction to the use of "other people's money" to solve the world's problems. And they pay no price for this endless expansion of the federal government. Indeed, they reap a benefit: they guarantee themselves perpetual re-election by throwing pork at the voters in their individual districts. Seen in this light, only the president is elected by the entire body of US citizens, regardless of congressional district, to serve as caretaker for the health of the US body politic and economy as a whole.

Yet the executive is given no specific tools under the Constitution to control federal spending. The president cannot delete parochial projects—i.e., "pork" —included by individual members of Congress in the federal budget. Nor does he have the power, if the federal courts are to be believed, to just not spend all the dollars that the Congress in its largesse has provided for in their continuing resolutions—despite the fact that such "impoundment" powers were accepted in this country as a part of the president's inherent powers until the Nixon Administration; at that juncture (with the Administration already politically engulfed in scandal), a federal judge decided he didn't think the president should have such a power, for reasons that are still not clear.[1] Later, Congress piled onto this bandwagon by enacting the "Impoundment Control Act of 1974" ("ICA"). The ICA purports to eliminate cancellation by the president of any congressionally appropriated funding to be spent by the federal government. It permits delay or withholding of such funds only if the president has sent Congress a "special message," which must contain the reasons for such delay or withholding and explain the fiscal, economic, and budgetary effects thereof. Certain funding, such as Social Security or Medicare payments, cannot be so delayed or withheld under any circumstances. According to the General Accountability Office (GAO), such special messages were sent 156 times between 1975 and 1985, and 83 times between 1985 and 2002. Thereafter, there were no special messages sent until 2018, when President Trump sent one, which was subsequently withdrawn by President Biden. Clearly, "special messages" are useless as a fiscal tool.

Neither the ICA nor the federal judge's decision against Nixon that pioneered the concept has yet been tested as to constitutionality at the Supreme Court. It did not seem to occur to either that judge or members of Congress that one reason the drafters of the Constitution had not specified tools for the president to control spending is that they understood that impoundment powers were indeed inherent in the executive. But this issue does illustrate all too well the unconstrained power of the judiciary to cripple the other branches of government without consequence. And of course the federal judiciary's role in crippling traditional executive tools to ensure fiscal sanity is especially egregious, since federal judges are not elected at all, and have little interest in how fiscal policy affects the economy, as long as they continue to receive their salaries and pensions for life. Moreover, any branch of government left unchecked is only too happy to engage in self-aggrandizement if it can be done at the expense of another branch, as history has repeatedly shown. More on that subject below.

One final point on the line item veto: it is a power granted to governors by state constitutions in 44 of the 50 states, so apparently even some blue states consider it a useful tool of governance.

Rebalancing the roles of the legislative and executive branch in matters relating to public finance may well require constitutional amendment, though it may be possible to restore some balance if the current Administration is able to get the impoundment issue before the Supreme Court.

B. The Federal Judiciary

This brings us to the second structural weakness of the US Constitution: the establishment and operation of the federal judiciary. In some respects, this phenomenon is harder to explain. Many of the drafters of the Constitution were lawyers after all. One can speculate that the major problem with the judiciary that the Founders thought they were grappling with at the time was

[1] State Highway Commission of Missouri v. Volpe, 347 F. Supp. 950 (W.D. Mo 1972). Decision against US Secretary of Transportation Volpe affirmed at 479 F.2d 1099 (1973).

how to address the fact that, too often in English history, the judiciary had been coopted into serving as the handmaiden of the executive branch—that is, the king—and doing the king's dirty work. The reign of terror instituted by "Hanging Judge" George Jeffreys at the behest of King James II in 1685 is a notorious example of this phenomenon, an example the Founders would have been anxious to avoid.

In divorcing the judiciary from the executive branch, the essential characteristic that the Founders sought was "independence," but again, this was principally seen as independence from the executive. The president's only role in connection with federal judges is to nominate them. Thereafter, they are to be confirmed (or not) by a vote of the Senate. To further ensure judicial independence, judges are to serve life terms, a measure adopted by the English Parliament in the Act of Settlement of 1701 (presumably to ensure there would be no more "Hanging Judges" doing the king's bidding). As an additional safeguard to independence, judges can be removed from office by an impeachment proceeding, a proceeding in which the executive branch had no role, and a judge's compensation is to continue until so removed. Impeachment was intended, and has proved, to be a high hurdle, as witnessed by the fact that Congress has succeeded in removing only eight judges in our entire history.

So there can be no question that the federal judiciary is independent. But in achieving this studied independence, modeled on English precedent, the Founders may have overlooked one thing—English courts generally have no power of judicial review.[2] Judicial review represents a critical power, since it allows courts to declare legislation unconstitutional, and hence, void. In its ability to shape the work of legislatures, judicial review also borders on creation, rather than interpretation, of the law, vastly increasing judicial power. Under the US Constitution, the combination of life terms—with removal only by impeachment—with the power of judicial review has proved to be unworkable. A system that seeks to balance the legislative, executive, and judicial roles in this manner can work only so long as judges act with restraint. Judicial restraint is a doctrine of judicial conduct long recognized by the federal courts,[3] though you might not think so to see some of the recent conduct of the federal district courts. Imbued with the power of judicial review, an independent, unelected judiciary must exercise judicial restraint if it is to play its proper role in our constitutional system of acting as referee between the co-equal, elected legislative and executive branches of government.

But who decides whether federal judges are exercising a proper degree of restraint, either in particular cases, or even systematically over time? In our system, the answer is only the judges themselves. It is axiomatic that judges—being mere humans, despite what they may think of themselves—will not exercise that required restraint unless they are forced to do so by the potential threat of consequences for failing to do so. But with "independence," there are no such consequences. It is all very well to believe that an independent judiciary can be a bulwark against tyranny—in republics as well as monarchies[4]—but a completely unfettered judiciary can also

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[2] Apparently English courts are allowed limited procedural review, to ensure that a public body acted in accordance with its own and any other applicable procedural rules, but that power does not extend to the substance of the act.
[3] See, e.g, the entry for judicial restraint in Encyclopedia Brittanica, https://www.britannica.com/topic/judicial-restraint.
[4] Alexander Hamilton, The Federalist No. 78 re an independent judiciary: "In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."

constitute a tyranny in its own right. The paucity of removal of judges by impeachment rather makes the point.

While the focus of many critics of the judiciary in the past has been, understandably, on the performance of the Supreme Court, rather than the lower federal courts established by Congress pursuant to Article III of the Constitution, it seems painfully obvious in recent years—especially as one watches the antics of district court judges under the Trump Administration—that the federal judiciary has evolved into an institution that is not only politicized but indulges itself in outcome-based decision making, reflecting the political biases of individual judges.[5] Abuse of the temporary restraining order, or TRO, has been much in in evidence in these antics, probably because meaningful appellate review is made more difficult by the transitory nature of the TRO process and its lack of formal opinions—and by the time any review is conducted, the damage has often been done. While calls for impeachment of federal judges by the executive and conservative commentators are understandable in the current politically charged environment, impeachment is too inefficient, too ad hoc, and comes too late to serve the purpose of systematic reform of the federal judiciary as an institution.

The argument here is that the roles of the judiciary and executive branches could be effectively re-balanced by legislative action—and without amending the Constitution, though we will also consider amendments that might be desirable to ensure that balance for the long term. What we suggest is the imposition of a periodic review process by Congress, in which the records of all federal judges are independently evaluated by the House of Representatives as to how well they meet defined criteria—which might include the frequency with which they are over-turned on appeal; failing to recuse themselves from cases where the appearance of conflicts are present; indulging in decisions driven by personal bias, whether political or otherwise; and taking on adjudication of cases where there is no well-defined precedent for subject matter jurisdiction. While federal judges have from time to time been investigated and prosecuted for criminal matters, including blatant corruption, the criteria suggested above are more nuanced, and go to performance that reflects an appropriate judicial temperament—that is, the ability to put the cause of justice above personal bias.

Perhaps here a word about bias is in order. Nothing undermines the public trust in the judiciary more than the appearance of bias. Indeed, the Code of Conduct for US Judges ("CCJ" or "Code of Conduct for Judges"), first promulgated by the Judicial Conference in 1973, in "Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently" states in part:

> The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or <u>biased</u>.[6] (emphasis added)

"Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities" states in part:

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[5] On immigration matters in particular, it is interesting that the same judges who now decry the "lawlessness" of the Trump Administration were nowhere to be found during the Biden Administration, when agencies such as DHS refused to enforce existing immigration laws.

[6] It then goes on to recite four pages of specific standards relating to this general principle.

(A) Respect for Law. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. (emphasis added)

(B) Outside Influence. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. (emphasis added)

But what are these standards of conduct intended to uphold? "Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary 1" states in full:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective. (emphasis added)

These canons squarely confront one issue: the independence of the judiciary is essential, and that independence can only be maintained so long as the judiciary acts with the integrity required by these canons. The issues the canons choose to ignore are (1) who is to determine whether judges are indeed acting with integrity, and (2) what is to be the consequence of any failure to do so? To answer these questions, we must turn to the Constitution.

The Federal Judiciary Under the Constitution

The text of the Constitution does not tell us much. Article III is the shortest of the articles dealing with the three branches of government. Article I concerning the Congress runs to some 6 pages. Article II concerning the executive branch runs to about 2-and-a-half pages. Article III is covered in one page.[7] We have already noted above the key features of the judiciary—life tenure with compensation and removal by impeachment. Article III, Section 1 (quoted here in its entirety) tells us that

> "[t]he 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 Behavior,[8] and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." (emphasis added)

[7] The very paucity of text surrounding the judiciary might suggest that the Founders did not regard the judiciary as that important to their overall structure, compared with the legislative and executive branches, once judicial "independence" had been addressed.
[8] We set aside for the moment a preliminary question which is why federal judges should serve for life at all. Since any change in this area would require constitutional amendment, we set it aside for the moment and return to it below under "Constitutional Amendments."

Section 2 of Article III delineates certain limits on the judiciary's subject matter jurisdiction.[9] Section 3 defines treason; sets certain procedural limits on any conviction therefor; and gives Congress the power to set the punishment for treason, subject to certain limits. That is the entire scope of Article III.

As to impeachment, we must turn to Article II (concerning the President), Section 4, where we learn that civil officers of the United States (including judges) "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[10] In Article I, Section 3 (concerning the Senate), we learn that "[t]he Senate shall have the sole Power to try all Impeachments," and that "no Person shall be convicted without the Concurrence of two thirds of the Members present." In Article I, Section 2 (concerning the House), it is stated that the House of Representatives "shall have the sole Power of Impeachment."

A lot of ink has been spilled over the Article III provision noted above that judges are to hold office "during good Behavior" and whether the drafters of the Constitution intended this provision to constitute a separate basis for removal from office, in addition to impeachment.[11] During the ratification debates, some commentators (notably Federalists) asserted that impeachment was to be the sole instrument by which a federal judge could be removed,[12] but the text of the Constitution, as ratified, does not say that. There are also examples since ratification of individual justices of the Supreme Court asserting that impeachment is the sole mechanism for removal, as discussed below in relation to the <u>Chandler</u> case, but these assertions have always come in the form of dictum, so the Supreme Court itself has never addressed this issue one way or the other.

So where does that leave us? Impeachment has proved to be an exceptionally high bar to removal of judges (only eight in 250 years) and, in any event, is applicable only to the most egregious forms of misconduct (treason, bribery, and high crimes and misdemeanors). Did the Founders really intend that the republic be left with no remedy to address the sort of judicial misconduct that is neither impeachable nor blatantly criminal? And self-regulation by the judiciary through such devices as the Code of Conduct for Judges referred to above is fine as far as it goes, but it certainly does not provide for balance of power as between the judicial and the elected branches

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[9] As discussed below, Congress in its Judiciary Act of 1789 felt free to further limit that subject matter jurisdiction, not going as far as the text of Section 2 (Natelson, The Original Constitution §8.3, 2015 hereinafter "Natelson"), suggesting its implied power to regulate the judiciary.

[10] Natelson explains that the concept of "high misdemeanors" in the late 1700s included breach of the public trust. Natelson §11.1.

[11] Whether or not "good behavior" established a separate standard for judicial performance, bad behavior in the form of criminal conduct is clearly grounds for removal. A judge is not immune from prosecution in a court of law for criminal acts (whether felonies or misdemeanors). (<u>See</u> case of Harry E. Claiborn, convicted of income tax fraud and subsequently impeached and removed from office in the mid-1980s for income tax evasion, where the conviction served as grounds for impeachment and removal from office.) It is not clear why the conviction alone would not be sufficient grounds for removal, at least by a court, since such removal on its face cannot threaten the judiciary's independence from the legislative and executive branches where the criminal conviction and removal are themselves the work of the judiciary. Still, this sets a pretty low bar for judicial performance—you can continue to serve for life as long as you are not a convicted criminal (it is so difficult to run your courtroom from prison).

[12] Alexander Hamilton, The Federalist No. 79: Impeachment should be the only method of removing a judge since any other cause would "be liable to abuse" and would "give scope to personal and party attachments and enmities."

of government. Accordingly, it is hard to believe the Founders were blind to the potential of our "rule of law" degenerating into judicial tyranny.

One check that the Founders might have provided on the judiciary is to make federal judges subject to elections, as with the other branches of government. Elected judges—even in supreme courts—represent a key feature of many state constitutions: According to the federal government's Office of Justice Programs,

> Nonpartisan elections are held to select most or all judges in 17 States and for some judges in an additional 3 States. One-half of the States hold elections for State supreme court judges. Seventeen States out of the 32 which have intermediate appellate courts elect judges to these courts.[13]

That the Founders chose not to take this approach presumably reflects their desire that the judiciary be "independent," in the sense that they were to be insulated to some degree from the often short-lived enthusiasms that can sweep any political system from time to time. That does not imply, however, that the Founders intended the judiciary to be completely unchecked by the more political branches of government. And indeed, Article III the Constitution specifically assigns Congress certain regulatory powers relating to the judiciary, including establishing those "inferior courts" below the Supreme Court.

The Constitution specifically grants to Congress the express power to establish the lower federal courts, their subject matter jurisdiction, and the mechanics of their operations in the first instance. In fact, one of the earliest actions taken by Congress after the Constitution took effect was to enact the Federal Judiciary Act (1789) to establish the inferior district and appellate courts throughout the states, a system that remains largely intact today. That Act describes in detail the subject matter jurisdiction of these courts (which was not as extensive as permitted by the Constitution itself) and details related to their operation—even including times when sessions were to be held; what additional staff personnel were to be employed by the courts; and what oaths were to be taken by such judges and additional personnel. While there is no mention in the Act of any oversight of judicial performance to be conducted by the Congress, that silence need not be read as an absence of the power to do so.

Even more telling is the creation by Congress almost exactly a hundred years ago, in 1922, of the antecedent of the Judicial Conference of the United States (oversight body for the several Judicial Councils, discussed below). This came about as a compromise to thwart efforts of judicial reformers, led by Senator George W. Norris, to amend the Constitution to eliminate life tenure for federal judges and further restrict the jurisdiction of the federal courts. Conveniently, the Judicial Conference was the brainchild of former President William Taft, who went on to be appointed Chief Justice of the US Supreme Court in 1921, where he served until his death in 1930.[14] Note that both Taft and Norris were Republicans. These debates during the teens and 1920s often pitted the "progressive" wing of the Republican Party (joined by progressive

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[13] https://www.ojp.gov/ncjrs/virtual-library/abstracts/judicial-selection-united-states-special-report#:~:text=Nonpartisan%20elections%20are%20held%20to,elect%20judges%20to%20these%20courts.

[14] See https://en.wikipedia.org/wiki/Judicial_Conference_of_the_United_States and https://www.senate.gov/artandhistory/senate-stories/senate-progressives-vs-the-federal-courts.htm.

Democrats) against the "conservative" wing led by Taft and others. The progressives sought reform of the federal judiciary over what they perceived as the obstacles federal judges often threw in the way of progressive efforts to regulate social and economic matters, such as limiting child labor or encouraging union activity. Curiously, these obstacles often took the form of injunctions issued by the federal courts. While these efforts by both sides often ended in stalemate, the whole notion of the federal courts as a conservative bulwark to excessive federal government power was completely swept away during the Great Depression of the 1930s, with the results we see today.[15] It is in fact these results that militate for a reconsideration of the debate over judicial oversight, especially as it relates to the "good behavior" standard of judicial conduct.

As noted earlier, a totally independent, unelected judiciary, with the power of judicial review, poses a unique challenge to maintaining balance among the branches of government, as sought by the Constitution. The debate over the good behavior standard illustrates that challenge all too well. On the one hand, to police the performance of the judiciary under the good behavior standard, Congress must assert that the Founders intended the good behavior clause to be meaningful and that it serves as a basis for the legislative branch to regulate judicial behavior; on the other hand, in making this assertion, and given the judiciary's power of judicial review, Congress must get the Supreme Court to agree (or at least not object) to this constitutional interpretation. Thus, the very individuals whose powers will be most impacted by any enlargement of the removal mechanism beyond impeachment are those who must first agree to it. Again, this squarely raises the inherently conflicted role of the judiciary in such matters.

At first glance, it may appear we have reached an insoluble impasse, but perhaps not. We are not talking here (or in any event need not be) about congressional regulation of the Supreme Court itself, but only of those "inferior courts" where Congress already has express powers to regulate under the Constitution. Stopping short of the Supreme Court is also reasonable, since that court is subject to much closer public scrutiny in its decision making than are the thousand federal district and circuit court judges spread across the United States. In addition, even if the "good behavior" argument were to be rejected by the Supreme Court, congressional regulation of the judiciary may be supportable under Congress's implied powers in Article III, so Congress can argue more than one constitutional "hook" for its jurisdiction. The precise mechanics proposed to implement any such oversight program will of course be important in this context. We will return to this theme below in "What Is To Be Done?"

An often-cited case that did nothing to clarify the good behavior debate is the US Supreme Court case, Chandler v. Judicial Council of the Tenth Circuit of the United States (1970). In that case, a district court judge had been suspended from case assignments by the relevant Judicial Council. Judicial Councils exist for each of the 13 circuit courts (12 regional and 1 federal). Their mandate is to implement the judicial policies of the Judicial Conference of the United States, first created by Congress in 1922 under its Article III powers, as discussed earlier. In addition to implementing judicial policy, the Judicial Councils are responsible for judicial discipline. In the

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[15] For a review of the "modern" Supreme Court's role in shaping the out-of-control Leviathan today's federal government has become, including the Court's ignoring the clear limits imposed on the federal government by the enumerated powers under the Constitution (so long as the feds pay for it), we recommend "The Dirty Dozen," Levy & Mellor (2009).

Chandler case, the Judicial Council had suspended assignment of cases to the petitioning party, Judge Chandler, based on performance, an action which effectively resulted in his removal from office. Unfortunately, the Supreme Court majority dismissed the aggrieved judge's case on the grounds that it (the Supreme Court) lacked jurisdiction, apparently because Chandler and the Judicial Council had earlier resolved their disagreement by mutual consent. A concurring opinion stated that the Supreme Court did have jurisdiction and should have found for the Judicial Council. Two separate dissenting opinions, however, declared that the Judicial Council had exceeded its authority, since the only permissible way to remove a judge from office was through congressional impeachment. As dictum, these concurring and dissenting opinions have no legal weight, but they do suggest how jealous federal judges—including Supreme Court justices—are of their prerogatives.

A more interesting aspect of Judicial Councils for our purposes is that in enacting the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Congress specifically granted to these Councils the power to suspend case assignments where judges were found by the Council to be mentally or physically unable to discharge their duties or had engaged in inappropriate conduct. Presumably to duck the constitutional issues, Congress in that Act went on to prohibit removal from office of such judges "during good behavior." For our purposes, it is also important to note that suspension of case assignments, if it becomes permanent, is tantamount to removal from office. That suspension could be with or without stopping compensation, and that may have its own implications under the second constitutional requirement relating to judges' compensation noted above.

It is important at this juncture to consider the political life of judges generally. We are not suggesting here that judges should have no political interests or indeed affiliations. The judiciary is after all a human institution, and we should not expect judges to be political eunuchs. That is unrealistic and even undesirable. Indeed, political views in themselves are almost certainly not a ground for impeachment of a judge under the Constitution. The case most cited in this regard is the impeachment trial of Samuel Chase. In 1804 and 1805, the Democratic-Republican Party, at the urging of President Jefferson, head of that party, sought to remove the Chief Justice of the Supreme Court, Samuel Chase, a staunch Federalist. This was the Senate's third impeachment trial: in the first, they dismissed a case against a senator previously convicted of treason for lack of jurisdiction; in the second, they voted to remove a judge for drunkenness and insanity.

The House voted to impeach Chase in March 1804, and the Senate took up the case in January 1805. Bias in the handling of two politically sensitive cases was alleged. In his defense before the Senate, Chase took the position that he was being tried for expressing his political views (which he was apparently wont to do in open court). He successfully avoided conviction on all counts, though a majority (but less than two-thirds) voted to convict on three of the several counts. At the time, Jefferson's party controlled 75% of the seats in the Senate, enough to convict on a straight party line vote. A judge's political opinions in themselves have not been raised since that time as grounds for removal in a federal impeachment case, except in the case of Judge Humphreys, who was removed for siding with the Confederacy during the Civil War.[16] If one reads the summary of the Chase case on the Senate website, one could get the impression that political views can never play a role in impeachment, but that is clearly wishful thinking. While Chase can be read as support for the need to tread carefully in determining a judge's fitness for

[16] A case that can be read as a treason case, not merely a case concerning political views.

office, it cannot be read as an endorsement of judge's allowing their political bias, or any other bias, to drive decisions; it simply means that two-thirds of this group of senators did not find on the evidence that such political bias in fact influenced Chase's judicial decisions.

To that point, just a year earlier, in 1803, the Senate did vote to confirm the impeachment of federal judge John Pickering, who while apparently being a bit erratic emotionally, also allowed political bias to play a role in his decisions.

Recent Actions of Congress

We note that as of this writing, legislation has been introduced in Congress that attempts to deal with the "national injunction" problem. Under current judicial policy, a district court judge sitting in one state can issue a restraining order or injunction against the executive branch that covers the entire country. Congress clearly has the power to bar the use of injunctions altogether by the "inferior" federal courts, especially where the legislative or executive branch is a party. In addition, one could argue that it offends the co-equal status of the legislative and executive branches for a federal judge to find them in "contempt" of court if they are not inclined to agree with the judge's ruling.

While such legislation is a good first step, it will be effective at reining in judicial over-reach only if it also addresses an issue that goes hand in hand with the national reach of district court injunctions: that is the issue of "judge shopping," to ensure that a sympathetic judge presides over the plaintiff's request for a TRO or injunction. The phenomenon of judge shopping is well described in an article appearing on the Brennan Justice Center's website.[17] The Brennan Center is offended that right-leaning litigants are allowed to engage in such practices, apparently as a result of the existence of certain rural districts that are further divided into "divisions" that are so small that a single judge hears all the cases brought in that division. If that judge develops a reputation among the bar for being sympathetic to a certain type of case, then plaintiffs are motivated to file cases of that type in that division. There is further abuse of the justice system possible through the creative work of lawyers who ensure that the plaintiff has the ties to that division that justify the court's jurisdiction there.

This brings us to the forum shopping engaged in by left-leaning litigants in the opening days of the Trump Administration. Arguably, there are entire districts where conservative judges are likely to be hard to find—Massachusetts comes to mind as an example. It has been suggested by some commentators that left-leaning litigants are coordinating their efforts to file multiple identical suits in what they perceive as sympathetic federal districts around the country, waiting to see which judge they draw, then once they have succeeded in drawing a sympathetic judge in any one of those courts, withdrawing the suits in the other jurisdictions. This kind of forum shopping, representing as it does a form of judicial over-reach, should be anathema to both the right and the left.

A related question is whether the success left-leaning litigants seem to be having in getting before sympathetic judges is indicative of any more deep-rooted malaise in our judicial system. Taking the DC District Court as an example, it appears that litigants there have succeeded in many instances in drawing sympathetic judges, as occurred most notoriously in the recent cases related to deportation from the US of Tren De Aragua members. If we look at the data, however,

[17] Judge Shopping, Explained, February 27, 2025.

it is at least statistically possible that these case assignments were not the result of malfeasance by court administrators. Nationwide, there are currently 677 federal district court judges, and 179 circuit court judges. Obama succeeded in appointing 268 of those district court judges, while Biden appointed another 187. At the circuit court level, those numbers are 55 and 45, respectively. (This of course assumes that these judges are at least as likely as other judicial appointees to be driven by their political biases to reach decisions reflecting those biases, but recent events suggest this is not an unwarranted assumption.) The data thus indicate that, nationwide, a litigant has a 67% probability of ending up before a judge appointed by either Obama or Biden in the case of district courts, and a 56% probability of having his case heard on appeal by a circuit court judge appointed by either Obama or Biden.

On a related point, the fact that the Obama-Biden axis found so many leftist judges to appoint should come as no surprise. All judges start out as lawyers, and the legal profession, like so many others, has shifted left substantially in the last 50 years. This is not hard to explain. A hallmark of the global economy as it has evolved since the Second World War has been growth in the size of professional firms—driven by increasing complexity and related specialization. As the size of the professional firm has increased, so too has its propensity to become institutionalized. This can be seen in all professions—accounting, medicine, law, economics, education, and even public corporations in the business world. For this purpose, we can define "institution" as an organization controlled by a small group, its so-called leadership, who get to impose their values on the rank and file. Such organizations are susceptible to ideological capture, since the ideologically-driven professional seems prone to seek power, hence becoming over-represented in the organization. Professionals are particularly susceptible to manipulation of their values by professional institutions, since these individuals are required to uphold the values of their profession, in addition to succeeding as entrepreneurs in the larger economy. The pressure to conform within the professions is thus stronger than it might be in the business world. This phenomenon is super-charged by the ideological capture of the related educational institutions, including the academic faculties who train these professionals. So we should not be surprised that the legal profession has followed this trend.

In the 1980s, law faculties began to shift left.[18] They were followed by the large law firms—both national and regional—who began to pursue DEI before it was even a term.[19] Where large numbers of lawyers, like doctors, now work for institutions rather than being self-employed, it is not surprising that a smaller number tend to be conservative. In the case of lawyers and constitutional issues, this trend has been even more alarming, since the left-wing constitutional law faculties in law schools tend to teach the "living constitution" doctrine rather than taking a more traditional approach to constitutional interpretation.

Returning to the problem of forum shopping, a final, but somewhat harrowing, possibility is that even in those district courts where conservative judges may be well represented, the clerks of the court in those districts may not be assigning cases randomly but are steering them to sympathetic judges to improve the possibility of successful outcomes for left-leaning plaintiffs. And at this

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[18] It is no accident that several prestigious law schools served as incubators for development of Critical Race Theory.
[19] It was apparently embarrassing that a bunch of old white guys appeared to control these firms and, thereby, access to "social justice." Large law firms have also attempted to mask the realities of institutional power within their firms by retaining the "partnership" model, but today's partners are no more than salaried employees with a suggestive title. Meaningful decisions are made by the leadership cabal, with both economic and value implications.

writing, we do not even know if all districts currently have a policy of making such assignments randomly, rather than having them assigned by the chief judge of the district or some committee constituted from the judges of the court. Either of these approaches would obviously open the door to potential for bias—either of individual jurists or their clerks—coming into play in those districts. While we have no data to support the suggestion that such bias is indeed at work in some judicial districts, the possibility that such malpractice could be going on is concern enough. It makes the point that there is no effective method in place to police such practices—and therefore no transparency. Just as in the debate over voting irregularities, anyone concerned about whether local elections are subject to fraud perpetrated by local election officials confronts a hodgepodge of systems, where transparency may exist to a greater or lesser degree. At least in the case of election fraud, elected officials play some role in oversight in most jurisdictions. The same cannot be said for such irregularities within the judicial branch.

In 2024, the Judicial Conference issued a new policy relating to case assignment. That policy would require all the districts to assign cases randomly within the district as a whole, regardless of the division in which the case was filed. A number of Republican Senators have objected to the issuance of that policy, arguing that the assignment of cases within districts is governed by federal statute (28 U.S.C. § 137(a)), which delegates that authority to the district courts, as opposed to the Judicial Conference. These Senators have indicated that the Chief Judges of the districts should continue to assign cases as they see fit for their own districts.

Finally, we note that Congress is separately reviewing its options with respect to legislation designed to "curtail judicial activism." While legislation related to curbing the use of nationwide injunctions, discussed earlier, is likely to rest on a firm constitutional foundation, this legislation addressing judicial activism is likely to confront all the issues discussed above under "The Federal Judiciary Under the Constitution." On the other hand, one simple and clearly constitutional way for Congress to curb at least one type of the activism currently on display would be to eliminate the federal judiciary's subject matter jurisdiction in cases where the US is a defendant and plaintiffs seek to raise issues relating to their employment. If the US chooses to offer such plaintiffs any remedy in such matters, they should be forced into arbitration, where the only issue would be potential money damages. This would reinforce the notion that federal employees—like most of us in the US—are employees at will and have no property interest in their jobs. In other words, "public service" means just that, and is a privilege, not a right.

JPE in the States

Many of the states have implemented judicial performance evaluation ("JPE") programs, which may or may not be accompanied by judicial elections. Many features of these programs would be difficult to translate directly to the federal context, due to the constitutional structure discussed above. Nonetheless, these programs represent a useful resource, to evaluate both the various mechanisms available and the experience of the states in dealing with them in practice. These programs are contained, variously, at the constitutional and statutory levels, often both. Much of this material can be found in the useful 2022 report prepared by the Institute for the Advancement of the American Legal System ("IAALS").[20] These programs are generally one of two types: one is a review of performance required by law at regular intervals, where judges are

[20] "Judicial Performance Evaluation in the States," Institute for the Advancement of the American Legal System, May 2022.

graded against set criteria; the other is a review initiated by specific complaints made by attorneys who have appeared in the judge's court, litigants in those courts, or members of the general public. Some states employ both types. For example, Virgina's constitution, Article VI, Section 10, applicable to both justices of the Supreme Court and judges of other courts of record, provides that:

> The General Assembly shall create a Judicial Inquiry and Review Commission consisting of members of the judiciary, the bar, and the public and vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge. The Commission shall be authorized to conduct hearings and to subpoena witnesses and documents.

Upon a finding that

> the judge has engaged in misconduct while in office, or that he has persistently failed to perform the duties of his office, or that he has engaged in conduct prejudicial to the proper administration of justice, it shall censure him or shall remove him from office.

Penalties may include the loss of the job as well as pension benefits, other than employee contributions thereto. This then is a system driven by specific complaints.

In addition, by statute (Virgina Code §17.1-100), Virgina requires that its supreme court establish and maintain a periodic performance review process, the results of which are provided to the relevant committees of the legislature, with copies to the affected judges, in the year prior to the end of each judge's term, before they have to stand for re-election. The report provided to the legislature is also a public record. Since, in Virgina, supreme court justices as well as judges in other courts of record are chosen by vote of the legislature rather than the public, a negative report to the legislature on an individual judge is likely to affect his continuing tenure in office. In addition, the supreme court is required to conduct at least one interim performance review during the term of each judge, for purposes of potential improvement in any performance deficiencies. The results of these interim reviews are not shared with the legislature or made public.

According to the IAALS report, just under 20 states currently engage in some form of JPE, many in the context of retention elections, where sitting judges are required to face a vote of the electorate to retain their jobs after so many years in office. To assist voter decision-making, some states have a nonpartisan commission that issues an assessment on each judge up for election and makes a recommendation whether that individual should be retained, a recommendation that voters are free to accept or ignore. In recent years, this "retain"/"don't retain" recommendation in many states has been replaced by a numerical score indicating how well the judge has performed against the indicated evaluation criteria, so voters can exercise their own judgment as to retention.

<u>What Is To Be Done?</u>

We have suggested above that Congress does have the power to implement a program of judicial performance evaluation, if that program is carefully structured to avoid constitutional pitfalls. Where the goal is to beef up congressional oversight of the judiciary's disciplinary proceedings, allowing for better transparency for the public, what might such a program look like?

One approach might be to continue to give the Judicial Councils the latitude in the first instance to enforce their own Code of Conduct for Judges, but improve oversight and enforcement of that process by Congress. One such approach might consist of the following:

- Judges would be subject to periodic individual review of their performance—which could be, say, every five years—by the Judicial Councils using the existing Code of Conduct for Judges as the evaluation criteria. As part of that review, it is essential that Councils examine the records, including any complaints, for evidence of bias—including political bias—in each judge's work.
- In the event a judge draws an unsatisfactory performance rating, he would be put on a three-year probation. During that probationary period, the judge would continue to receive case assignments, unless the Council determined it would be otherwise detrimental to the course of justice.
- At the end of the probation period, the Council would recommend that each affected judge either be reinstated or become a candidate for removal.
- Councils would be required to report their JPE actions annually to the relevant judiciary committees of the houses of Congress, along with the most current evaluations and supporting records for all judges, not just those subject to disciplinary action.
- The individual lists received annually from Councils of judges who are candidates for removal would be compiled by the House Judiciary Committee and presented to the full House for a vote to approve, which would be by simple majority. To buttress the notion of judicial independence, such a vote should probably be conducted on an "all or nothing" basis, since we do not want to allow for political targeting of specific judges in that process. The point of the exercise is to eliminate judges who have not performed in accordance with the standards of the judiciary's own Code of Conduct for Judges, not to pillory individual judges for their political affiliation.
- Once approved by the House, the list would go to the Senate for a vote of approval, again, by simple majority and an up or down vote on the list in its entirety.
- Of course, part of the congressional oversight process is to ensure they are seeing judges of both parties represented on the list for removal. (Let's not pretend this will be a "nonpartisan" process.) Where Congress determines, based on their own information received from constituent complaints or other sources, that the Judicial Councils are not being rigorous enough in meting out discipline—whether in an effort to "cover for their own" or otherwise—Congress could hold public hearings and conduct investigations, all to ensure the judiciary is not in breach of the public trust. The publicity engendered by such proceedings might shed enough light on the judiciary to ensure it no longer operates in the dark. Any embarrassment the judiciary may suffer in this process might well have a salutary effect, perhaps even helping to dispel any conceit of individual judges that they are themselves above the law.

Combined with better oversight of judicial performance, Congress may wish to consider further restricting subject matter jurisdiction of the federal inferior courts. Over the years, Congress has created several specialized courts that hear matters related to purely federal matters, such as international trade, immigration, and federal claims. In fact, there are currently more such specialized judges in existence than the total number comprising the more generalized district and circuit courts judges. One may wonder whether the inferior courts should have jurisdiction at all of matters where the legislative or executive branch is a party; it may be more appropriate for such disputes to be forced directly to the US Supreme Court, since such matters will typically involve issues affecting the constitutional balance of powers among the branches of the federal government.

If the effort to impose better oversight and discipline of judicial performance should fail as a result of unfavorable judicial interpretation of the Constitution, judges should be mindful that Congress has other, less surgical, approaches at its disposal that clearly fall within its power of the purse. In constructing the budget, the House can cap the size of the federal judiciary and even reduce it over time by eliminating funding for existing judicial positions as judges retire. Moreover, cuts to the administrative side of the judiciary's annual budget—leaving judicial salaries untouched—are clearly within congressional purview. Such cuts are unlikely to be welcomed by judges who already seem to complain constantly about their caseloads. If judges refuse to strengthen discipline and ensure enforcement of their own Code of Conduct, Congress has the means to make a career in the federal judiciary far less attractive than it is currently. When all else fails, there is always the prospect of constitutional amendment, which while difficult, is not impossible. That would put all alternatives for the structure of the federal judiciary back on the table. This is no longer the 1780s. Query whether the American people, with 250 years of experience under their belts, will continue to be so sanguine about a judiciary over which they have no control, all in support of a questionable theory of "judicial independence." We close with the following section, which notes a few of the issues that might be considered in any reform of the judiciary under the Constitution.

Constitutional Amendments and the Judiciary

Though obviously an ambitious project, the 250-year history of the federal judiciary—with its extremely limited disciplinary record—urges a reconsideration of the judiciary's role, to assure a proper balance among the branches of the federal government under the Constitution. In any such reconsideration, all options will be on the table, including the structure and role of the Supreme Court. We flag below a few of the more important themes that will come to bear on any such reconsideration.

1. Election of judges—As noted above at footnote 13, some 20 states currently choose all or most of their judges by public election. Interestingly, where elections are employed, they typically apply to supreme and appellate court judges. While elections do ensure that judges are forced to stay generally attuned to popular issues of the day, it is not clear that winning an election, in itself, makes a person a better judge. The very qualities that make a person good at winning elections may make him less suited to being a judge. We like to think of judges as having a certain kind of temperament—one that is generally calm and impartial. When we see this kind of temperament displayed in court, it strengthens our belief in the overall fairness of our justice system. (And of course when not, not.) By contrast, we expect a politician to be committed to a certain set of beliefs—or philosophy—of law and government and to fight for those beliefs. This differing view of judges and politicians Is based on our assumption that the politician will be involved in legislating—that is, the creating of laws—while the judge is only supposed to be interpreting the existing law to apply it to different parties and fact patterns that appear before his tribunal as cases. But as we have said above, giving judges the power of judicial review (the ability to declare certain legislation unconstitutional) affects (or at least should affect) our expectations about the differences between those two roles in our society. This is because giving judges the power to

strike down laws, gives them the power to shape them, and this looks a lot more like "legislating" than it does "judging."

An additional complication with judges is that the skills they require may differ, depending on the level at which they are working—that is, trial work versus appellate review. At the trial level, the judge's administrative or management skills may well be even more important than judicial demeanor, since the ability to efficiently, bur fairly, dispense with cases is critical to our notion of "speedy justice." At the appellate level, however, commitment to a certain legal philosophy—one that is hopefully shared by all or most individual judges—is critical to maintain consistency in reviewing the work of the trial courts. It is also likely that such consistency plays a key role in shaping public perception of the justice system over time, since appellate decision may attract even greater publicity than trials.

The foregoing characteristics of the judiciary may have implications for whether judges should be elected or appointed. One problem in electing judges is that it is difficult for the public to obtain the information it needs to vote for judges. It has been our experience living in states with public judicial elections, that meaningful information about candidates is often hard to come by, even for those of us who are lawyers but do not practice in front of those judges. And the voter's information needs are different, depending on the judge's level. In reviewing the public statements of a judicial candidate for the appellate level, a voter can usually at least get a sense of that judge's legal philosophy, and then have some confidence that that philosophy will translate into decisions the voter can respect overall, even while he may disagree with some of them individually. Where a trial judge is concerned, however, unless the voter is an attorney practicing in front of that particular judge,[21] or have, by some remote chance, appeared before that judge in litigation as a party, how can the voter know about that judge's demeanor in court? How can the voter be sure the judge has the requisite management and administrative skills to move cases forward efficiently? This tends to suggest that a good system might be one where supreme court or appellate judges (of which there are only a small number) are elected, while the larger number of trial judges are appointed through some process involving the legislative and executive branches. It is certainly easier for those in government than for the general public to obtain the reporting about the performance of trial judges and learn about their reputations on the bench that represent the information needed to make informed decisions about their suitability. Accordingly, it may be no accident that, where states have judicial elections, they tend to apply to appellate and supreme court judges more than to trial judges.

One particular problem arises in connection with electing federal judges, or at least the district court judges. We have noted the information challenges that voters confront in voting for judges at the state level. Where federal districts cover multiple states, dozens of judges are required to staff each district. Clearly, this would exacerbate both logistical and informational challenges for voters of those districts. Under the circumstances, there may be no alternative but to continue the existing appointment process for district court judges. It

[21] The IAALS report discussed earlier at footnote 20 found that lawyers who practice in front of the judges being evaluated are reluctant to say anything adverse about them, for fear they will face future reprisals when they next appear before those judges. These lawyers also tend to be generally skeptical of anonymity protections offered by the evaluation systems.

may, however, still be practicable to require elections applicable to either all circuit court judges, or at least to the elevation of those judges to the relevant Judicial Councils, where there are much smaller numbers involved. In that light, it may also be possible to require voting for Chief Judges who run districts and circuits.

2. Life tenure vs term limits—This seems like an easier issue to address than the election of judges. For this commentator, life tenure in a job seems difficult to justify under any circumstances. The judiciary can abuse its power just like any other part of the government. Judges are human after all, and most of us recognize from experience, that the longer a person is allowed to sit in one position in any organization, the more power he will accrue, and with it, a growing temptation to abuse that power. This may seem acceptable in a society where aristocracy is an accepted feature, but it is anathema in a democracy. This is readily demonstrated in the debate over term limits for public office. Most ordinary citizens see term limits as just common sense, based no doubt on experience. Those who deplore term limits are those who benefit most from their absence—that is, current office holders. For judges, granting them the power of judicial review simply broadens the scope in which they can abuse their power, as noted above.

   There is also something unseemly In the case of federal judges, where not only do they want to be "independent" and avoid elections and the dirty work of politics, but they also want the privilege of holding their offices for life, without consequences; hence, their resistance to performance review. Yet for the rest of us, consequences in the performance of our jobs is the defining characteristic of life.

   The 50 states offer an interesting contrast to the federal approach. Of the 344 justices serving on supreme courts of the states, only the five in Rhode Island currently enjoy life tenure.[22]

   On the related question of how long a judicial term should be, if not for life, the states' experience is also worth considering. The 339 state supreme court justices who serve for limited terms experience terms of varying length. In Virginia, for example, supreme court justices serve 12-year terms (while lower court judges serve eight-year terms), with re-election possible. (In Virgina, on the question of elections generally, both justices and judges are elected by the General Assembly rather than by popular vote, though Virginia and South Carolina are currently the only two states that adopt this approach, according to Ballotpedia.) As to what might constitute a sensible term, a 16-year term seems suitable if re-election is not permitted, while 12 years might make sense if re-election is permitted (though limiting re-election to a single time might curb excessive tenure in office). We assume that terms would be set at multiples of four years, so that judicial elections would coincide with the general election cycle. Off-cycle elections are notorious for low turn-out, often producing anomalous results.

   In all cases, the goal is to avoid providing individuals with life sinecures, so they maintain some emotional and practical connection with the issues that confront ordinary citizens.

[22] "Life Tenure is a Rarity on State Supreme Courts," October 2, 2024, Brennan Center for Justice website.

3. Policy of avoidance—In imperial China, which lasted two thousand years, they had a policy of barring government officials from serving in their home provinces, what they called the "policy of avoidance." The purpose of the policy was to discourage corruption resulting from officials' steering public benefits to the friends and families they grew up with. Looking at the political scene in contemporary America—with its blue states and red states—it would seem that a modified version of such a policy might have some salutary effect in achieving consistency in the rulings handed down by federal judges from district to district. This policy might require federal judges to move to new districts every five to seven years, and might include a requirement that a judge serve in both rural and urban districts. The goal here would be to reinforce the notion that judges are serving the public, not building their own political empires.

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