Transition to Democracy in Latin America: The Role of the Judiciary

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The Right Degree of Independence

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

The term "independence" is generally used to characterize the relationship of the judiciary to other institutions or agencies.[2] An independent judge is one who is not under the influence or control of someone else. An element of ambiguity arises, however, because there are several different kinds of institutions or agencies from which the judge is to be independent. Judges are supposed to be independent, but from whom?

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

Another form of independence -- "individual autonomy" -- concerns collegial relationships or the power of one judge over another. In common law systems, judges feel the pressure of other judges through the doctrine of *stare decisis*. In both common and civil law countries, collegial control may also be exercised over lower court judges through the regular appellate procedures. These traditional forms of collegial control do not threaten the independence that rightly belongs to a judge. But another form of control, recently imported into the United States, may threaten a judge's indepen-

dence, or more specifically the claim for autonomy from bureaucratic control. Here I am referring to arrangements such as those embodied in the 1980 Judicial Councils Reform Act[3] that allow one group of judges, acting through an organization rather than the normal appellate procedures, to review the work of an individual judge and discipline him or her. The 1980 Act gives the judicial councils of the circuit courts power to investigate complaints against trial judges and to impose a number of sanctions against them.

Such bureaucratic controls are commonplace in civil law countries, where the judiciary is professionalized, but their introduction in the United States has alarmed some who fear the potential inroads on the American tradition that promises to each judge a measure of individual autonomy.[4] This tradition is nourished by broad cultural norms and our individualistic ideology; it also stems from the practice, most prevalent in the federal courts, of recruiting judges laterally.

A third form of independence -- the most difficult to understand and the focus of this chapter -- concerns what I call "political insularity." The judiciary is a part of the state, exercising the state's coercive power and dedicated to fulfilling the state's purposes, yet we insist that the judiciary be independent of other governmental institutions. This form of independence overlaps with party detachment whenever one of the litigants before the court happens to be another branch of the state, say the executive, but it is more encompassing and is best understood as an additional requirement. Even when a case is wholly between private parties, the judge is expected to decide the case free of any influence or control from the other branches of government.

Political insularity enables the judiciary to act as a countervailing force within the larger governmental system. In the context of a dictatorship, conflict or the very possibility of conflict between the judiciary (if it is allowed to exist) and the ruling powers is all to the good -- the more political insularity the better. The situation is more complicated, however, when the judiciary is part of a democratic regime. Then, so I will argue, we must optimize rather than maximize independence. In contrast to impartiality, it simply is not true that the more insularity the better, for a judiciary that is insulated from the popularly controlled institutions of government -- the legislative and executive branches -- has the power to interfere with the actions or decisions of those institutions, and thus has the power to frustrate the will of the people. An independent judiciary can be a threat to democracy.

The tension between popular sovereignty and judicial independence is most pronounced where judges are appointed by the executive and have life tenure, as is true of the federal judiciary in the United States. However, this tension also exists where judges are elected or subject to popular recall, since the mechanisms by which the judiciary is held publicly accountable tend to be far cruder than those that hold the executive or legislative branches accountable. Judicial terms of office are longer, elections occur more irregularly, and information about the performance or qualifications of the judiciary is more difficult for the public to assess.

Admittedly, the power possessed by an independent judiciary may sometimes be used to further the power of the electorate. This occurs, for example, whenever the court protects the integrity of the electoral process or political freedoms. Even then, however, the tension between judicial independence and democracy is not altogether absent, since undemocratic means are being used to protect democratic ends. Granted, only an institution that is free of political control can serve as an effective watchdog of the political process. Yet there is no guarantee that the judicial power will be used to enhance rather than constrict the power or political freedom of the electorate. Judges enjoying a hefty measure of independence may be no more committed to the preservation of free and open debate than military officers who are similarly insulated from politics. Sometimes they are, and sometimes they are not.

An even more fundamental conflict between democracy and judicial independence arises when, as is often the case, the judiciary goes beyond protecting the electoral process or political freedoms and sets aside an executive or legislative act that could not possibly be said to interfere with or corrupt the representational process. Typically, those seeking to justify judicial independence and to lessen this conflict expand upon the notion of democracy and insist that it does not require a complete surrender to the demands of the present electorate.[5] Rather, democracy is presented as a nuanced theory of governance that requires the state to be responsive both to preferences and principles: the democratic state must respond to both the occurrent demands of the electorate and to certain transcendent values, such as the protection of human rights, or to core principles embodied in a constitution. Within this scheme, the judiciary appears as the privileged guardian of these core principles or transcendent values, not least because it is insulated from popular control and generally sequestered from politics. Independence allows the judiciary to take the long view.

Such interpretations of democracy, distinguishing it from an insistent populism and tying it to such notions as "constitutionalism" or the "rule of law," are commonplace today in both the United States and Latin America and account for much of the appeal of the ideal of political insularity. The

fact remains, however, that the appeal is a qualified one. Democracy may be acknowledged to be a combination of principle and preference, but the proportion of each is never specified. Moreover, while political insularity may put the judiciary, as compared to the legislature or executive, in a privileged position to speak authoritatively on questions of principle, there is no guarantee that what it says will be correct. A politically neutral interpretation is not necessarily a correct one.[6]

We are thereby confronted with a dilemma. Independence is assumed to be one of the cardinal virtues of the judiciary, but in a democracy it must be acknowledged that too much independence may be a bad thing. We want to insulate the judiciary from the more popularly controlled institutions, but recognize at the same time that some elements of political control should remain. We are, in other words, ambivalent about independence. This attitude is reflected in the United States constitutional system, as I will describe in the first section of this essay. It is even more evident in the emerging democratic republics of Latin America. In these countries one sees in dramatic ways the truly limited and contingent nature of the ideal of an independent judiciary.

I.

State and local courts are essential elements of the United States judicial system, but the federal courts are the more celebrated division of that system. They are treated as the fullest embodiment of the ideal of judicial independence and a model for all the world to emulate. We boast of the political insularity of the federal courts and point to Article III of the Constitution,[7] providing life tenure and protection against diminution of pay, as the essential guarantor of independence. In the same spirit, we explain how the work of the federal judiciary is protected against easy revision by the political branches. The Supreme Court's interpretations of the Constitution can be revised only by the cumbersome amendment process, which requires special majorities in each house of Congress and approval by three-fourths of the states.[8] As a consequence, in the two-hundred-year history of the nation, only three amendments -- the Eleventh,[9] Fourteenth[10] and Sixteenth[11] -- have reversed decisions of the Supreme Court.

This mythic picture of the federal judiciary is often buttressed with references to some of the more dramatic instances in which the Supreme Court defied the executive or legislature, as when the Court required President Nixon to surrender secret tapes of his conversations[12] or when it ordered Congress to accept Adam Clayton Powell as a member even though it had previously refused to seat him.[13] The truth, however, is more complex than this one-sided telling of victorious moments may con-

vey. While the Constitution creates a measure of political insularity for the federal judiciary, a number of other factors -- some also rooted in the Constitution -- bring the judiciary to some extent under the sway of one or the other of the political branches. Independent to an important degree, the federal judiciary is nonetheless tied to the political branches in ways that sometimes constrict its independence and other times enhance it. The relationship among the branches is multifaceted and highly interdependent, and this is true whether the focus be the process by which judges are appointed, the guarantee of life tenure and protection against the diminution of pay, or the law-making function of the judiciary.

A natural starting point for this inquiry is, of course, the process by which judges are appointed. As an abstract matter, judges can be selected by other judges and thus truly insulated from popular pressure. In the United States, however, the power to appoint federal judges is vested by the Constitution in a political officer, specifically the President, and an element of political control over the judiciary is thereby introduced. Presumably, the President does not want someone to do his bidding, and recognizes that the judge's job is law, not politics. Nonetheless, he is likely to appoint someone whose concept of justice approximates his own and who is likely to further rather than impede the policies of his administration.

While the President's control over the appointment process provides the executive branch with a certain degree of influence over the judiciary, the President's control is not unconstrained. The bar and public expect a measure of professional and intellectual achievement for nominees to the federal bench. Moreover, the President's power over appointments is a shared one, since the Senate must confirm the President's nomination. The Senate is as much a political institution as is the presidency, but the very division of the appointment power limits the control of the President over appointments, and the interaction between the two institutions often creates a dynamic which is not wholly within the control of either one.

Time also works to lessen the influence of the President. The judge has life tenure while the President serves for four or possibly eight years. At the moment of selection, the judge is likely to be deeply grateful to those responsible for his or her appointment, above all the President, and may be inclined to transform that feeling of gratitude into a sense of loyalty, giving the President every benefit of doubt. As time passes, however, administrations change, and the judge confronts the policies of a President with whom he or she has had no relationship. As a result, the distance between the President and the judge grows. Indeed, at certain points in its history, the Supreme Court has been composed of justices who owe their appointments to an entire panoply of Presidents. In the mid-1960s, for example, the Court was constituted by justices appointed by Franklin Roosevelt, Harry

Truman, Dwight Eisenhower, and John Kennedy, each President strikingly different from the others and collectively representing almost all the political strands of the modern period.

The threat to independence posed by the President's power over appointments is further limited by certain understandings that have evolved about the process by which new judgeships are created. Every vacancy constitutes an opportunity for the President to enhance his control over the judiciary. The Constitution does not limit the number of federal judgeships, either on the Supreme Court or the lower federal courts. However, an informal understanding -- stemming from the court-packing incident of the late 1930s -- has partially filled that gap. Frustrated by a series of Supreme Court decisions invalidating various New Deal measures, President Roosevelt proposed creating new justiceships -- one for each justice over seventy -- because he was unwilling to await the normal creation of vacancies from deaths and retirements.[14] The effect of this proposal was the opposite of that intended. Not only did it engender great hostility in Congress and the bar, forcing its withdrawal, but it left us with the settled understanding that the number of judges cannot be increased solely to create the opportunity to make appointments.

Aside from the appointments process, a threat to independence may also arise from a judge's continued involvement with the President and his administration. In the past, such involvement was commonplace. Indeed, one of the most distinguished judges of the United States, Louis D. Brandeis, acted as an informal adviser to President Roosevelt.[15] Such involvement impairs the impartiality of the judge; he or she may one day be called on to adjudicate the legality of a government practice that he or she shaped. But even more, such involvement is likely to create informal ties and bonds of loyalty to the President and thus is likely to breach what I have called the political insularity of the judiciary. The threat posed by this kind of behavior has somewhat declined, however. In recent decades a general understanding has evolved requiring sitting justices to remove themselves from the councils of the President.[16] Justice Harlan took this new demand for political abstinence to extreme lengths by refusing even to vote.

Financial need may also increase the political vulnerability of the judiciary. The protection against diminution of salary is an important bulwark against political control. It is qualified, however, because it leaves judges subject to inflationary pressure: a decision by Congress or the President to hold judicial salaries constant in the face of spiraling inflation can act as a severe sanction.[17] Mindful of congressional and executive control over their salaries, judges trying to keep up with inflation may be motivated to tailor their actions in such a way as to win the good will of these branches. The judiciary's attachment to the incidental emoluments of office, such as

secretaries, law clerks, and chauffeurs can have a like effect, for these too are within the control of Congress and the President.

Similarly, the provision for life tenure, another measure that is supposed to provide political insularity, is qualified by the fact that federal judges are subject to impeachment and removal for misconduct. The Constitution vests this power in Congress but does not specify the permissible grounds of impeachment. Article III speaks only in the most general terms, providing that judges "shall hold their Offices during good Behavior." Another provision provides for impeachment of all civil officers of the United States for "high Crimes and Misdemeanors."[18] In the early history of the nation, the power of impeachment was in fact used to express strong disagreement with judicial decisions.[19] No judge, however, has ever been removed for that reason, and with the exception of an attack on Justice Douglas in the late 1960s by then Representative Gerald Ford,[20] an understanding has evolved under which a judge can be impeached only for violation of the most elemental duties of office, for example, through drunkenness, corruption, or conviction of a crime.[21]

In addition to its impeachment power, Congress may also try to exercise power over the judiciary by reversing judicial decisions. While it is true that a constitutional decision cannot be altered by simple legislative enactment, Congress, with the concurrence of the President, can reverse a statutory interpretation by a simple majority. Moreover, there is considerable congressional power over the jurisdiction of the federal courts, especially the lower ones; in the past, particularly controversial decisions have led to proposals to withdraw jurisdiction of the federal courts over select subject matters as a way of curbing judicial power.[22] Few such measures have been enacted, but the threats of such action and concrete plans to actualize those threats remind the judiciary of the limits of its power.

Finally, the judiciary is likely to become dependent on the other branches of government -- and thus less insulated from politics than the more familiar account suggests -- when the moment of enforcement or implementation comes. Judges speak the law and hope that there will be voluntary compliance with all that they command, but realize that resistance may well be encountered. They know that requiring the release of a prisoner or the desegregation of the schools may provoke sharp and passionate reactions.[23] Judges may be sovereign in articulating rights, but they are not sovereign in enforcing them. The coercive machinery of the state -- the sword -- is in the immediate control of the executive, and the purse strings are in the hands of the legislature and executive.

It is thus apparent that even the mythic independence of the United States federal judiciary is substantially constrained. Whether it be through the appointments process, control over jurisdiction and financial matters, or the

imperatives of the implementation process, the executive and legislative branches exercise significant influence over the courts.

II.

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

Sometimes the political insularity of the judiciary is greater in the Latin American republics than in the United States. In Chile, for example, where the judiciary is professionalized, Supreme Court justices play an important role in selecting lower court judges and choosing their own successors.[24] There, the justices create a short list of nominees for the Supreme Court and Court of Appeals from which the President makes his selection. In a similar vein, the provision in the Argentine Constitution protecting against the diminution of pay, though identical to that found in Article III of the United States Constitution, has been interpreted more broadly. This provision has been read to protect against diminution of pay through inflation, on the theory that it is concerned with real, not just nominal, income.[25]

In other ways, of course, the tie between political institutions and the judiciary has been considerably stronger in some Latin American countries than in the United States. While consultation between the President and the judiciary is exceptional in the United States, and today is frowned upon, it is commonplace in Argentina. President Alfonsín engaged in it, and so does President Menem. The norm against court-packing also seems distinctly less robust. In 1990, for example, President Menem proposed legislation increasing the number of justices from five to nine, and as soon as that legislation was enacted he proceeded to fill the newly created vacancies with candidates of his own choosing.[26] All this was done in a context where Menem's party controlled the Senate (which must confirm the appointments) and where party loyalty was essentially taken for granted. To make matters worse, President Menem was alleged to have earlier offered inducements in the form of ambassadorships to encourage his predecessor's appointees to resign.

A study of such controversies in Latin America may have an intrinsic interest, but the issues they present do not differ significantly from those we have explored with regard to the United States. In all these controversies, it is generally assumed that judicial independence is a virtue, but also that

it should not be complete. As in the United States, it is taken as axiomatic that the judiciary's relationship to political institutions consists of a delicate balance of both separation and control. Sometimes the balance is struck in one direction, sometimes in another. As a practical matter, a great deal depends on how the balance is struck, but the understanding of independence is not essentially different from that prevailing in the United States.

An entirely new dimension, however, is added to our understanding of judicial independence when our focus shifts from these interstitial controversies to more elemental ones, such as those arising from the transitions from authoritarianism to democracy that countries such as Chile and Argentina underwent in the 1980s. These transitions suggest a new and important qualification to the ideal of judicial independence. Not only is independence an ideal that must be optimized rather than maximized, but it is also regime-relative. A look at the Latin American transitions to democracy suggests that the claim for independence or political insularity is sharply confined to the regime of which the judiciary is a part.

The regime-relative nature of independence can be illustrated by another reference to Argentina. In that country, a military dictatorship seized power in 1976 and governed until 1983, at which time the junta called for elections that resulted in the election of President Raúl Alfonsín, who then restored constitutional government and went so far as to prosecute the junta for human rights violations.[27] In the period from 1976 to 1983 the junta utilized pre-existing institutions, including the courts, to govern; but the junta did not use those institutions according to the norms established by the Constitution. For the most part, the junta left the lower courts alone, but appointed its own Supreme Court.[28]

When the transition occurred in Argentina in 1983, the Supreme Court justices appointed by the dictatorship tendered their resignations, as indeed was customary in Argentina in such circumstances.[29] I would argue that even if they had not been so accommodating, President Alfonsín could have demanded their resignations and tried to impeach them. As a practical matter, he may not have had the power to do so, but for our purposes what is important is that the norm of independence did not constrain him. Alfonsín should not have been required to respect the justices appointed by the previous regime.

Some might take a contrary position and suggest -- to continue this speculative exercise -- that if President Alfonsín had left the justices appointed by the dictatorship in place, the ideal of judicial independence would have been dramatically strengthened. Possibly such an action could have constrained others -- not just President Menem, who lawfully succeeded Alfonsín, but also some ruler who might one day unlawfully seize power. This seems implausible to me. The newly refurbished norm might possibly

have deterred Menem from packing the court in 1990, but it is hard to believe that it could have much force on any dictator who might seize power unlawfully. Those who act by such means do not usually consider themselves bound by considerations of reciprocity ("I'll let your judges stay in office, because you let mine.").

Additionally, there is no philosophical basis for insisting that President Alfonsín should have respected the independence of the justices appointed by the junta. Those justices could have checked or constrained Alfonsín's exercise of power, thereby serving one of the ends of independence; but as the instruments of another regime, there is no reason to respect their effort to do so. We want exercises of power to be checked, but not by another government. Of course, if a democratic regime were overthrown by a dictatorship, we may well want the dictators to leave in office the justices appointed by the democratic government. But that desire derives from our commitment to the democratic nature of the old government and from the hope that the incumbent justices will use their power to further the values of the previous regime, not to any abstract notion of judicial independence.

The qualification I am proposing to the ideal of independence makes crucial the scope one assigns to the notion of a regime-shift. More than an ordinary change of administrations is required; there has to be a decisive break with the past, almost a constitutional change. By way of illustration one can point, as I have, to the events occurring in Argentina in 1983, since these can easily be characterized as a regime shift. In many other cases, however, it will be much harder to determine whether a change of this nature occurred. This is true of present-day Chile, where the presidency has been transferred -- through elections, as in the case of Argentina -- from General Pinochet to President Patricio Aylwin. Although there is all the difference in the world between the policies of Pinochet and Aylwin, it is harder to say that there had been a regime shift.

In 1973, General Pinochet seized power in violation of the 1925 Chilean Constitution.[30] From that time until 1980, Pinochet claimed that he ruled according to the Constitution, but that claim was a farce. He assumed the presidency through force, Congress was dissolved, generals were placed in control of civilian agencies and though the courts continued to function, the writ of *habeas corpus* was effectively suspended.[31] In 1980 Pinochet proposed a new Constitution, which was then adopted by a plebiscite conducted without free and open debate. The new Constitution radically revised and supplemented the 1925 Constitution, adding a new layer of authoritarianism.

The 1980 Constitution retained the presidential system, but restructured Congress and put off congressional elections until 1989. It further provided that Pinochet would retain the presidency until March 1989.[32] A plebiscite would be held prior to that date to determine whether the General would

remain in office for another eight years. If he lost, elections would promptly be held to determine who would replace him as President. (Regardless of the outcome, Pinochet would remain Commander-in-Chief of the Army until 1997). Beginning in 1983, the reign of terror lessened and the political climate in Chile improved, but it was still something of a miracle when the opposition defeated Pinochet in the October 1988 plebiscite and then managed to have Aylwin rather than Pinochet's candidate chosen as President in the election of December 1989.[33] Aylwin is a Christian Democrat, but he was supported in that election by a coalition of some seventeen parties.

President Aylwin took office in March 1990. Since that time, President Aylwin has governed with a broad political base, but always within the terms of the 1980 Constitution -- even though that document was adopted during a reign of terror which deprives it of any moral claim upon him. The aging general has remained in control of the army and presumably is prepared to use that power to protect his Constitution. In July 1989, the newly elected Congress amended the Constitution to remove some of its more draconian provisions,[34] but further amendment is difficult. Crucial provisions can only be amended by a three-fifths vote of both houses,[35] and nine of the forty-seven Senators are appointed rather than elected. As the 1980 Constitution provided, two of the nine were directly appointed by Pinochet (acting as President), and the remaining seven were appointed by institutions controlled by Pinochet -- the National Security Council (which appointed four) and the Supreme Court (which appointed three).[36]

Not only is Aylwin encumbered by the 1980 Constitution, but he inherited a Supreme Court that was largely molded by Pinochet. When the General seized power in 1973, he dissolved Congress, but left the Supreme Court -- no friend of Allende -- in power.[37] The President of the Court, Enrique Urratia Manzano, placed the "presidential band" on the General and proudly declared, "I put the judiciary in your hands." Unlike the Argentina junta, Pinochet did not replace the individual justices when he came to power -- there was no need to -- and for the most part, the rulings of the Supreme Court supported or strengthened Pinochet's reign. The 1980 Constitution left the personnel and structure of the Supreme Court unchanged, only with one exception. While retirement at seventy-five became a constitutional requirement (previously it was an administrative regulation, but was breached during the Pinochet years), an exception was made for the incumbent justices.[38] They could serve for life.

In 1973, the Supreme Court consisted of twelve justices. Under Pinochet, the Court was expanded until in 1988 it had seventeen members. Between 1973 and 1988, five of the twelve original seats on the Court became vacant and were filled by Pinochet, which meant that at the time of

the October 1988 plebiscite ousting Pinochet, ten of the seventeen justices were Pinochet appointees. Moreover, immediately after the plebiscite but before the December 1989 election, two pre-Pinochet justices left the Court (one died and one retired), and Pinochet offered the aging justices who remained generous pensions, so-called "golden parachutes."[39] Six accepted this offer -- two of whom were appointed before 1973 -- and Pinochet filled these vacancies too. This meant that by the time Aylwin took office in March 1990, he confronted a Supreme Court consisting of a total of fourteen Pinochet appointees, some newly appointed. The other three were not appointed by Pinochet -- one was appointed by Allende in 1971 and the two others were appointed in the mid-1960s by Eduardo Frei, a Christian Democrat -- but all served during the dictatorship. The new President therefore had to face the question -- only hypothetical in the case of Alfonsín in Argentina -- whether he had to respect the independence of those justices who were either appointed by the dictator or who had served him during his regime.

With Pinochet in control of the Army, it was not clear that Aylwin had the practical power to unseat any of the incumbent justices. Nor was it clear that those justices would actually use their power to frustrate the new President's policies or to interfere with his fragile and cautious steps toward democracy.[40] Today, the question of judicial independence grows less urgent as some of the Pinochet justices retire or die.[41] Still, in 1990 the prospect of judicial interference with the policies of the fledgling administration was considered real, and that brought to the fore the question of the proper scope of the ideal of judicial independence. What could Aylwin legitimately do to control the Court? One option, in particular, which drew both curiosity and fire was court-packing.[42]

In the hands of Presidents Roosevelt and Menem, court-packing was justly regarded as an improper assault on an independent judiciary. In neither the United States of the 1930s nor in 1990 Argentina had there been a transformation that one could characterize as a regime shift.[43] Both Roosevelt and Menem acquired power through the constitutionally prescribed mechanisms (although in the case of Menem there was one irregularity -- he took office six months early). Aylwin is, however, in a different and more complex situation. On the one hand, he derives his power from the 1980 Constitution, and thus is not altogether free from the constraints it lays down. On the other hand, given the non-democratic elements of the 1980 Constitution, the circumstances surrounding its adoption, and Aylwin's repudiation of Pinochet's dictatorial policies, Aylwin's administration represents a partial break with the predecessor regime -- a relation one might call a "partial regime shift."

Aylwin's Chile, in this regard, falls somewhere between Alfonsín's Argentina and the Argentina of Menem -- between a sharp regime shift and a simple change of administrations. In such an in-between situation, in-between remedies may be appropriate, and court-packing might be such a remedy. It is a classically intermediate solution to the problem of inheriting a hostile judiciary. Unlike impeachment, court-packing accepts the authority of the justices in office, but it dilutes their power by adding new ones. It weakens the stranglehold of the past, but does not break from it altogether.

Initially, court-packing might seem anathema to those who, like myself, envision an important role for the judiciary even in democratic regimes and count political insularity as essential to judicial legitimacy. The transitions in Argentina and Chile make clear, however, that American aversion to court-packing and other political interferences with the judiciary crucially depends on a judgment about the terms and conditions under which power has been acquired. Independence is not a transcendent ideal, but contingent upon certain assumptions about the structure of government. In the case of the United States, our understanding of the nature of judicial independence has been forged in the context of stability -- two hundred years of a shifting, but generally stable government structure. It would be a mistake of the highest order to apply mechanically and uncritically that understanding to countries that have had an entirely different history.

Notes

[1]I am especially grateful to Irwin Stotzky, the organizing spirit and the editor of this volume. I also wish to thank Terence Anderson, Eric Beckman, Eric Bentley, Jr., Marcel Bryar, Rodrigo P. Correa Gonzáles, Steve Diamond, Kenneth Held, Elizabeth Iglesias, Stanley Katz, Jonathan Miller, Keith Rosenn, Pablo Ruiz-Tagle, and Kevin Russell for commenting on this chapter and giving me the benefit of their thoughts.

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

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

[4]Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1445 (1983).

[5]Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979); BRUCE ACKERMAN, WE THE PEOPLE (1991).

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

[7]Article III provides in pertinent part: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III §1.

[8]Article V provides in pertinent part:

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

U.S. CONST. art. V.

[9]The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Eleventh Amendment was adopted in response to the Supreme Court's decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (holding that a state could be sued by a citizen of another state and that the Supreme Court had original jurisdiction over such a suit).

[10]The Fourteenth Amendment confers citizenship on all persons born or naturalized in the United States and thus reversed the ruling of Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), that denied persons of African ancestry the possibility of becoming citizens even when freed from slavery.

[11]The Sixteenth Amendment provides: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI. The Sixteenth Amendment was adopted in response to the Supreme Court's decision in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); 158 U.S. 601 (1895) (holding that Congress' attempt to tax incomes without apportionment was unconstitutional).

[12]United States v. Nixon, 418 U.S. 683 (1974). Another instance of defiance is Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding that President Truman lacked the authority to seize the nation's steel mills during the Korean War).

[13]Powell v. McCormack, 395 U.S. 486 (1969).

[14]William E. Leuchtenberg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347; WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 219-34 (1987). Executive interference with the judiciary had an early start in American history. Under President Thomas Jefferson, Republican frustration towards the Federalist judiciary led to the initial refusal to issue commissions to certain judges President Adams had appointed, measures to repeal the Judiciary Act of 1801 (thereby abolishing the positions to which these new judges had been appointed), and legislation in 1802 which recessed the Supreme Court for fourteen months. In 1804, Jefferson engineered impeachment proceedings against one Supreme Court justice, and by 1808 he had expanded the Court from five members to seven, filling each new vacancy with a Republican. 2 GEORGE L. HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815, 136-245 (1981).

[15]BRUCE A. MURPHY, THE BRANDEIS-FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES 98-185 (1982).

[16]Justice Fortas's continuing involvement as President Johnson's advisor was one factor that damaged his candidacy for the chief justiceship. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 293-357 (1990); BRUCE A. MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 234-68 (1988).

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

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

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

[20]EDWIN P. HOYT, WILLIAM O. DOUGLAS 149-51 (1979).

[21]In recent years, federal judges have been impeached for tax fraud, bribery and perjury. Mark A. Hutchinson, *Maintaining Public Confidence in the Integrity of the Judiciary: State Bar of Nevada v. Claiborne*, 1989 B.Y.U. L. REV. 283, 284; *see also* IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS, PROCEEDINGS OF THE U.S. SENATE IN THE IMPEACHMENT TRIAL OF ALCEE L. HASTINGS, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, S. Doc. No. 18, 101st Cong., 1st Sess. (1989); S. Rep. No. 164, 101st Cong., 1st Sess. 4 (1989) (on the impeachment of Judge Walter L. Nixon, Jr., of Mississippi). A failed challenge to Judge Nixon's

impeachment has been granted certiorari by the Supreme Court. Nixon v. United States, 938 F.2d 239 (D.C. Cir. 1991), *cert. granted*, 112 S. Ct. 1158 (1992). Judge Hastings's impeachment was recently declared invalid by the District of Columbia District Court. Hastings v. United States, 802 F. Supp. 490 (D.D.C. 1992).

[22]In the early 1980s, legislation was introduced to limit lower federal court jurisdiction over state anti-abortion laws. *See, e.g.*, S. 158, 97th Cong., 1st Sess., (1981); H.R. 3225, 97th Cong., 1st Sess. (1981); H.R. 900, 97th Cong., 1st Sess. (1981). Bills were also introduced to limit federal court powers to order school busing. *See, e.g.*, S. 1147, 97th Cong., 1st Sess. (1981); S. 1005, 97th Cong., 1st Sess. (1981); H.R. 3332, 97th Cong., 1st Sess. (1981); H.R. 1180, 97th Cong., 1st Sess. (1981). For a general discussion, *see* Lawrence G. Sager, *Constitutional Limitation on Congress' Authority to Regulate the Jurisdiction of the Federal Court*, 95 HARV. L. REV. 17-20 (1981).

[23]Fiss, *supra* note 5, at 2.

[24]CONSTITUTIÓN POLÍTICA DE LA REPÚBLICA DE CHILE art. 75 (1980) [hereinafter, CHILE CONST.]; Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 22 BULLETIN OF THE CENTRE FOR THE PROTECTION OF JUDGES AND LAWYERS 13, 22 (1980).

[25]Bonorino Peró v. Estado Nacional, Supreme Court of Argentina, November 15, 1985, 116 E.D. 321 (1985) and decisions of December 4, 1985 and April 4, 1986 [1986-II] J.A. 376, 377; Rosenn, *supra* note 24, at 33. *But see id.* at 18 (noting the decreasing percentage of the Argentine national budget devoted to the federal judiciary).

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

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

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

[29]*Argentina: Controversy Surrounding the Judiciary*, *supra* note 26, at 2. *But see* Rosenn, *supra* note 24, at 30 (describing court changes prior to 1976 as dismissals); Garro, *supra* note 28, at 314-15 (describing these changes as purges).

[30]For a review of Chile's recent past, see JAY A. SIGLER ET AL., CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CHILE 15-36 (Albert P. Blaustein & Gisbert H. Flanz eds., 1991).

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

[32]CHILE CONST. transitory provision 14; SIGLER ET AL., *supra* note 30, at 28-29.

[33]MARK FALCOFF, MODERN CHILE 1970-1989: A CRITICAL HISTORY 311-12 (1989).

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

[35]CHILE CONST. art. 63.

[36]*Id.* art. 75 (as amended).

[37]One of the primary justifications for the military takeover was the restoration of constitutional order. Rosenn, *supra* note 24, at 34. The Allende government had refused to enforce Supreme Court decisions ordering the return of illegally occupied land and illegally seized factories. Eugenio Velasco, *The Allende Regime in Chile: An Historical and Legal Analysis (Part II)*, 9 LOY. L.A. L. REV. 711, 725-26 (1976).

[38]CHILE CONST. transitory provision 8.

[39]Letter from Rodrigo P. Correa Gonzáles to Owen M. Fiss (Oct. 19, 1992) (on file with Owen M. Fiss).

[40]The sensitivity of the Supreme Court to the limits of its power was revealed in its handling of a controversy involving Carlos Cerda, a court of appeals judge greatly admired by human rights groups in Chile. The controversy began in the mid-1980s, before Aylwin came to power, when Cerda undertook an investigation of the disappearance in 1976 of ten members of the Communist Party. The persons accused of this crime claimed that the investigation was barred by the 1978 amnesty law, and the Supreme Court agreed and ordered Cerda to desist from his investigation. When he refused, the Supreme Court suspended him for two months. That occurred in 1986. In 1990, after the plebiscite ousting Pinochet and after the election of Aylwin, Cerda resumed the investigation and the Supreme Court then responded by reaffirming its previous order requiring him to desist. Cerda stopped the proceedings but refused to dismiss the case altogether, and then the Supreme Court entered an order in effect requiring the President to remove Cerda from office. There was an immediate and enormous public uproar over this order, and following a formal request for reconsideration by Cerda, the Supreme Court backed down. During the summer of 1990, speculating on what action the Supreme Court might take in the Cerda matter, officials spoke informally of the possibility of impeachment and court-packing if the Court tried to remove Cerda from office. For Cerda's distinctive conception of judicial independence, what I have called "individual autonomy," see Pablo Ruiz-Tagle, *Analisis Comparado de la Función Judicial*, 39 REVISTA DE ESTUDIOS PUBLICO 131, 154-58 (1990).

[41]By 1992, Aylwin had the opportunity to fill three vacancies -- two of the three vacancies arose from the retirement of Frei appointees and one arose from the death of a justice appointed by Pinochet shortly before the election. In July 1992, a law was enacted creating as generous a retirement program as the one Pinochet established in 1989. It applied to those justices over seventy and who held office at the time the law was passed.

[42]Changes concerning the Chilean Constitutional Court (dissolved by Pinochet in 1973, but reinstated in the 1980 Constitution) were also considered at this time, but with less specificity and urgency, perhaps because the judges serve only for eight year terms. It is noteworthy that Germany and Italy established Constitutional Courts following World War II, as did Spain following the death of Franco. SUPRANATIONAL AND CONSTITUTIONAL COURTS IN EUROPE: FUNCTIONS AND SOURCES 6-11 (Igor I. Kavass ed., 1992). These courts might be seen as transitional devices -- as a way of constraining the influence of judges who were appointed by or served dictatorial regimes.

[43]Bruce Ackerman does not regard the New Deal as a regime shift, but describes it as a decisive moment in American history "at which deep changes in popular opinion gained authoritative constitutional recognition." BRUCE ACKERMAN, *supra* note 5, at 41, 47-50 (1991).