THE WALL STREET JOURNAL.

WEDNESDAY, JUNE 21, 2023

OPINION | COMMENTARY

'Ethics' and the Supreme Court's Independence

Lawmakers seek to dictate the judiciary's inner workings, imperiling the constitutional order.

By Helgi C. Walker

One thing that ought to hold Americans together is respect for the Constitution, the liberty it protects, and the institutions that allow our government to work for all of us. The constitutional principle of the separation of powers is central to all three. As a lawyer who practices before the Supreme Court, I am concerned that recent congressional proposals to impose a "code of conduct" on the justices threaten the separation of powers.

The Constitution's separation of the executive, legislative and judicial powers into three coequal branches of government isn't merely a political theory. It is the backstop that ensures the rights we are promised on paper are enforced in practice. Under the Constitution, law isn't politics. That's why the Constitution provides for the appointment—not the election—of Supreme Court judges and gives them life tenure, unlike lawmakers or the president.

It doesn't take a common political ideology to appreciate these concepts. Justice Antonin Scalia used to say that "structure is everything"—you can guarantee anything you want in a Bill of Rights, but it is the independence of each branch that protects the people from government overreach. Justice Stephen Breyer warned recently that anyone considering "significant structural (or other important) changes" to the way the Supreme Court operates should "think long and hard before embodying those changes in law."

For 235 years, chief justices from John Marshall to John Roberts have underscored the importance of judicial independence. At times in our history when what was right wasn't popular, an independent judiciary upheld core American values and defended important individual rights. Recall *Brown v. Board of Education*'s promise of racial equality before the law, or *Texas v. Johnson*'s protection of offensive speech.

Recent bills in Congress pose a danger to the separation of powers and judicial independence and thus to our liberties. The justices are already required by federal law to disqualify themselves from a case if their impartiality could reasonably be questioned. But these bills dive headfirst into the inner workings of the court.

One of them would order the justices to adopt a code of conduct. It would subject them to disciplinary action in which "judicial investigation panels" composed of lower-court judges would investigate (with subpoena power and perhaps hearings) complaints filed by anyone who thinks a particular justice has done something that "undermines the integrity of the Supreme Court." The bills would also impose new recusal standards, making disqualification motions reviewable by the other justices and requiring the court to publish on its website descriptions of complaints against the justices.

This would turn Supreme Court litigation into a political circus and cripple public confidence in the integrity and impartiality of the court. Imagine the spectacle of motions over recusal and disqual-

ification—which would likely become routine, especially in high-profile cases—with opposing parties fighting to knock out justices viewed as unfavorable to their side. A justice's colleagues could be in the position of having to make the final call.

Underlying every dispute would be the accusation that a justice is incapable of fairly and impartially interpreting the law. Bit by bit and justice by justice, those accusations would erode the public's perception of the court's legitimacy. For an institution whose authority depends on public acceptance of decisions even when the result is unpopular, that is a recipe for trouble.

This issue is far bigger than any one justice or case. It is about the Supreme Court's status as a coequal branch of government. An independent judiciary has existed for two centuries, but it isn't inevitable. As Justice Scalia wrote for the court in 1995, "the Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression." Today's institutions are something to be grateful for, and to maintain carefully and thoughtfully.

The Supreme Court doesn't tell Congress how to run its sessions, and Congress should respect the court's constitutional responsibility to manage its own affairs. Every indication is that the court takes that duty seriously. Chief Justice Roberts recently confirmed that he is "committed to making certain that we as a court adhere to the highest standards of conduct," and that the court is "continuing to look at things we can do to give practical effect to that commitment . . . consistent with our status as an independent branch of government and the constitution's separation of powers." A month ago all nine justices affirmed their commitment to a Statement of Ethics Principles and Practices.

The Supreme Court isn't perfect—no institution is. But the court has served this country well, and the men and women who work there every day are dedicated to equal justice under law. That is something worth defending and preserving. If today's partisan factions don't lay down their arms, we risk destroying the court and our system of democratic government. And if we throw that system away in the heat of political strife, we will all lose our ability as citizens to pursue our individual beliefs, whatever they may be.

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