INDEPENDENCE AND ACCOUNTABILITY OF COURTS

Paul Gewirtz
Potter Stewart Professor of Constitutional Law
and Director, The China Law Center
Yale Law School*

Those who are thinking most deeply about judicial reform in China today understand that an essential element of those reforms must be strengthening judicial independence. This is at it should be, for greater independence of individual judges, tribunals, and the judicial system as a whole is necessary if courts in China are to play the roles that society wishes them to play and that they should play. But as scholars and reformers explore ways to strengthen judicial independence, it is necessary to appreciate the complexities of the idea of judicial independence, and how it properly coexists with ideas of judicial accountability and constraint. Mature legal systems are characterized by both judicial independence and judicial accountability. China can not, and should not, avoid the necessary tensions between these two values. The challenges are, first, to understand the proper relationship between these concepts; and, second, to develop the right balance between them in the behavior of judges and the design of institutional relationships. This brief article seeks to contribute to those crucially important efforts.

I. The Functions of Judicial Independence

The core of judicial independence, as I use that phrase here, is the capacity to decide

---

*This is an English language version of an article that appeared in Chinese in the *Global Law Review*, published in 2002 by the Chinese Academy of Social Sciences in Beijing, China. I am very grateful to Jonathan Hecht for his comments on an earlier draft and to Philip Chen for his research assistance.

cases in a lawful and impartial manner free from improper control and influence. This independence of the judiciary is essential if courts are to perform the main functions that most societies expect of them. These functions include: (1) resolving legal disputes; (2) articulating legal norms that people can rely upon; (3) protecting legal rights; and (4) constraining illegal government action. Each of these traditional roles of courts, particularly in a market economy, requires judicial institutions that are independent. (I use the phrase "market economy" as a shorthand to refer to societies within a broad spectrum, recognizing that societies typically have a mix of market, regulatory and planning policies to structure economic life.)

Most obviously, independence is necessary to resolve disputes fairly. Where judges are not independent but are controlled or improperly influenced, it is unlikely that disputes will be resolved in an impartial way according to law. Instead, cases are likely to be resolved according to the wishes of those who control or improperly influence the court. The result is unfairness to the parties, of course. But, in addition, there are adverse effects for the whole social system. In a market economy, for example, if disputes are not settled neutrally and fairly, the market cannot operate effectively. Players in the market lose confidence that their expectations will be honored. Without courts that settle disputes fairly, market actors will have to protect themselves through both ex post and ex ante distortions to their behavior -- the contract price will go up, the market price will go up, deals and investments that would otherwise be made will not be made, economically inefficient behavior will proliferate.

Similarly, judicial independence is also necessary if courts are to elaborate rules in a predictable way. Courts do more than just decide disputes; in deciding disputes they are expected to behave in a rule-based way and typically to elaborate on legal rules in judicial opinions.

Whether derived from statutory, administrative, or constitutional provisions, or thoroughly judge-made, judicially elaborated legal rules help establish the basic framework within which markets develop. Market economies, in particular, require predictable rules of the game to allow people to plan their behavior. Where judges are not independent, they cannot be expected to act in a predictable, rule-based way, but will act in accord with other interests. And where people are unable to make economic arrangements in reliance upon predictable rules, they will engage in wasteful adaptive behavior, leading to an inefficient allocation of resources.

Judicial independence is also necessary if courts are to fairly and effectively protect legal rights. Rights are the bedrock of all modern societies that seek to protect individuals or enterprises, and thus are the bedrock of modern legal systems. We look to courts to adjudicate rights because we cannot expect parties (whether governmental or non-governmental) to adjudicate their own rights or duties. Rights may exist on paper, but, in the real world, rights are at times disregarded by those with the duty to respect them. Thus, independent institutions are needed to actualize rights -- to be a recourse for the rights-holder, and to determine neutrally and impartially whether rights have been violated. Courts that are not independent -- indeed, courts that cannot at times be courageous -- are unlikely to play their appropriate role in protecting rights.

For similar reasons, judicial independence is needed if courts are to play their crucial role in constraining illegal government action. The central requirement of "the rule of law", even under the narrowest version of that concept, is that government is constrained by law. An unconstrained government is a threat to both liberty and order. Independent courts are centrally important in making the constraints of law meaningful in the real world. The government itself

cannot do that, because no entity can be the final judge of constraints upon it. The government, for example, is often the party to law suits – and just as "no man should be the judge of his own cause," no man should control or improperly influence the person who judges his own cause. If we want there to be legal constraints on the government – and, I repeat, this is the essence of "the rule of law" – then the courts must be independent and have the independent power to determine in appropriate cases whether the government has violated the legal constraints upon it.

II. The Tensions Between Independence and Accountability

If judges lack independence, they cannot adequately perform any of the crucial functions I have just described. But independence is an incomplete characterization of what we expect from judges. We also expect judges to decide cases according to law and not according to personal whim. We expect judges to be impartial. We expect "independence" from judges, but not the independence to be lawless. Independence can be abused through corrupt or incompetent decision making. Judges can use their power beyond the law. They can make mistakes. Judges exercise power, and the lived experience of humanity teaches us how dangerous it is if any person or institution is allowed to exercise power essentially unchecked.

This is why it is right, even as we insist upon the independence of courts, that we also acknowledge some limitations on the idea of independence and the need for some forms of judicial accountability. This points, then, to the fundamental dilemma that faces both mature legal systems and developing ones: how to assure sufficient judicial accountability and constraint so as to limit judicial abuses without interfering with the judicial independence that is required if courts are to play their essential roles. The particular manifestations of this dilemma

may take different forms in different societies, but the tensions exists everywhere.

Since experience teaches that judicial independence is both absolutely essential and also relatively fragile, it is right to insist upon independence as the starting point and to see various appropriate forms of accountability as necessary qualifications on the principle of independence. This provides a valuable "frame of mind" for thinking about the tension between independence and accountability. But we need more than a frame of mind if we are to understand the tensions and determine the right balance between independence and accountability in a more particular way.

The tensions between independence and accountability are played out on three main terrains: (1) the internalized self-conception and beliefs of judges ("mentality"); (2) the internal dynamics and relationships within the court system itself ("internal relationships"), and (3) the judiciary's relationship to other institutions ("external relationships"). In other words, independence is partly a matter of mentality and partly a matter of structure -- and so too for accountability and constraint.

A. Mentality

The internalized self-conception and beliefs of judges -- their "mentality"-- is crucial in both sustaining judicial independence and assuring judicial constraint. Without a structure that supports independence, independence is impossible. But without a mentality that insists on independence, no structure can produce it. Judicial independence requires the judge to have the self-conception that he or she is independent. It requires the will to resist and overcome any sense of obligation to outside parties, or to factions, or to regimes -- not to mention the will to

resist efforts by outsiders to coerce or distort one's judgment. (We recently saw an instance of this mentality in Pakistan, where the new military leadership demanded that the judges on the Supreme Court sign an oath pledging to carry out the military regime's emergency orders; several of the judges bravely refused to take the oath and were fired.) Judicial independence also requires an inner commitment to judge cases neutrally and to surmount bias. It requires integrity. These too are aspects of mind.

Just as the mentality of the judge is crucial in sustaining judicial independence, the mentality of the judge is crucial in assuring that judges are constrained. A judge's self-conception of role properly includes the conception that judges may not do whatever they want but are constrained by law, constrained by the obligation to adhere to the oath of office, to do justice without fear or favoritism, to adhere to appropriate procedures, to write reasoned opinions -- to be, in short, a "judge." Put another way, the judge must resist the self-indulgence that an excessive sense of independence can produce. Above all, the judge should consciously struggle to be faithful to law. The deepest paradox in this area is that judicial independence, at bottom, is a means to promote a form of judicial submission: submission to law.

Both independence and constraint, in short, are significantly products of a judge's self-conception. Independence requires a belief that one's role as a judge requires independence. So too, judicial constraint depends crucially on the judge's acceptance of constraining procedures within the judicial role. Cynics routinely ignore or trivialize these sorts of internalized constraints on judicial behavior, but in fact for most judges in most judicial systems they are not trivial at all.

I certainly do not suggest that either independence or self-constraint is simply a matter of

a judge's individual will. Mentality is affected by a variety of external factors. Structural arrangements can strengthen or weaken both independence and accountability. Moreover, broader social and cultural conditions play a major role. Social norms can strengthen independence. These norms are internalized and become an aspect of a judge's consciousness simply because of immersion in society. Thus, developing broader cultural beliefs and social expectations that support judicial independence is important in part because those wider beliefs and expectations can affect the mentality of the judges themselves. Independence should not require acts of heroism, but be part of the routine ingrained behavior of judges and the reinforcing expectations of others. Credible and repeated statements of political leaders that praise judicial independence, for example, not only can reduce external interference with judicial behavior but can also shape a broader social climate and "social mentality" that fosters a mentality of independence among the judges. So, too, social norms constrain independence. Like most self-constraint in human beings, self-constraint in judges develops through cultural reinforcements and education. Indeed, no judge can be completely free of the social norms of his or her community -- which is why total independence of mind is actually impossible.

In China as elsewhere, the education and training of judges will continue to be crucial in developing both independence and constraint as aspects of the judicial mentality. Judicial training programs may strike some as too modest a way to advance judicial reform. "Training" appears to advance judicial reform only one judge at a time – and in some cases may seem hopeless, since some of those being "trained" lack minimum qualifications and never should have been appointed as judges in the first place, and since training by itself cannot address structural deficiencies that make it difficult for even the best judges to fulfill their promise.

The limits and problems with training should be acknowledged -- it is not a substitute for other fundamental reforms. But training deals with certain realities of where the judiciary is now -- and since those realities are inescapable, they cannot be ignored. Training programs can emphasize the distinctive elements of the judicial role and the judicial craft -- the skills of legal analysis, the rules of court procedures, the drafting of judicial opinions. They can encourage judges to think about the judicial role, and can develop a professional self-image among judges. It is reasonable to think that both judicial independence and an appropriate degree of judicial self-constraint will be strengthened as judges become more skilled in acting as "judges" – as aspects of the judicial craft become more ingrained and elements of the judicial role more consciously embraced. The very act of training judges in groups can reenforce their identity as "judges" who are performing a distinctive social role. For all of these reasons, it is clearly important to strengthen institutions like the National Judges College in China and the Federal Judicial Center in the United States – institutions run by the judiciary itself which bring judges together, enhance their professional skills and their sense of a distinct professional identity, and, as institutions, embody the distinctiveness of "courts" and the aspiration for excellence among judges.

B. Internal Relationships

Internal relationships within the court system also affect the degree of independence and accountability of judges. In all judicial systems, judges are constrained and held accountable by internal mechanisms within the judiciary itself. Most obviously, this occurs through judges' participation on multi-member tribunals and through the appeal system. None of these

constraints, by themselves, directly affect the independence of the judicial branch as a whole – by definition, they involve control or influence by judicial officials themselves, not "external" interference by non-judicial officials. But these constraints do affect the independence of individual judges. Where is the line between what is appropriate and inappropriate?

Multi-member tribunals constrain the individual judge by requiring that the majority of the tribunal or the entire tribunal agree upon a decision. But no ideal of independence precludes being influenced by the better-considered views of other tribunal members. Nor is any ideal of judicial independence violated if an individual judge is outvoted on the tribunal by his colleagues and the tribunal's decision departs from the approach he or she would individually favor. But independence is compromised, I think, if tribunal participants are not freely permitted to state their views during deliberations or if a tribunal member's views do not count in the deliberations. And independence is compromised if the decisional role is actually played not by the tribunal but by some person or entity that stands behind the tribunal and dictates its result.

Appellate review is a form of accountability, and it certainly limits the independence of lower courts. (I include here the various forms of "post-conviction review," such as habeas corpus, that are often provided after ordinary appeals are final.) But appellate review is a form of accountability that advances important ideals of the judicial system that are themselves related to independence: judgment according to law, accuracy, and uniformity of decision within the appellate tribunal's jurisdiction. Moreover, if the appellate tribunal is itself independent, its decisions directly further the independence of "the judicial branch" as a whole by constraining corruption and favoritism in the lower courts. Appellate review also enhances judicial independence by reducing the need for other institutions to step in to deal with abuses and

mistakes within the court system. The existence of effective *internal* mechanisms of constraint and accountability through appellate review is one reason why certain *external* constraints on judicial independence are unnecessary.

A comment about "adjudication committees" in Chinese courts may be relevant here. If these adjudication committees were simply appellate tribunals reviewing the work of lower tribunals, they would not be as controversial as they are today. The adjudication committee, however, apparently decides the case without hearing it according to appellate procedures. The safeguards that attend both the initial trial of a case and a regular appeal are simply not available if an adjudication committee decides a case without hearing the parties, and outside of public view. Adjudication committees may provide a degree of accountability and constraint that some believe is necessary, but they appear to do so in a way that is at odds with other ideals of a properly functioning judicial system -- namely, that cases should be decided through a process that is open to the parties, and that judges who decide a case should be the judges who hear the case.

Similar concerns can be raised about the practice in China of lower courts sometimes requesting advice from a higher court while the case is still pending in the lower court, and the practice of the head of a court sometimes influencing a tribunal while a case is pending. In the United States, as in other countries, there is typically a provision for "interlocutory appeals" in certain circumstances, allowing the parties to appeal to a higher court before a final judgment is entered in the lower court. There are also provisions for "certification" in some circumstances, allowing one court to certify a legal question to another court for an answer while the case is still pending in the first court. A necessary element in each situation, however, is that the

"interlocutory appeal" or "certified question" is decided by means of a process open to the parties. The mechanisms in China that sometimes permit the interlocutory involvement by judges who are not on the hearing tribunal do not provide adequate procedural guarantees for the judicial decision, and they undermine the procedural guarantees that do exist before the hearing tribunal. In addition, where potentially "appellate" judges are involved in the decision at the initial stage, the right to appeal is undermined. Appellate judges have literally prejudged the matter, and cannot be expected to give meaningful appellate review of the decision later on.

Two other forms of accountability and constraint internal to the judiciary are worth mentioning. One is a precedent system. Under a precedent system, judges are constrained not only by statutes and other laws but by the authoritative judicial interpretation and application of them in particular cases, especially by superior courts. Evaluating the merits of a precedent system is a complex subject of its own and beyond the scope of this paper. But it is important to appreciate the value of a precedent system in constraining potentially wayward judges and giving the entire legal system more predictability, without sacrificing the important elements of judicial independence.

Another internal mechanism that has proven important in some countries in achieving an appropriate balance between judicial independence and accountability involves the enforcement of judicial ethics. The judiciary itself sometimes develops rules of judicial ethics and mechanisms within the judicial branch to enforce those ethics rules outside the context of ordinary appeals. (Along with problems of judicial misconduct, these rules and mechanisms often address the problem of judicial disability and incompetence as well.) Typically, provision is made for complaints about judicial misconduct to be filed with a committee of judges, which

then investigates the complaint. The court committee can resolve the complaint informally or take more coercive corrective steps against the judge (typically short of removal or criminal punishment) -- or the committee can dismiss the complaint.

This system of judicial ethics -- sometimes developed by the courts based on a view of their own inherent authority, sometimes developed under authority delegated to them by a legislature -- promotes judicial independence by seeking to eliminate influences that undermine independence. To be sure, the "independence" of the judge being investigated and disciplined is being constrained. And there is no avoiding the problem that, at least potentially and more ominously, the instruments of accountability might themselves become corrupted, becoming a vehicle for punishing truly independent but unpopular judges on trumped up charges of misconduct. It is also possible that internal enforcement mechanisms can become a device to cover-up wrongdoing, as judges act to "protect their own." To reduce the likelihood of these things, both the judges who are subjects of complaints and the complainants who make them must have procedural protections that are publically stated. But a judiciary that has effective mechanisms for policing itself is better able to deflect efforts by other institutions to do the policing. And since these other institutions are often less sensitive about protecting judicial independence than the courts themselves, internal mechanisms are likely to be more protective of judicial independence.

C. External Relationships

The greatest threats to judicial independence typically come from external sources not internal ones. (In systems where the external interference is greatest, of course, the day-to-day

mechanisms of the external control may actually come from senior judicial officials who know how to implement the external will without direct instructions in every case.) The improper influence or control can involve, among other possibilities, intimidation, bribery, ex parte contacts, wrongful removal from office, or refusal to comply with court judgments. It can be as brutal as violence, or as mild as a dinner invitation. It can compromise the independence of individual judges or the judiciary as a whole, or both. In some societies, the interference with courts is occasional. In extreme settings, the regime does not want judicial independence at all, but seeks to thoroughly control all agencies of state power and is prepared to sacrifice all of the many social benefits that would come from judicial independence.

But even in societies at the other extreme -- societies deeply respectful of judicial independence -- courts have extensive and complex relationships with other governmental institutions. Numerous aspects of these relationships clearly limit the "independence" of judges, but many of these limitations are not at all inconsistent with the ideal of judicial independence properly understood. Once again, the key matter is defining and enforcing the line between the appropriate and inappropriate forms of control and influence upon judges.

In virtually all legal systems, non-judicial government institutions shape the judiciary in numerous ways: through selecting judges; through funding the courts; through making the laws that judges are required to enforce; through defining the jurisdiction of courts; through participating in the implementation of court judgments (not to mention, through making arguments in court). Put another way, judges do not have the "independence" to appoint themselves and determine their terms of office, to fund their own operations, to make most of the laws they enforce, to define their own jurisdiction, or typically enforce their own judgments

without help from other governmental officials. In each of these realms, non-judicial institutions shape what the judiciary does and foster forms of judicial accountability. Typically this involvement by external institutions in the courts' work is not perceived as improperly undermining judicial independence – but, in each realm, there is a potential for undermining judicial independence that must be resisted.

Let me mention just a few examples of the interactions between the courts and other governmental institutions where these issues arise.

1. Appointment, Removal and Sanctioning

Different legal systems select judges differently, and provide different terms of office. Different systems and criteria for judicial selection can affect judicial behavior in different ways. In the selection process, there is always the risk that the appointing authority will select people with the expectation (or even the understanding) that they will in fact not be independent but instead seek particular results wanted by the appointing authority. Appointment mechanisms have often developed to try to reduce that risk, and to reduce the shaping power of any one political faction or branch of government in making judicial appointments. In some countries, different entities have the power to appoint a share of the judges on a court. In my own country, national judges are nominated by the President, but must be confirmed by the Senate, which may be controlled by a different political party and in any event often has a mind of its own. In some of the states, judicial candidates are nominated by commissions that are supposed to be non-partisan.

Nevertheless the shaping power of appointments is inescapable. Since at least the time of

the "Legal Realists," we understand that judges fill in gaps and resolve ambiguities in the laws [] and that a judge's starting point judicial philosophy and legal views help to shape how those gaps are filled and ambiguities resolved. Therefore, appointments inevitably shape the direction of the law. And they can have an impact in "correcting" wrong turns that the appointing authorities think the courts have previously taken. Appointing authorities have self-consciously used this shaping power to a greater or lesser degree. In my own country in recent years, particularly with higher level courts with the greatest power to shape the meaning of laws in the course of applying them, appointing authorities have often taken conscious account of a prospective judge's judicial philosophy (and sometimes that judge's views on particular contemporary legal issues) in making appointments. They see this as a legitimate democratic and political check on a judiciary that can be independent in many ways and that has broad powers to affect society through interpreting and applying the law. They see it as a form of judicial accountability.

True as this may be, however, it is striking that those who appoint judges in my country are frequently surprised and disappointed in how the judges they appoint turn out. And this highlights a key point in the U.S. Even though those who appoint have the power to try to shape the courts, their direct power over the judge ends at the moment the appointment is made – and as independent judges, their appointees have broad power to chart their own direction.

In the U.S., Article III of our Constitution provides that national judges are not only appointed for life but also that their compensation may not be reduced during their term of office. These are seen as the main guarantors of the independence of the national judiciary. But many other countries, and many states within the United States, provide other terms of office for judges under their jurisdiction -- for example, appointment until an specified age of mandatory

retirement, appointment for a fixed term without possibility of reappointment, and appointment for a fixed term with possibility of reappointment. These other countries and states typically consider their regime to be consistent with judicial independence. The risks to judicial independence are greatest when judges are subject to reappointment, since the judges may tailor their judicial actions to curry favor with the reappointing authority. This risk is gravest if the term of appointment before possible reappointment is short, since this allows the appointing authority to keep the judges on a "short leash." In my own country, at the state level, judges are sometimes elected and subject to reelection by the general public. Although this is a well-entrenched practice in some states, the risks it poses for judicial independence seem quite great. Judges are often called upon to render unpopular decisions -- sometimes that is what the law requires. To make appointment and reappointment of judges depend upon popular majority-rule elections and reelections invites an excessive politicization of the judiciary and may reduce the judges' willingness to vigorously protect the rights of minorities and unpopular individuals, which are often rights against the majority.

A critical element that makes independence possible in the U.S. system is that once judges are appointed they may not be removed from office during their term of office except in extreme circumstances. Under our Constitution, federal judges hold their office for life "during good behavior," and can be removed only by impeachment by the U.S. Senate. As Alexander Hamilton stated in *Federalist # 78,* written in 1788, "[N]othing can contribute so much to [the judiciary's] firmness and independence, as permanency in office." The standards for removal applied over the years have been very strict, and since the federal judiciary was established in 1789 very few federal judges have been removed from office by the impeachment process. If

impeachment and removal from office were easy to accomplish, of course, judicial independence would be impossible. (Much the same could be said if it were easy to punish judges by "reassigning" them to less attractive judicial posts.) In addition to the removal process, judges can be prosecuted if they engage in corruption and criminal wrongdoing. In theory, this poses a risk that unpopular judges could be victimized by trumped up charges of criminality, but in practice this is almost unheard of in the United States because the ideal of judicial independence is broadly accepted. In truth, prosecutors in the U.S. treat allegations of judicial wrongdoing with extreme delicacy because they appreciate the risks to judicial independence that are posed even by opening a criminal investigation. Judicial corruption cases are certainly pursued where evidence of criminality exists, but prosecutors generally proceed very carefully.

A similar respect for judicial independence, and worries about deterring judicial independence, have led to the establishment of a near-absolute immunity of judges from civil actions against them in the United States. Judges who issue judgments that prove to be "wrong" may be reversed on appeal, but "wrong judgments" almost never lead to any other form of personal sanction against the judges. Only in the most extreme cases, where there is a pattern of judicial behavior suggesting incompetence or there is evidence of corruption, will sanctions be imposed -- and this is rarely done. There is certainly no regular procedure for officials to examine and sanction individual "wrong judgments" outside of the regular appeals process – and judicial independence in the U.S. would be gravely threatened if there were.

Two caveats are in order: First, government officials and others do frequently criticize court decisions. It is hard to imagine things otherwise in the American system of free expression, but some see even this as a threat to judicial independence. In any event, criticism is very

different and far less serious than threats to try to remove the judge from office. Second, where judges have fixed terms and are eligible to be reappointed or reelected, a pattern of what is perceived as "wrong judgments" often is held against them. While some celebrate this as a form of useful accountability, others cite this as a reason why systems which allow reappointment or reelection of judges threaten judicial independence.

2. Funding

Funding of the courts also gives the other branches of government great power to shape the judiciary. The salaries paid to judges, the construction and repair of courthouses, the provision of adequate court library and support staff, etc. – all are under the ultimate power of non-judicial officials. This power can be used to enhance judicial independence (for example, paying judges adequately will reduce corruption and make it easier to recruit high quality judges). The power can also be used to improperly control or influence the courts. In my own country, as noted above, the Constitution guarantees that a federal judge's compensation will not be reduced during his or her term of office – a funding-related measure designed to protect judicial independence. But since the powers of the legislative branch of the U.S. government over the courts' budget is so great, the potential risk to judicial independence remains.

Given this, the survival of vibrant judicial independence in the United States is very largely the product of the self-restraint of the other branches of government and their own recognition of the importance of protecting judicial independence, even while maintaining some measure of judicial accountability. In addition, there are various structural mechanisms and rules that give judicial independence some significant protection from the dangers to independence

which funding potentially produces. Let me mention three examples of this -- simply to be illustrative, not exhaustive.

First, in the U.S., at least at the federal level, the budget for the judiciary is treated quite distinctively in the national budget process. Budget requests from government agencies are typically submitted to the Office of Management and Budget (an entity within the Office of the President) and subject to revision by that Office before the President transmits an overall proposed federal budget to Congress. However, by federal statute, the proposed budget for the federal judiciary cannot be revised by the Office of Management and Budget and must go to Congress as the judiciary prepared it. This procedure does not remove the risks of political over-reaching (Congress itself still has the power to adopt whatever budget it chooses), but the unusual procedure reduces the risk and strengthens a culture of respect for judicial independence.

Second, court jurisdiction is defined to try to reduce some of the more extreme dangers to judicial independence that can arise from "local protectionism." In many countries, including my own, local courts are appointed and funded by local authorities. These local authorities understandably, if not always justifiably, seek to protect local interests. In a national economy, the phenomenon of local protectionism can have unfortunate effects. By favoring local interests, local governments can treat outsiders unfairly and can deter national economic growth by deterring outsiders from investing and doing business where they otherwise would. There is a particular risk in court cases where the litigants before the court are one party from the locality and the other party from outside the locality. In such cases, a judgment for the outsider may have a negative effect on the locality or at least may have a negative effect on a local resident. Because courts may feel themselves dependent upon the local authorities that fund and appoint

them, and because sometimes the local pressures are intense, there is the risk that local courts will unfairly favor the local litigant, either by unfairly giving judgment to the litigant or failing to enforce a judgment against that litigant.

These matters were serious concerns in the U.S. at the very founding of our country. Indeed, my friends in China, mindful of the concerns about local protectionism in China today, are typically very surprised to learn that concerns about local protectionism received very considerable attention from the people who drafted the U.S. Constitution in 1787. These framers of the Constitution sought to create a national economic market, and were worried that local protectionism by both local governments and local courts could frustrate that objective. As a result, one step the framers took was to establish in the Constitution a national power to regulate interstate commerce. Along with this national power, there developed limitations on the power to local governments to regulate commerce involving people from more than one state. Another step the framers took to address concerns about local protectionism, and the one most relevant here, was to provide for national courts to supplement the state and local courts -- national courts appointed and funded by the national government. In response to worries that state courts might engage in unfair local protectionist behavior in litigation involving a citizen from the local state and a citizen from another state, the framers of the Constitution provided that these new national courts would have the power to decide such cases. This is the so-called "diversity jurisdiction" of our national courts.

The premise of this "diversity jurisdiction" (which survives in our national courts to this day in spite of criticism that conditions no longer justify it) is that courts funded and appointed by national officials are less likely than state courts to engage in local protectionism. The

impulse behind "diversity jurisdiction" can lead to different sorts of structural arrangements, of course -- and those in China who are disturbed by local protectionism in local Chinese courts have various options for reform that they could consider. For example, instead of creating separate national and local court systems, regional courts rather than local courts might be given the power to decide "diversity" cases, or special "Commerce Courts" might be established. The basic point here is that local funding and appointment of the judges creates a risk of local protectionist pressures that can undermine judicial independence, and one way to address that problem is to have the judges who decide these cases not be judges dependent upon local funding and appointment.

Third, constitutional rules in the U.S. restrict funding mechanisms that pose a particular danger to judicial independence. Our constitutional requirement of "due process of law" requires that judges be impartial. This principle is violated if a judge has a personal financial interest in the outcome of a case. The principle has been interpreted to mean that funding mechanisms for the courts cannot give judges a direct financial interest in favoring one side or the other. For example, court fines may not be directly used to fund judges' salaries or the court budget, for that might give judges an improper incentive to impose the fines. Similarly, a funding system in which judges are paid for the issuance, but not for the non-issuance, of a search warrant is invalid. As the Supreme Court has said, "the Due Process Clause [does] not permit any `procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.'" Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); see also Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. v. Village of

Monroeville, 409 U.S. 57 (1972); Connally v. Georgia, 429 U.S. 488 (1974).

3. Lawmaking

In addition to making judicial appointments and furnishing funds, of course, other governmental institutions can control the courts through the power to make laws. I include here not only substantive laws but also laws governing the jurisdiction of the judiciary as a whole and of particular courts. Legislatures often delegate to the courts the power to develop rules of procedure within the court system, and practically this is an important element of the judiciary's own sense of its independence -- but this delegated power is revokable. With the usual exception of constitutional requirements, legislatures typically have essentially unrestricted power to make laws that the courts must apply and to amend laws that the courts have already applied. This also means that legislatures have the power to adopt laws that reverse judicial interpretations of prior laws -- a powerful method by which judges are held accountable and constrained. Indeed, the mere possibility that legislatures may exercise this power can be an effective deterrent to judicial overreaching. These legislative powers are all significant constraints on judicial "independence."

A fundamental distinction must be emphasized here, however. Although legislative or administrative "reversing" of judicial interpretations is usually acceptable if the legislature or agency amends the law that was interpreted or adopts a generally applicable new law, it is far different, and usually inappropriate, for legislatures or administrative agencies to try to "reverse" the outcome of a particular case. That would usurp the central judicial function of deciding cases, and would undermine judicial independence. Moreover, it is doubtful that institutions like legislatures, which focus primarily on broad issues of policy, will have the institutional capacity

and experience to adjudicate specific cases, which require sifting particularized facts and applying specific laws to them. Indeed, it might be asked, if there is worry that courts may be improperly influenced or not fully competent to resolve complex legal cases, why should there be greater confidence about legislators?

In the U.S., the principle that courts must have the final authority to decide cases has found expression in various rules. It is a long settled rule, for example, that if an administrative agency has the power to reverse the outcome of a particular court case, the courts will refuse to decide the case, concluding that they would be performing a non-judicial function. In a quite recent case decided by the Supreme Court of the United States, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), the basic principle was applied in a somewhat different context. In the Plaut case, the Supreme Court ruled that the U.S. Congress had unconstitutionally interfered with the judicial role when it enacted a law requiring the courts to reopen final court judgments dismissing certain lawsuits. As the Court wrote:

> "The Federal Judiciary [has] the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in [the] hierarchy – with an understanding, in short, that `a judgment conclusively resolves the case' because `a "Judicial Power" is one to render dispositive judgments.' By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle."

4. Enforcement

The independence of the judiciary is also complicated by the fact that courts must rely upon others if their judgments are to be effective. They have limited enforcement powers of their own. This is true in at least two senses. First, when courts require government officials to do something as losing parties in a law suit, compliance by the government officials requires their

cooperation and acquiescence in the court's judgment. Second, in order for court judgments against private parties to be enforced, the court may need the assistance of law enforcement or other government officials to seize assets, make arrests, and so forth; this too requires their cooperation and acquiescence in the court's judgment. The courts, therefore, are quite literally dependent on other institutions.

Some might see this limitation on judicial power as a useful constraint on judges: it helps to keep judges' actions within mainstream legal understandings, since judges know that if they depart too far from what is generally acceptable, they run the risk of being ignored. But this limitation on judicial power is also a real challenge to an independent judiciary. In the end, judicial independence is meaningless if parties are free to ignore court judgments. And judges are unable to perform their proper functions, which at times include issuing unpopular judgments or judgments against powerful interests, if they are disobeyed.

To sustain an independent judiciary, therefore, it is crucial that there be effective enforcement mechanisms and also broader cultural attitudes that court orders will be obeyed. Without both of these things, an independent judiciary is impossible – or, perhaps more precisely, even if the judiciary is independent it will not be able to perform the social functions that independence is supposed to make possible.

No society is free of the problem of enforcing court judgments. In my country, people at times seek to hide their assets to avoid paying judgments against them. We also have had instances of government officials refusing to obey court decrees -- most notoriously, the refusal of many government officials in the American South to racially desegregate schools in compliance with court orders in the 1950s and 1960s. See Paul Gewirtz, Remedies and

Resistance, 92 Yale Law Journal 585 (1983).

It is well known that enforcing court judgments and arbitral awards is also a significant problem in China today. See Donald Clarke, Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments, 10 Colum. J. Asian L. 1 (1996); Jerome A. Cohen, "Reforming China's Civil Procedure: Judging the Courts," 45 American Journal of Comparative Law, 793, 802 (1997). To some extent, this is a problem of the courts' themselves not taking appropriate steps to enforce judgments, whether for reasons of local protectionism, weakness or corruption. To some extent, it is a problem of courts not having adequate legal tools to get access to hidden assets. To some extent, it is a problem of other government officials not cooperating in the enforcement of judgments. To some extent it is a problem of broader public attitudes about the courts and law itself. Whatever the causes, however, the effects are significant: unfairness for individuals; frustration of rational economic activity and deterrence of lending and investment (both domestic and foreign); and weakened societal respect for the courts and for law generally. Addressing this problem must be a continued part of efforts to strengthen, and make meaningful, judicial independence in China.

III. The Problem of Transitions and the Second Best

There is a last issue that needs to be addressed because of its particular relevance to developing countries such as China. Let us call this the problem of "transitions and the second best." An argument sometimes heard goes roughly like this: "All right, I understand why an independent judiciary is necessary, and I understand why certain mechanisms of accountability such as closer legislative supervision of the courts threaten judicial independence. However, the

current problems with the judiciary are very serious. There is very significant corruption, and existing judges are often poorly trained to perform the important tasks they are asked to do. Too many judges are using their independence to become dependent on corrupt forces or to perform their jobs poorly. The courts themselves cannot solve these problems. In an ideal world, the courts should be left more fully independent. But this is not an ideal world, and imperfect `second best' solutions are necessary, at least for a transition period. Thus, for example, legislative supervision of particular cases is necessary, sanctioning judges for wrong judgments is necessary, referring pending cases for decision by higher level judges is necessary -- even though these things admittedly may compromise the independence of judges. The balance between independence and accountability for now must be weighted quite heavily on the side of accountability."

This sort of argument is not without some force. It is important to appreciate that the mechanisms for achieving an appropriate balance between judicial independence and judicial accountability may not be exactly the same for all societies. (They are certainly not the same even within the United States, where, for example, in some states judges are appointed and in other states they are elected and allowed to stand for reelection by popular majority.)

Nevertheless, the problems of developing judicial systems, I believe, can be addressed without compromising judicial independence in the ways that some have suggested. The best approach is to address the root causes of problems facing the judiciary. Recognizing the mutually reinforcing nature of mentality and structure in this area, there is much that can be done to address these root problems and advance judicial reform without interfering inappropriately with judicial independence. For example:

- Making structural improvements in the organization, appointment, funding and jurisdiction of courts can help address problems of local protectionism without interfering with judicial independence.

- Raising judicial salaries can do much to reduce the incentives for judicial corruption, and thus enhance judicial independence.

- Improving internal review mechanisms -- including regular appeals, interlocutory appeals, post-conviction reviews, and internal ethics complaint procedures -- can provide better mechanisms of accountability within the judicial branch itself, and reduce the pressure for external accountability mechanisms that could seriously undermine judicial independence.

- Appointing highly qualified people to be judges -- and continuing to give them training about the judicial role and judicial craft, as well as evolving areas of substantive law -- are the best ways to improve the quality of judicial work, and do not compromise independence.

- Strengthening the courts' enforcement powers and techniques of enforcing judgments can improve the capacity of independent judges to carry out the law.

- Giving rhetorical support to the important role an independent judiciary plays can increase the courts' stature, make being a judge more attractive to talented people, and strengthen cultural attitudes that reenforce judicial honesty and independence as well as public compliance with court judgments.

The problem with "second best" approaches here is that they do not address the root causes of problems. Indeed, second best approaches can actually contribute to some of the root problems, by reducing the stature and independence of judges. The root problems should be

addressed. And where transitional policies are necessary, they should move society closer to the ideal of judicial independence, not further away.

The dilemmas in finding the right balance between independence and accountability are real, as I have tried to show in this article. But as I have also tried to show, an appropriate degree of judicial accountability and constraint can be fostered without at the same time undermining the core elements and functions of judicial independence. The goal of judicial independence, it must be remembered, is not to make judges unconstrained, but to make it possible for judges to decide cases according to the law. Where judges are independent -- where they are able to decide cases in a lawful and impartial manner, free from improper control and influence -- they can play a distinctive and important role in promoting economic development, effective dispute resolution, rights protections, and other societal goals. This is the path that can and should be followed.

* * * * * *

Bibliographic Note

The literature on judicial independence in the United States is vast. This is a small sample of leading writings:

ABA Commission on Separation of Judicial Powers and Judicial Independence, An Independent Judiciary (1997) (including a fuller bibliography).
Report of the National Commission on Discipline and Removal (1993).
Martin Shapiro, Courts: A Comparative and Political Analysis (1981).
Symposium: Judicial Independence and Accountability, 72 Southern California Law Review (January/March 1999) (collecting articles by leading scholars and judges).
Symposium: Conference of Supreme Courts of the Americas, 40 St. Louis University Law Journal (1996) (collecting articles by leading scholars and judges).

Symposium: Federal Judicial Independence, 46 Mercer Law Review (Winter 1995) (collecting articles).
The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).