The heart of judicial independence, it must be understood, is judicial individualism.\textsuperscript{1}

—Irving Kaufman

The prior chapters of this book have explored the subjective responses of judges in the process of judicial decision making by examining the translation of those responses through modes of legal reasoning in the formulation of legal judgments that are communicated to a wider community, which then evaluates the validity of those judgments. In this chapter, I explore the process of judicial decision making by considering the structural protections of that process.\textsuperscript{2} I argue in this chapter that the institutional independence of the judiciary cannot be understood fully as separate from the individual independence of its judges. More specifically, I examine some legislative attempts to interfere with or influence the judicial decision-making process as threats to judicial independence, and I examine them as a means of improving our understanding of the relationship between the institutional independence of the judiciary and the individual independence of judges. By analyzing legislation and judicial decisions from the United States and the United Kingdom, I consider the institutional protections of the judicial process as the Anglo-American constitutional method of ensuring that individual judges may decide for themselves what they believe the law says and how it should be applied in their courts.

Legislative interference with judicial independence can take many forms.\textsuperscript{3} In this chapter, I focus on two types of legislative interference that strike closely at a judge’s ability to act in accordance with her own indepen-
dent perspective: legislative efforts to preclude judges from considering certain sources or evidence they might wish to consult and legislative efforts to require judges to consider evidence that they might wish to exclude. In both of these instances, legislative interference with the judge’s individual autonomy threatens the judiciary’s broader institutional independence. I argue here that a judge cannot decide independently if she cannot decide as an individual, and a judge cannot decide individually if she cannot determine what legal sources and reasoning should inform her judgment independent of any external interference or pressure.

I discuss here only legislative attempts to interfere with the judicial decision-making process itself. I will not discuss legislation that challenges the finality of judicial rulings, although these statutes also raise significant separation of powers concerns. All these forms of legislative interference are unified by their goal of subjecting judicial decisions and decision making to nonjudicial control. Consequently, as the Supreme Court has emphasized, all these forms of legislative interference challenge the independence of the judiciary by threatening the power of judges to decide cases autonomously:

Article III establishes a ‘judicial department.’ . . . The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that ‘a judgment conclusively resolves the case’ because ‘a judicial Power is one to render dispositive judgments.’

As the Court fully understood, the power to decide cases, to adjudge them, requires not just an arid ability to enter a judicial order but the full authority to decide for oneself what the proper judgment should be.

**Individual and Institutional Independence**

Judicial independence in the Anglo-American tradition is usually described in terms of the individual, or decisional, independence of judges and the institutional independence of the judiciary. Decisional independence means that each judge must be able to determine, individually and impartially, the proper legal ruling and reasoning in a given case, and institutional independence means that the decisions and decision-making processes of courts must be respected by and protected from the elected branches of government:
Decisional independence concerns the impartiality of judges—the capacity of individual judges to decide specific cases on the merits, without ‘fear or favor.’ Branch or institutional independence, on the other hand, concerns the general, non-case specific separation of the judicial branch—the capacity of the judiciary to remain autonomous, so that it might serve as an effective check against the excesses of the political branches.9

Despite a familiar and widely shared understanding of the meaning of decisional and institutional independence, the relationship between the independence of judges and the independence of the judiciary is not well understood.

I begin by examining legislative efforts in the United States to constrain judges’ decisional independence, such as the proposed Constitution Restoration Act (CRA) and the Sentencing Reform Act of 1984 (SRA). I argue that legislative interference with the decisional autonomy of individual judges through the SRA, the CRA, and similar initiatives represents a genuine challenge to the institutional independence of the judiciary envisioned by Article III.10

Some scholars disagree. They believe that as a general and practical matter, Congress poses little threat to judicial independence. For example, John Ferejohn argues that Congress will almost never possess the collective motivation to interfere with the independence of the federal courts:

I shall argue here that an organization or person is a potential political threat to judicial independence if the entity or individual: (1) has reason to get a judge or court to reach a decision on grounds irrelevant to law; (2) has sufficient resources—political, social and/or economic—to influence or intimidate the judge; and (3) is capable of forming a will or intention to act in a way that interferes with judicial independence. . . . In the United States, I think that Congress will occasionally satisfy the first condition, always satisfy the second condition, and will rarely satisfy the third condition.11

The first prong of Professor Ferejohn’s description of potential threats to judicial independence is problematic. An entity need not be motivated to impel judges to decide on grounds “irrelevant to law” to threaten judicial independence. The entity may simply be motivated to preclude judges from considering certain legally relevant grounds or to prevent judges
from deciding for themselves which legally relevant grounds are worthy of consideration.

As I will explain in this chapter, I believe Professor Ferejohn also underestimates the will of Congress to challenge the decisional independence of judges, in part because Professor Ferejohn (like many others) overlooks the importance of the relationship between individual and institutional independence. Ferejohn believes that the individual independence of judges is actually more secure than institutional independence.\(^{12}\) And he is probably correct, at least historically, concerning congressional threats to individual judges’ legal judgments; the time when Congress attempted to impeach judges for their legal rulings seems to have passed.\(^{13}\) But the threat to individual judicial independence that Ferejohn overlooks is the threat to the process of judicial decision making. For example, by making judicial reliance upon foreign sources an impeachable offense,\(^{14}\) the CRA threatens to revisit the unhappy chapter in US constitutional history when Congress attempted to hinder judicial independence by penalizing judges for their legal decisions, in this instance not for the judgments they reached but rather for the reasoning they used to reach their judgments. The CRA indicates that Congress does still sometimes possess the will to threaten the ability of judges to decide—autonomously, individually, and independently—which sources they find persuasive when reasoning about the law and formulating legal judgments.\(^{15}\)

Even more fundamentally, Ferejohn’s argument proceeds from the assumption that we need to determine whether individual or institutional independence is more central to the US constitutional framework. I see no reason to make that assumption. Institutional and individual independence share the same constitutional groundwork and are mutually reinforcing. Institutional independence exists so that individual judges can reach their own judgment in evaluating and articulating the law. Conversely, individual independence allows the judiciary to fulfill its institutional role in ensuring that legislative and executive power are exercised only within constitutional and other legal constraints upon the government.

Judicial and scholarly discussions of judicial independence usually concentrate on institutional independence. In fact, it is not unusual for scholars to assume that institutional independence is really what judicial independence is all about. As Stephen Burbank put it, “Federal judicial independence is also first and foremost an institutional value, designed to protect the separation of powers and the rule of law. Article III of the Constitution vests judicial power in courts, not judges.”\(^{16}\) The problem with this view is that it is a bit like saying that the current standings of a sports league are statements
about teams rather than players. In an important sense, that is undeniable. In an equally important sense, the players play the games, and it is misguided to conceive of a team’s performance as somehow disconnected from the players themselves. The players *are* the team, and their efforts define the team’s success. Similarly, judicial independence is without question an institutional value. As I mentioned at the end of the previous chapter, judges frequently refer to themselves as the court, and the courts have an institutional identity apart from the judges who are on the court at any point in time. Moreover, the courts’ institutional identity is importantly connected to their institutional independence. Institutional independence positions judges in an institution that allows them to reach impartial judgments, and the process of individual judicial decision making reflects and reinforces the institutional autonomy and integrity of the judiciary. That is to say, the institutional value of judicial independence exists for a purpose, which is to allow the judges who comprise the judiciary to decide cases based upon their own judgment of the law. Article III vests judicial power in courts. But Article III courts do not exist without judges. And Article III also says that “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.”

Burbank bases his understanding of judicial independence on his understanding of US constitutional development. In his view, “a judge-centered view of judicial independence is problematic from a historical perspective, and it is demonstrably inadequate given conditions in, and the needs of, contemporary American society. . . . The primary goal of the architects of federal judicial independence was to enable the separation of powers and thereby to enable the judiciary to exercise the power of judicial review.” Taking the historical point first, it is difficult to see how the “primary goal” of judicial independence was enabling the exercise of judicial review, given the vehement disagreements and uncertainty surrounding the exercise of that power at the time of the framing. I am not arguing that judicial review was not anticipated at the time of the framing or that there is no implicit support for the power in the text and structure of the Constitution. I am simply noting that it cannot be considered a *fait accompli* during and following the drafting and ratification of Article III. Burbank puts the institutional cart before the constitutional horse by suggesting that in the minds of the framers, the primary goal of judicial independence was to allow the courts to exercise judicial review.

Like Professors Ferejohn and Burbank, the Supreme Court of the United States usually concerns itself primarily with the judiciary’s institutional independence in the constitutional design of the federal system. Here is a
good example from the Court’s *Northern Pipeline* decision, which held that Congress was not empowered to assign Article III judicial powers to an Article I court:

> Basic to the constitutional structure established by the Framers was their recognition that ‘[the] accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.’ . . . The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial. . . . As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch. . . . In sum, our Constitution unambiguously enunciates a fundamental principle—that the ‘judicial Power of the United States’ must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.  

The Court in *Northern Pipeline* emphasized in this passage the relationship between judicial independence and judicial impartiality. As the Court pointed out, the function of the federal courts in the separation of powers structure and dynamics of the US constitutional system depends upon a judicial institution whose impartiality is protected by its independence from external influences. But the Court also recognized, although it takes a bit more effort to find in its opinion, that judicial independence and impartiality depend equally upon the autonomy and authority of judges to decide as individuals: “The independence from political forces that they [the life tenure and fixed salary provisions of Article III] guarantee helps to promote public confidence in judicial determinations. . . . The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism.”

**Decisional Autonomy and Judicial Independence**

In the face of repeated threats and attempts to impose penalties upon judges for referring to foreign legal sources when interpreting the US Constitution,
Justice Scalia encouraged Congress to keep its legislative hands off of the judiciary’s business:

No one is more opposed to the use of foreign law than I am, but I’m darned if I think it’s up to Congress to direct the court how to make its decisions. . . . [It] is like telling us not to use certain principles of logic. . . . Let us make our mistakes just as we let you make yours.25

One of the legislative initiatives to which Justice Scalia was responding was the Constitution Restoration Act (CRA), which was introduced in the Senate in 2004 and 2005.26 Here is a provision from that proposed legislation:

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.27

Another provision of the CRA indicated that any judge who chose to rely upon a foreign source of law when interpreting and applying the US Constitution would be subject to impeachment.28 More recently, state legislatures and electoral initiatives have pursued similar goals in restricting the decisional autonomy of judges by precluding them from referring to foreign sources when rendering judgments. For example, the Oklahoma legislature approved a proposed amendment to Article VII, Section 1 of the Oklahoma state constitution that would preclude judges in Oklahoma from referring to international legal sources: “[i]n making judicial decisions[,] [t]he courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international or Sharia Law.”29 This proposed amendment was approved on November 2, 2010, by more than 70 percent of Oklahoma voters.30 The measure was ultimately enjoined by the United States Court of Appeals for the Tenth Circuit as an Establishment Clause violation due to its disfavored treatment of Islam.31

I am not discussing here whether it is a good idea for judges to refer to foreign sources when interpreting US law.32 Although a great deal has been written about the propriety of judges citing foreign legal sources when interpreting the US Constitution, and about the efforts of Congress to intervene in this matter, surprisingly little attention has been paid to this issue as it
This chapter considers congressional intervention in the process of judicial decision making as a threat to judicial independence. More specifically, this chapter attempts to answer this question: How can the various attempts by legislatures to intervene in the decision-making process of judges help us to understand the relationship between individual judicial independence and institutional judicial independence? Despite his strong opposition to US judges citing foreign sources when interpreting the US Constitution, Justice Scalia was even more concerned by congressional attempts to dictate which sources individual justices may refer to in their reasoning and opinion writing.

Long before the introduction of the CRA, members of Congress had repeatedly attempted to interfere with judicial independence by, for instance, summoning a federal judge to testify regarding confidential grand jury proceedings. More recently, Congress passed the 1984 Sentencing Reform Act (SRA), which established the United States Sentencing Commission and ultimately led to the United States Sentencing Guidelines. The purpose of the Guidelines was to address the disparity among the sentences imposed by courts upon individuals convicted of the same or similar criminal violations; different judges were imposing different sentences for the same crime. Although the SRA largely replaced the perceived problem of judicial discretion with prosecutorial discretion, and even though the Guidelines have been subjected to extensive criticism on constitutional and policy grounds, my concern here is with the inability under the Guidelines of individual judges to decide for themselves what an appropriate sentence should be for an individual defendant.

The Supreme Court ruled in Mistretta v. United States that the creation of the Commission through the SRA was not an unconstitutional violation of separation of powers and judicial independence. An important factor in the Court’s decision was the placement of the Commission “within the Judicial Branch.” Ironically, the majority in Mistretta also emphasized that the Commission “is not a court and does not exercise judicial power” even though “the legislative history of the Act makes clear that Congress’s decision to place the Commission within the Judicial Branch reflected Congress’s ‘strong feeling’ that sentencing has been and should remain ‘primarily a judicial function.’” This view somehow led the Court to conclude that the placement of the Commission within the judicial branch did not “vest[] within the Judiciary responsibilities that more appropriately belong to another Branch, [but instead] simply acknowledge[d] the role that the Judiciary always has played, and continues to play, in sentencing.”
The majority gets the issue in *Mistretta* exactly backwards. The concern is not whether the creation of the Sentencing Commission grants to the judiciary a “non-judicial” authority that more appropriately belongs in another branch of government. The concern is whether the creation of the Commission grants to the Commission a distinctively judicial authority that cannot properly be transferred to a “non-judicial” authority. The Court had already observed that the Commission is not a court and does not exercise judicial authority. Then the Court observed that the power of sentencing is an authority “the judiciary always has” exercised. And then the Court decided that transferring the authority to determine sentences for criminal offenses from federal judges to the Sentencing Commission was not violative of judicial independence or separation of powers because Congress placed the Commission “within the judicial branch.”

The majority’s reasoning in *Mistretta* fails because it equates judicial independence entirely or predominantly with institutional independence. The Court’s preoccupation with the independence of the judicial branch led it to conclude that depriving judges of their authority to fashion sentences for defendants in cases over which they presided was not an impermissible infringement upon judicial independence because the Commission was placed by Congress within the judicial branch of government. The majority therefore concluded that no one from outside the judicial branch was interfering with the judiciary’s institutional authority. But of course the institutional independence and authority of the judiciary is virtually meaningless without the decisional independence of its judges to determine for themselves what the proper legal outcome of the trial process should be.

Justice Scalia dissented in *Mistretta*. In contrast with the majority’s focus on the judicial branch, Scalia addresses in the second sentence of his opinion the impact of the Guidelines on the decisional independence of judges: “A judge who disregards them will be reversed.” Scalia devotes a substantial amount of the discussion in his dissent to issues of congressional delegation, institutional authority, and separation of powers. Throughout his analysis, though, he returns to the relationship between the institutional independence of the judiciary and the decisional autonomy of its judges:

It is already a leap from the proposition that a person who is not the President may exercise executive powers to the proposition we accepted in *Morrison* that a person who is *neither* the President *nor* subject to the President’s control may exercise executive powers. But with respect to the exercise of judicial powers (the business of the Judicial Branch) the plat-
form for such a leap does not even exist. For unlike executive power . . . [a] judge may not leave the decision to his law clerk, or to a master. . . . Thus, however well established may be the ‘independent agencies’ of the Executive Branch, here we have an anomaly beyond equal: an independent agency exercising governmental power on behalf of a Branch where all governmental power is supposed to be exercised personally by the judges of courts.50

Given his concern with legislative incursions into the judicial process, Scalia’s response to Congress’s interfering with a judge’s ability to reach independent legal determinations—whether in the form of the criminal sentences that should be imposed or the legal sources that should be considered—is consistent with respect to the Sentencing Reform Act and the Constitution Restoration Act. Scalia understands judicial independence to require that judges be allowed to determine for themselves what their judgments should be and how they should reason toward those judgments.

Judicial resistance to the Guidelines was powerful and predictable.51 Unsurprisingly, prior to the Court’s decision in Mistretta, over two hundred district court judges ruled that the SRA was unconstitutional.52 More surprisingly, circuit and district judges voiced their opposition to the Guidelines in their published opinions.53 And perhaps most surprisingly, even after Mistretta, district courts continued to rule the Guidelines unconstitutional, particularly after the enactment in 2003 of the so-called Feeney Amendment, which further curtailed the ability of federal judges to depart downward from the Guidelines.54 In addition, the Feeney Amendment eliminated the requirement that at least three of the seven members of the Sentencing Commission be federal judges55 and required “that the House and Senate Judiciary Committees, and the Attorney General, be notified each time a judge departs downward . . . [and] the report must include the ‘identity of the sentencing judge.’”56 Relying upon the Feeney Amendment, Attorney General John Ashcroft directed federal prosecutors, in a signed memorandum, to identify to the Department of Justice any federal judge who departed downward in sentencing in a manner not supported by the Guidelines.57

District court judges viewed the Feeney Amendment and the Ashcroft Memorandum as impermissibly interfering with the independence of judges: “The chilling effect resulting from such reporting requirements is sufficient to violate the separation of powers limitations of the United States Constitution. . . . There is no legitimate purpose served by reporting individual judges’['] performance to Congress. Congress does not have any direct
These judges recognized that judicial independence does not mean simply that judges may not be penalized or punished for their legal judgments; it also means that they must be able to reason toward and reach their judgments without improper interference or intimidation. Intimidation can take the form of reporting to Congress under the Feeney Amendment or the threat of impeachment by Congress under the Constitution Restoration Act, and interference can take the form of impeding the ability of judges to reach what they believe is an appropriate criminal sentence or inhibiting the ability of judges to refer to what they believe are appropriate legal sources when interpreting the Constitution.

In holding the post–Feeney Amendment Guidelines unconstitutional, the US District Court for the District of Oregon returned to the rationale of Mistretta and to Justice Scalia’s dissent:

We are thus left with a strange creature that is nominally lodged within the Judicial Branch, and purports to be performing duties of a judicial nature, yet need contain no judges, does not answer to anyone in the Judicial Branch, and into which the Judicial Branch is assured no input. . . . The alterations to the Sentencing Commission effected by the Feeney Amendment require re-examination of a fundamental premise of Mistretta, namely, that the Sentencing Commission is part of the Judicial Branch. . . . I see no principled basis on which to distinguish the Sentencing Commission, post-Feeney, from the . . . other administrative agencies that populate the Executive Branch . . . For such statutory purposes, Congress can define the term as it pleases. But since our subject here is the Constitution . . . the Court must . . . decide for itself where the Commission is located for purposes of separation-of-powers analysis.59

The District Court concluded that the Commission could no longer, even in a nominal or formal sense, be considered a part of a judicial branch that was meaningfully independent of the executive branch of government.60 The importance of the Commission as a threat to judicial independence is determined by what it does rather than where it is, by Congress interposing the Commission in the judicial branch with the authority to interfere with the traditional role and responsibility of independent Article III judges.

After sustained academic and judicial criticism of the Guidelines and the Court’s decision in Mistretta,61 the Supreme Court ruled in 2005 that the Sixth Amendment right to a jury trial is violated by provisions in the Guidelines that impose enhanced sentences on the basis of facts determined by a
judge rather than a jury, and that the Guidelines cannot be applied in accordance with the congressional intent underlying the SRA unless the Guidelines are deemed advisory rather than mandatory.\textsuperscript{62}

Although the Supreme Court did link institutional and individual independence (inconspicuously) in \textit{Northern Pipeline}, other courts have actually resisted this point. For example, in \textit{McBryde v. Committee to Review Circuit Council Conduct and Disability Orders}, the United States Court of Appeals for the District of Columbia Circuit reviewed the determination by the Conduct Review Committee that Judge McBryde had engaged in abusive behavior toward attorneys and other judges, which was “prejudicial to the effective and expeditious administration of the business of the courts.”\textsuperscript{63} Acting under the Judicial Conduct and Disability Act of 1980,\textsuperscript{64} the Committee publicly reprimanded Judge McBryde, ordered that no new cases would be assigned to him for one year, and precluded him for three years from presiding in any case involving any of the twenty-three attorneys who participated in the investigation of his alleged misconduct.\textsuperscript{65}

Judge McBryde then challenged the constitutionality of the Judicial Conduct and Disability Act. He argued that the Act violated the Constitution’s due process and separation of powers guarantees and that the Act violated the First Amendment by preventing disclosure of the record in the Committee proceedings. The District Court concluded that the Act did function as a prior restraint upon Judge McBryde’s speech in violation of the First Amendment, but it rejected the rest of his arguments.\textsuperscript{66} On appeal, the D.C. Circuit ruled that Judge McBryde’s challenges to the one-year moratorium and the three-year preclusion were moot because they had expired and that several of his other challenges to the Act were barred by the statute itself. For purposes of my argument, the court’s discussion of McBryde’s separation of powers argument is most important.

Judge McBryde argued that impeachment is the only constitutional avenue for disciplining federal judges\textsuperscript{67} and that therefore the Act violated separation of powers. McBryde also argued that the judicial independence provided under Article III prevents judges from being disciplined for their actions while on the bench.\textsuperscript{68}

In rejecting Judge McBryde’s arguments, the D.C. Circuit construed judicial independence under Article III as limited solely to institutional independence:

\textit{[T]he great bulwarks of judicial independence are the guarantees of life tenure and undiminished salary during good behavior. For Judge McBryde, the fact that individual judges are the direct beneficiaries of these...}
guarantees proves that it is the individual judge that is the relevant unit of judicial independence. . . . That individual judges are direct beneficiaries of the tenure and salary protections of Article III by itself hardly shows that the overarching purpose of these provisions was to insulate individual judges against the world as a whole (including the judicial branch itself), rather than . . . to safeguard the branch’s independence from its two competitors.69

Although federal judges may be involuntarily removed from office only via “Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors,”70 according to the McBryde court, Article III does not foreclose other forms of discipline for lesser forms of misconduct.71

The tendency even for courts to overlook the connection between institutional independence and individual independence is striking. And the question whether impeachment is the sole constitutional means of disciplining federal judges is a serious matter that has not been adequately addressed by courts or scholars. But I do not want that question to distract from my argument here. Whatever may be the case with respect to disciplining a judge for his demeanor on the bench or in his chambers, my focus is on decisional autonomy as the cynosure of individual judicial independence and on individual independence as a central feature of institutional independence. In its decision in Chandler v. Judicial Council of the Tenth Circuit, the Supreme Court insisted that individual judges must be free to render judgments independently: “There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function.”72 Whatever the merits may be of the D.C. Circuit’s view of the constitutionality of disciplining federal judges for other behavior, the McBryde court’s attempt to dissociate institutional independence entirely from individual independence was seriously misguided.73

Charles Gardner Geyh explains the relationship between the judge’s independence and the judiciary’s independence in this way:

Thinking about judicial independence with reference to judges as individuals highlights the role independence plays in judicial decision making. It is said that if we want judges to decide cases on the basis of facts as they find them and law as they construe it to be written, we must insulate them from external influences that could corrupt their integrity or impartiality—hence the need for ‘decisional’ or ‘decision-making’ independence. On the
other hand, thinking about judicial independence in terms of judges collectively, as a branch, shifts our focus toward the role of the judiciary in a representative democracy where the powers of government are separated. The argument goes that if the judiciary is to maintain its structural separation from the legislative and executive branches and to keep the other branches in check through the exercise of judicial review, it must be able to preserve its institutional integrity and resist encroachments—hence the need for ‘institutional’ or ‘branch’ independence.74

In discussing the relationship of institutional and individual judicial independence, we cannot lose sight of the fact that the constitutional and definitional obligation of individual judges and the judicial institution is to adjudicate: to decide cases and to render judgments. The central purpose of insulating the courts from external influence was so that each judge of those courts could reach her own judgment of what the law means and requires.75

Once we see the correlation between decisional independence and institutional independence, we can appreciate that this freedom of a judge to decide cases without external interference also requires that these cases be decided by a judge acting as a judge, within the distinctive forms and constraints of his institution. Jefferson Powell describes these interconnected aspects of judicial autonomy and obligation as the “Three Independences”:

- Independence of position, then, is concerned with tangible, external threats to the courts’ proper exercise of their constitutional function, and it is secured in the Founders’ view by external structural protections for the individuals who exercise the power of the courts. But I want us to take note of the way in which Hamilton links these external factors to the internal subjectivities of the judges—to their ‘temper’ as he puts it. The second strand in the weave making up judicial independence is what I am calling independence of decision. The courts are only truly independent, our tradition has maintained, when the decisions of the judges take effect, are enforceable and enforced, without circumvention or defiance by legislatures and executive officers. . . . The third element that I believe is woven into the general concept of judicial independence is what I am calling independence of thought. The courts are only truly independent, our tradition has maintained, when the judges reach their conclusions through a process of thought and decision that is significantly different from the forms of decisionmaking the other branches of government employ. The function of adjudication involves by definition the exercise of a
type of judgment that proceeds from different premises and operates within different constraints than those which characterize the activities of the legislature and the executive. . . . Judges who fail to maintain and respect the difference between judicial and extrajudicial reasoning are not independent in the American constitutional sense, no matter how secure their positions and how respected their judgments, for those judgments will then necessarily be subservient to something other than the people’s law.\textsuperscript{76}

In Powell’s terms, judicial independence of position, decision, and thought create an institution that is constrained primarily from within, an institution that allows judges to act on their own best judgment of what the law requires so long as they can always demonstrate that they are acting in accordance with what their legal tradition requires of them. The independence of judges demands that they be independent as judges.

Attempts by Congress to curtail the sources or evidence to which judges may refer when deciding cases are, in fact, attempts to interfere with judicial independence. In relation to the distinction between institutional and decisional judicial independence, an unusual aspect of these legislative efforts to restrict decisional resources is that they attempt to reduce the courts’ institutional independence by reducing the judges’ decisional independence. The core value of decisional independence is that “judges must be free to decide individual cases according to the judge’s view of the law.”\textsuperscript{77} These legislative efforts to limit the sources available to judges constrain the judges’ ability to determine, independently and without external interference, their own understanding of the law. Judges who are limited in their individual capacity to determine for themselves what the law means are limited in their institutional capacity to operate apart from undue intrusions by coordinate branches of government.\textsuperscript{78} Accordingly, these legislative incursions threaten judicial independence and require the courts to preserve their institutional integrity by protecting their decisional autonomy.\textsuperscript{79}

Decisional Integrity and Judicial Independence

To this point, we have considered legislative attempts to prevent judges from considering sources and evidence that they might want to consider as a threat to the decisional independence of judges and, consequently, to the institutional independence of the judiciary. Now we will examine the converse problem: to what extent are legislative attempts to require judges to
consider evidence that they might wish to exclude a threat to judicial independence? To answer this question, I will focus on an important judgment by the House of Lords, the predecessor to the Supreme Court of the United Kingdom.80

One year after it ruled in A. v. Secretary of State for the Home Department (hereafter Belmarsh) that the potentially indefinite detention of foreign nationals violated British81 and EU82 law, the House of Lords heard a subsequent appeal on behalf of the same group of detainees.83 In this case, which I will refer to as Belmarsh II,84 the House was asked to consider whether the Special Immigration Appeals Commission (SIAC)—the administrative tribunal authorized by Parliament to hear cases under the Anti-Terrorism Act85—could review evidence that might have been obtained through torture conducted without the participation or authorization of the British government.86 When this issue was raised in the proceedings before the SIAC, the SIAC determined that the procurement of evidence through torture was a fact that went to the weight, but not to the admissibility, of the evidence.87

The House disagreed. Lord Bingham and Lord Nicholls underscored the common law’s long-standing prohibition against torture of all types, for all purposes.88 And although this prohibition was not always respected by the Crown, torture was consistently declared to be “totally repugnant to the fundamental principles of English law” and “repugnant to reason, justice, and humanity.”89 The legal proscription of torture in English law was formalized in 1640 and seems to have been followed faithfully (but not entirely without exception).90

In their argument before the House, the detainees relied upon the common law prohibition against torture as a legal foundation for their more specific claim that the use of evidence obtained via torture violates the principle that the government cannot introduce an involuntary confession as evidence against the defendant.91 The Police and Criminal Evidence Act of 1984 codified this common law principle and required that where a defendant asserts that a confession was obtained improperly, the government must demonstrate beyond a reasonable doubt that the confession was not the result of oppressive conduct.92 After examining the statutory and decisional law on this subject, the House concluded that the use of torture to obtain evidence goes to the admissibility of the evidence, rather than its weight. In other words, where the government cannot rebut the claim that evidence was obtained by torture, that evidence must be excluded.93

In addition to their argument that the use of evidence procured by tor-
ture is analogous to admission of an involuntary confession, the detainees argued that the use of evidence obtained by torture amounts to an abuse of the judicial process and the judicial institution. The detainees argued that common law principles protect against the use of evidence gathered through torture because “[the infliction of torture is so grave a breach of . . . the rule of law that any court degrades itself and the administration of justice by admitting it. . . . The court must exercise its discretion to reject such evidence as an abuse of its process.”

More than any other issue or argument in the Belmarsh cases, the abuse-of-process principle most directly and concretely recognizes that the judicial process itself—the individual challenge to government action raised before an independent judge—is intrinsic to the Anglo-American tradition of judicial independence and the rule of law. The central point, which the House endorsed and reaffirmed, is that the judiciary has an independent institutional authority to maintain the integrity of the judicial process even (or especially) when confronted with an apparent abuse of power by the executive or the legislature:

[T]he judiciary [must] accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. . . . [Where] it offends the court’s sense of justice and propriety to be asked to try the accused in the circumstances of a particular case . . . the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court’s conscience as being contrary to the rule of law.

The court’s sense of justice is a judge’s sense of justice and the court’s conscience is a judge’s conscience. The formal language should not distract us from the functional reality that the offense in permitting evidence obtained through torture is an offense to the conscience and sense of justice of the judge who is asked to allow that evidence to be used in her court. The House’s conclusion is that individual judges must protect the judicial process in which they participate. As in other instances where a sense of justice and conscience figure into a determination of the legality of government action, it is the subjective sense and conscience of individual judges on which this determination ultimately rests.

Lord Bingham concluded that this principle authorized the judiciary to
exercise its “jurisdiction to prevent abuse of executive power.” Lords Nicholls, Hoffmann, and Brown reinforced this point by highlighting explicitly the different institutional functions and responsibilities of the executive and the judiciary. And Lord Hoffmann went on to recognize that preservation of the integrity of the judicial process by the judiciary itself helps to demonstrate that this is the most fundamental basis for excluding improperly obtained evidence:

[What is] the purpose of the rule excluding evidence obtained by torture[?] . . . Is it to discipline the executive agents of the state by demonstrating that no advantage will come from torturing witnesses, or is it to preserve the integrity of the judicial process and the honour of English law? If it is the former, then of course we cannot aspire to discipline the agents of foreign governments. Their torturers would probably accept with indifference the possibility that the work of their hands might be rejected by an English court. If it is the latter, then the rule must exclude statements obtained by torture anywhere, since the stain attaching to such evidence will defile an English court whatever the nationality of the torturer. I have no doubt that the purpose of the rule is not to discipline the executive, although this may be an incidental consequence. It is to uphold the integrity of the administration of justice.

The House recognized in Belmarsh II that allowing evidence obtained by torture to be introduced in court would threaten the integrity and independence of the judiciary as an institution and the rule of law as a core value of Anglo-American constitutional government. To preserve the nature of their institution and of their constitution, judges are understood in the common law tradition to possess the authority to disavow acts of the government that violate legal principle. This authority becomes acutely important when the acts of the government threaten the judicial process itself. That process is frequently the means by which the legality of the government’s actions are challenged and determined, and this is why, in the United Kingdom and the United States, judges occupy the institutional position between the government and the governed, to enforce the legal limitations on government action that define constitutionalism.

This substantive and structural principle—that certain government acts are irretrievably inconsistent with the rule of law and that judges are obliged to say so—unifies the analysis of the various judicial opinions and statements discussed in this chapter. In protecting the process of judging, by de-
ciding which sources and evidence they find convincing, or by determining what an appropriate sentence should be for a criminal violation, or by ensuring that the integrity of the judicial process not be tarnished through the consideration of evidence obtained by torture, the independence of the judicial institution depends upon the responses of individual judges. Where acts of the legislative or executive branch threaten to undermine the integrity of the judicial process, the judges’ obligation is to preserve their institution by ensuring that they as independent judicial officials cannot be used to violate the constitutional principles that define and limit their government. This is also why several justices of the Supreme Court of the United Kingdom reaffirmed in *R. (on the application of Evans) v. Attorney General* the constitutional principle that neither legislative enactments nor executive action may exempt a government official from compliance with a court’s legal judgment or permit that official to override the court’s judgment:

A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law. First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions . . . reviewable by the court at the suit of an interested citizen. . . . The proposition that a member of the executive can actually overrule a decision of the judiciary because he does not agree with that decision is equally remarkable, even if one allows for the fact that the executive’s overruling can be judicially reviewed. Indeed, the notion of judicial review in such circumstances is a little quaint, as it can be said with some force that the rule of law would require a judge, almost as a matter of course, to quash the executive decision.102

In fact, the inability of government actors to disregard or repudiate a court’s judgment is encompassed by the fundamental rule of law commitment that the government is bound by the law. In *Evans*, Lord Neuberger accordingly emphasized the “constitutional importance” of the principle and presum-
tion that the legality of government action must be subject to review by the judiciary.¹⁰³

Indeed, if judges were to stand silently by in the face of government acts that would, for all practical purposes, create a space in which government could act without any reference to or constraint of the law, this would create what Lord Steyn called a “legal black hole,”¹⁰⁴ because rule of law values require that government action must always be limited by law and a legal black hole is a condition or circumstance in which government is empowered to act lawlessly.¹⁰⁵ For purposes of this chapter, the most significant threat posed by lawless government action is the tension between a legal black hole and the judicial role. This tension troubled Lord Steyn in relation to US and UK courts:

The United States has a long and honourable commitment to the Magna Carta and allegiance to the rule of law. In recent times extraordinary deference of the United States courts to the executive has undermined those values and principles. As matters stand at present the United States courts would refuse to hear a prisoner at Guantanamo Bay who produces credible medical evidence that he has been and is being tortured. They would refuse to hear prisoners who assert that they were not combatants at all. They would refuse to hear prisoners who assert that they were simply soldiers in the Taliban army and knew nothing about Al-Qaeda. They would refuse to examine any complaints of any individuals. The blanket presidential order deprives them all of any rights whatever. As a lawyer brought up to admire the ideals of American democracy and justice, I would have to say that I regard this as a monstrous failure of justice.¹⁰⁶

As Lord Steyn emphasized in this passage, whatever government actors may attempt to do in interrogation rooms, there are certain things they cannot do in courtrooms. In the common law tradition, judges have an obligation to ensure that the judicial process operates as it was meant to, by ensuring that the government must demonstrate the legality of its actions before an independent judge. That shared constitutional commitment of the Anglo-American tradition probably best explains the similar resistance among judges in the United Kingdom and the United States to attempts by other government actors to limit their ability to decide for themselves what their legal judgments should be or to degrade the integrity of the judicial process.