The American Judicature Society and Judicial Independence: Reflections at the Century Mark

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The American Judicature Society's name is emblematic of the burdens it bears, the benefits it brings, and the challenges it confronts in the twenty-first century. It is not the "judges are so cool, I can hardly stand it" Society or the "Justice: Wheeeeee!!!" Society. It is the Judicature Society—a name with all the marketing punch of the "Eat Your Kale" Consortium. Therein lies the burden, but also the benefit: Sometimes, people need to eat their kale. AJS generates information vital to the administration of justice without regard to political splash or media fanfare. As a consequence, it has served as an indispensable resource to every thoughtful court reform movement of the past century. But that, in turn, implicates the challenge: In an era when good-government organizations compete for scarce resources, getting noticed can be the key to their survival. And

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getting noticed is not easy when issues critical to the health of AJS are often more tedious than titillating.

Thankfully, we need not disseminate "Dare to be Dour" buttons to acknowledge AJS achievements. We can tell the AJS story, in its centennial year, through this series of articles. And that story is anything but dreary, for it tells the tale of a small organization with an unpronounceable name that has changed the face of American justice.

A logical starting point in the AJS story is with the issue of judicial independence, a sweeping topic with complex architecture that gives structure to the AJS mission. "Judicial" tethers independence to judges. Judges can be conceptualized as atomized individuals deciding cases or as a group collectively comprising the judicial branch of government. As individuals, judges include a sprawling array of adjudicators—state, federal, trial, and appellate. Their jurisdictions range just as widely: general and specialized; foreign and domestic; Article I and Article III. Collectively, the judiciary serves a host of roles, as administrator, rulemaker, disciplinarian, lobbyist, spokesperson, and sometimes, involuntary scapegoat.

"Independence," in turn, is defined as freedom from influence or control, which implies unfettered autonomy. "Judicial," however, modifies independence in ways that limit the word's construction with reference to the purposes independence serves individually and collectively. In relation to judges individually, independence arguably insulates them from the influence or control of interested outsiders who could interfere with judges' efforts to uphold the law, adhere to due process, and reach just results ("decisional," or "decision-making" independence). As to judges collectively, independence buffers the judiciary from legislative or executive branch controls that could encroach on the judiciary as a separate branch of government or institution ("institutional," "branch," or "administrative" independence).

Unfettered judicial independence does not serve these purposes. Rather, absolute independence would liberate judges to disregard the law, due process, and justice, leaving them accountable only to their own preferences or priorities. And it could morph the judiciary into an imperial, rather than a coequal, branch of government by immunizing the judiciary from the interdependency of checks and balances. Independence, then, must be qualified by accountability, making the perennial challenge to strike a balance in which judges and the judiciary are independent enough to serve the goals of independence, but not so independent as to undermine those same goals.

The century-old mission of AJS has been to assist in striking this independence-accountability balance across a diverse array of initiatives. Toward the end of the nineteenth century, populists and progressives ascended to power, winning elections to Congress and state legislatures. Unhappy with conservative political ideology, inferred from his cycles of anti-court sentiment have come and gone since the nation was founded, the ferocity with which courts were attacked during the populist and progressive era represents a high water mark. In a first, one that would become more commonplace in the twentieth century, the Senate rejected a Supreme Court nominee (Stanley Matthews) because of his political ideology, inferred from his

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2. See AMERICAN BAR ASSOCIATION, supra note 1, at 11-14; Bermant & Wheeler, supra note 2, at 838; Geyh & Van Tassel, supra note 1, at 31-32; Geyh, supra note 1, at 238-44.
4. Id.
The premise that preserving public confidence in the courts was critical to the judiciary's survival. Fourth, his approach elaborated on four causes and multiple sub-causes of dissatisfaction with the justice system in a systematic and deeply substantive way. Fifth, Pound protected core judicial independence values. By fixating on procedural and organizational remedies for popular unrest with the courts, he rejected and deflected the heavy-handed, independence-threatening proposals of the progressives.

AJS was established in no small part to carry on the work that Pound began, in response to the populist-progressive attack on the courts—an attack that arguably presented the greatest threat to judicial independence in American history. To that extent, judicial independence is AJS's raison d'être, and, in the intervening years, AJS has devoted considerable time and energy to this overarching issue. In the late 1990s, it established a Center for Judicial Independence that hosted programs, engaged in coalition building, and established a task force to identify and address pressing issues on the national and state scenes. AJS officers and staff have published books, book chapters, and articles on judicial independence—most notable, perhaps, being Judicial Independence at the Crossroads: An Interdisciplinary Approach, a ground-breaking collection of essays edited by AJS Board members Steve Burbank and Barry Friedman.17

The issues AJS has placed on its agenda—the issues explored in this issue of Judicature—can be understood and explained with reference to that common root: the organization's commitment to an independent and accountable judiciary. The paragraphs that follow elaborate a bit.

Judicial Administration and Access to Justice

In his 1906 address, Pound focused his reform proposals on judicial organization and procedure. Like Pound, AJS recognized from its inception that independence-threatening dissatisfaction with the courts is often attributable to poor administration, and that a poorly-administered judiciary squanders the good will that supports independence because incompetence lays independence to waste. When court systems exercise inadequate oversight; follow bad procedure or good procedure badly; are poorly structured, inadequately funded, or understaffed, they delay or deny access to the rule of law, due process, and justice. That, in turn, begets public disaffection that jeopardizes the courts' legitimacy and invites ham-handed intrusions upon the judiciary's autonomy via legislative micromanagement of judicial administration or insensitivity to the judiciary's budgetary needs—an issue AJS has addressed in conferences, editorials, and articles published in Judicature.

Judicial Conduct and Ethics

AJS has long understood that accountability is a critical counterpoint to independence and that it thwarts its abuse. The judiciary's continued independence requires the public's support; if the public becomes convinced that judges misuse the independence they are afforded, the obvious solution is to take that independence away. The key is to provide a measure of accountability that curbs judicial excesses without curbing independence in ways that [the establishment of] the American Judicature Society, there is no doubt that [it] played an significant role along with other factors then present).

6. Henry Abraham, Justices and Presidents: A Political History of Appointments to the Supreme Court 136 (3d ed. New York, NY: Oxford University Press 1992) ("It was perhaps the first clear instance of concerted, patent opposition to a nominee on grounds of economic affiliation.").


10. Id., at 86.


12. Ross, supra n. 3, at 48.


14. Norman Krivova, In Celebration of the 50th Anniversary of Merit Selection, 74 Judicature 128, 128 (1990) ("While that speech alone may not have been sufficient to prompt...
compromise its objectives. One such measure is to hold judges to standards of conduct that protect and preserve judicial impartiality, integrity, and independence.

The American Bar Association contemplated a proposal to promulgate canons of judicial ethics within three years of Roscoe Pound's address, but it worried that such a project could be misconstrued as an attack on the courts at a time when the judiciary's independence hung by a thread. In its inaugural bulletin published in 1913, AJS included judicial discipline as a topic heading in an amalgam of complaints and proposals aimed at alleviating disaffection with the courts. Push came to shove in 1920, when the federal judiciary was rocked by a scandal involving Judge Kennesaw Mountain Landis, who became commissioner of baseball without resigning from the court. After a period of study, the ABA adopted the first Canons of Judicial Ethics in 1924. Canon 14, captioned "independence," implored judges to disregard attacks akin to personal popularity or notoriety, nor be apprehensive of unjust criticism. In 1924, the American Bar Association founded the Center for Judicial Ethics, which has become a leading source of information and authority on ethics issues.

The Center publishes the quarterly Judicial Conduct Reporter, provides an information service and technical assistance to state judicial conduct and disciplinary entities, sponsors the biennial National College on Judicial Conduct and Ethics, lends expertise to ABA Model Code revision projects, and serves as an indispensable resource to scholars, judges, and practitioners.

State Judicial Selection
Among the causes of popular dissatisfaction with the courts enumerated in Roscoe Pound's 1906 address to the American Bar Association was "putting judges into politics"—a pointed reference to judicial elections. After 1789, when the Constitution was ratified, governors or legislatures appointed judges in all thirteen states. In the 1840s, a wave of states moved toward selecting judges in contested partisan elections; at the turn of the twentieth century, some states moved to select judges in contested nonpartisan elections. Appointive and contested election systems were variously criticized for rendering judges too dependent on governors, legislatures, political party bosses, the vagaries of name recognition, and the whims of a poorly-informed electorate. To promote judicial independence from these sources of political influence, AJS proposed to reorient the focus of judicial selection toward qualifications, with a merit selection plan devised in 1913 by AJS co-founder Albert Kales.

Pursuant to the AJS plan, judges were to be appointed by governors from commission-approved candidate pools; if states wished, they could add periodic, uncontested retention elections; at the turn of the twentieth century, some states moved to select judges in contested nonpartisan elections. Appointive and contested election systems were variously criticized for rendering judges too dependent on governors, legislatures, political party bosses, the vagaries of name recognition, and the whims of a poorly-informed electorate. To promote judicial independence from these sources of political influence, AJS proposed to reorient the focus of judicial selection toward qualifications, with a merit selection plan devised in 1913 by AJS co-founder Albert Kales. Pursuant to the AJS plan, judges were to be appointed by governors from commission-approved candidate pools; if states wished, they could add periodic, uncontested retention elections in which incumbents must win majority voter support in order to keep their seats. Beginning with Missouri in 1940, 23 states adopted some version of the AJS merit selection plan during the mid-twentieth century (with all but Hawaii adding a retention election component) to select some or all of their judges.

AJS and its Elmo B. Hunter Citizens' Center for Judicial Selection have served as a resource for anyone curious about judicial selection in the United States. The Center has advised jurisdictions contemplating reform, participated in programs hosted by others, hosted programs of its own, published indispensable data on selection systems, and advocated merit selection as preferable to more independence-threatening contested election systems.

And JUDICATURE has published scores of articles on the topic. In short, judicial selection and its relationship to judicial independence has been a centerpiece of the AJS agenda from the beginning.

Federal Judicial Selection
Judicial selection wars have not been confined to state systems. Supreme and circuit court confirmation proceedings transformed into referenda on nominee ideology over the course of the twentieth century, where once again, judicial independence was at the front and center. Inquiring into a nominee's judicial philosophy is one thing; so called "litmus" tests, in which the Senate conditions a nominee's confirmation on whether she will effectively commit to deciding future issues in politically acceptable ways, is another that arguably cuts to the quick of decisional independence.
Criminal Justice
When judges preside over criminal cases, they wield an awesome power over an individual’s life and liberty, and the decisions they make can have a significant effect on their community’s safety and peace of mind. Unsurprisingly, then, criminal justice issues are often at the center of the most heated independence-accountability debates. Two of the primary catalysts for the latest cycle of anti-court sentiment that began in the mid-nineties, discussed at the end of this article, concerned criminal justice issues. In 1996, House and Senate Republicans threatened federal district judge Harold Baer with impeachment after he ruled to suppress evidence in a drug case. In 1998, Tennessee Justice Penny White lost her retention election because she joined an opinion overturning a defendant’s death sentence. The choices judges make in criminal cases provoke threats to judicial independence and call for greater accountability because those choices are enormously important. For that reason, criminal justice issues have long been on the AJS agenda.

Jury Reform
The jury system arose as a check on judicial power. The decisional independence judges enjoy to decide cases without external interference is limited by juries that play a critical role in deciding the fate of parties coming before the court. Jury trials are increasingly rare—a potentially troubling development—but they remain a shotgun behind the door that influences the ways lawyers litigate and judges preside, even when cases culminate in settlement or negotiated pleas. Given the continuing importance of the jury system, AJS established the National Jury Center, later renamed the Edmund N. “Ned” Carpenter II Jury Center, which conducts applied research on jury system management and citizens’ views of jury service; gathers and disseminates information on jury systems; and promotes adoption and standardization of best practices in state and federal courts. In short, every issue in the AJS portfolio implicates judicial independence and accountability in important ways. In addition to its programmatic agenda, however, AJS has arguably exerted an even more profound impact on the course of the judicial independence debate through its journal, Judicature, as evidenced by its role in the most recent cycle of anti-court sentiment.

In 1994 midterm elections, the Republican Party gained control of both houses of Congress. House Republicans, elected on the strength of a “Contract with America” that proposed sweeping administrative and public policy reforms, quickly became impatient with judges whose decisions were at odds with the new agenda. In the Senate, majority leader Robert Dole was poised to become the Republican Party’s presidential nominee, and he made liberal “judicial activism” a campaign issue. As noted earlier, the Baer episode in 1996 lit the fuse: Senator Dole and Speaker of the House Newt Gingrich called for Baer’s impeachment if he did not reverse a suppress order he had issued in a pending drug case. President Clinton, through his press secretary, indicated that he would ask Baer to resign if he did not reverse himself, and Baer reversed himself. Between 1996 and 2008 (when the Democrats regained control of the House, Senate, and White House), members of Congress proposed, and in some cases implemented, a host of mechanisms to curb what they regarded as “liberal judges run amok.” They threatened to impeach “activist” judges; deprive federal courts of jurisdiction to hear cases on politically sensitive issues; disestablish or restructure “activist” courts (particularly the Ninth Circuit Court of Appeals); and freeze budgets. And they thwarted the appointment of liberal circuit judges; imposed restrictions on sentencing discretion; and, in one instance, created special jurisdiction for a federal court to review an unpopular state court ruling. While this cycle featured conservative politicians attacking liberal(ish) judges, the propensity to attack ideologically adverse judges is not confined to a particular party or
ideology. Recall that during the populist-progressive era, the shoe was on the other foot when progressives attacked conservatives. Moreover, between 2000 and 2008, Senate Democrats (who regained majority control for part of that time) used a range of tactics to delay or kill the conservative circuit court nominations of President George W. Bush.\footnote{47}

In state court systems, judicial elections have become "noisier, nastier, and costlier."\footnote{48} Numerous supreme court races morphed into referenda on a judicial candidate's vote in a single case or view on an isolated issue. Examples include matters such as capital punishment and criminal sentencing, gay marriage, water rights, abortion, funding of public education, and tort reform.\footnote{49} Driven by an ideological divide over tort reform, money poured into supreme court races in unprecedented amounts, fueling concerns that judges would be beholden to their contributors.\footnote{50} In other developments, court budgets were cut, sometimes as a retaliatory strike for unpopular decisions or as a matter of recession-related fiscal austerity, implicating both decisional and institutional independence.\footnote{51} In various states, unwelcome decisions by individual judges led to calls for impeachment, discipline, recall, removal by legislative address, restrictions on jurisdiction and judicial review, and, remarkably, exposure to criminal prosecution.\footnote{52}

During this cycle of anti-court anger, *Judicature* has covered judicial independence issues in five ways. First, it has kept readers abreast of events as they arise: When the latest cycle of anti-court sentiment began in earnest in the mid-nineties at the state and federal levels, *Judicature* ran articles that reported the developments and published transcriptions of AJS conferences that summarized and analyzed events implicating judicial independence concerns as they arose.\footnote{53}

Second, *Judicature* has published articles placing this latest cycle of court-directed animus in historical perspective.\footnote{54} Third, before the cycle began, it published editorials and advocacy pieces proposing reforms and exhorting the public, policy-makers, and judges to respect the judiciary's independence.\footnote{55} Fourth, it has placed judicial independence in comparative perspective by publishing work analyzing independence and accountability in foreign court systems.\footnote{56} Fifth, it has engaged the scholarly debate regarding the potential upsides to judicial elections.\footnote{57}
Looking ahead, the latest cycle of court-curbing rhetoric has wound down at the federal level (with the glaring exception of judicial appointments), but much remains to be done on judicial independence and accountability among the states. Political polarization, judicial selection wars, shrinking budgets, big money in judicial election campaigns, angry legislatures, determined interest groups, and changing media coverage of the courts are among a multitude of factors that will drive the hotly contested judicial independence and accountability debate deep into the twenty-first century.

The starting point is to transcend the gaseous pronouncements upon which the legal establishment’s longstanding arguments for judicial independence are based. Judges and lawyers often proceed from the unexamined premise that judicial independence is an instrumental value that promotes the rule of the law; the balance of their time is then spent arguing that different impositions upon judicial independence—threats of impeachment, recall, jurisdiction-stripping, defeat in contested or retention elections, budget cuts, disestablishment of courts, etc.—are axiomatically bad. But social scientists have shown that independent judges can be influenced by more than law; they can be influenced by ideology, race, gender, emotions, strategic considerations, and other factors. To date, scholars—particularly political scientists who have developed the attitudinal model of judicial decision-making—have studied extralegal influences on decision-making by the U.S. Supreme Court, to the virtual exclusion of state courts. **Judicature** is well positioned to encourage the proliferation of scholarship that explores the range of influences upon judicial decision-making on state trial and appellate courts.

Armed with data that elucidates the range of legal and extra-legal influences on state judicial decision-making, AJS will be well-positioned to reassess the normative justifications for judicial independence. If independent judges are liberated to do more or less than uphold the law, to what extent should traditional justifications for judicial independence be reconsidered? If independent state judges are influenced by their ideological predilections, rather than or in addition to the law, does that mean independence is undesirable? Or can one defend the independence of a judiciary that is subject to legal and extralegal influences?

For example, can one argue that independent judges are better situated to respect due process, to give us their best assessment of what the law requires, or to reach decisions they regard as just given the facts of the case—even if those decisions are influenced by their ideological predilections?

Once we know more about the influences on independent state courts and revise our justifications for judicial independence accordingly, it will be possible to formulate an action plan. The optimal independence-accountability balance should promote judicial independence in a way that furthers its desirable effects while curbing the undesirable ones. The merits of legislative or executive branch constraints on judicial decision-making, electoral accountability and privately funded judicial races, and the discipline or removal of judges for conduct related to their decision-making must be reassessed against this yardstick.

If AJS is to remain a key player in this project, it must tackle the paradox introduced in this article. On the one hand, it must continue to embrace its inner geek. It must remain devoted to the issues that matter most to the effective and expeditious administration of justice, even—and perhaps especially—when those issues are seen as sexy or cool to no one except lonely policy wonks, for that is where AJS’s unique expertise, perspective, and time-tested commitment are most needed. On the other hand, AJS must do more to attract attention in an era when charitable dollars often flow to those who grab headlines. In short, AJS must make itself famous while toiling in obscurity.

This paradox, however, is not inescapable. Ethics and selection are marquee issues for AJS—issues that routinely receive national attention. In the last five years alone, the national media has covered such issues as binding the Supreme Court to a code of conduct; disqualification of Supreme Court justices; the Caperton case and its implications for recusal reform, campaign finance, and judicial selection; the impeachment and removal of a federal judge for unethical conduct; and the retention-election ouster of three Iowa Supreme Court justices following their decision in a same-sex marriage case. An energized, opportunistic, and strategically-minded AJS would be poised to assume a more prominent leadership role on these issues relative to other interested organizations.

The resulting attention AJS receives can create funding opportunities for hot-button projects that beget funding opportunities for vital, if less prominent, initiatives.

Talk is cheap for a tenured law professor with a steady income. The challenge AJS confronts is more complicated and daunting than my simple, if not simplistic, recipe for success makes it out to be. Philanthropic organizations with the desire and wherewithal to improve the administration of justice in the United States can learn more about how AJS has helped to frame the public debate over the course of the last century from the articles that follow. The choices those organizations make will then decide whether AJS remains a vital participant in that debate for the next hundred years. Here’s hoping they do the right thing.*

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