Dispersing Judicial Power

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Ronald J. Krotoszynski, Jr., The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power, 89 **Notre Dame L. Rev.** 1021 (2014).

Why does our republic accept judgments invalidating decisions of presidents, congresses, and federal agencies? Why do state authorities elected by local constituents accept decisional overrides by federal judges? These questions, often called "the counter-majoritarian difficulty," have drawn the attention of scholars for decades.

Professor Ronald Krotoszynski's "The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power," casts new light, albeit indirectly, on this paradox. Descriptively, the article usefully examines the design parameters (constitutional, statutory, and procedural) of the federal judicial power. Normatively, it suggests hidden strengths to these parameters, which improve the quality and acceptance of judicial decisions that are often overlooked by analysts and reformers.

The Constitution specifies the powers of Congress, from the famously flexible "regulate interstate commerce" to the "necessary and proper" implementation of these powers. It expansively vests all federal executive power in one person, the President, who is Commander-in-Chief, maker of treaties, and vetoer of legislation. Conversely, the Chief Justice is mentioned only once in the Constitution, to preside over presidential impeachment trials in the Senate.

The Constitution also says little about the judicial power wielded by "one Supreme Court" and such lower courts as Congress may '"from time to time ordain and establish." Huge gaps in the document exist as to where lower courts should sit, how they should be structured, how many Justices there should be on the Supreme Court, and so on. The Chief Justice could have been accorded power to make such decisions, to assign cases, appoint law clerks, and so forth. Instead, the Chief has only one vote of nine in deciding cases, no power to organize the lower courts, and no discretion to discipline judges whose views differ from his.

A less sophisticated analyst than Krotoszynski might say the Chief is weak and the judicial power dispersed precisely because Congress desired to keep the judiciary weak. But if such was Congress's intent, Congress fell woefully short of its goal. Ironically, a dispersed and decentralized ("plural") judiciary has strengthened core federal judicial powers more than an efficient, centralized and unitary judicial design might have done.

Professor Krotoszynski richly elaborates how decentralizing the federal judiciary has enabled the growth and acceptance in America of judicial review. Judges with roots in local communities dispersed throughout the nation are more likely to have their decisions accepted than judges selected from a national pool and concentrated in the District of Columbia. Likewise, limiting the binding force of federal decisions to the deciding court or those immediately subordinate to it has allowed dialogue between different courts having varied perspectives. Decentralization has slowed the rush to judgment nationally on serious constitutional issues, allowing social consensus to develop and passions to cool before the Supreme Court makes a rule binding nationwide. Moreover, dissents and concurrences suggest decisional limits, and rule formulation ambiguities provide "wiggle room" for controversial rules to be

expanded or trimmed over time.

In short, the President can decide and command. Congress can discuss, logroll, and vote, enacting laws containing compromise-based inconsistencies. The courts have only the ability to explain their decisions collectively. Do those decisions have any special characteristics to make them acceptable, even against the tide of public opinion and in the face of political forces? Judges, after all, command no police, no armies, and no popular mass movements.

Traditional proponents of "one true solution" to every legal question might find it odd to question judicial objectivity while realists might surmise that biases govern divergent judicial answers to a question. Krotoszynski has a more nuanced perspective than either camp. Using social science terms, he examines impediments to good decision-making processes carried out in collegial contexts. For example, "groupthink" is a malady that makes a group likely to "fail to obtain its collective objectives as a result of concurrence-seeking." Krotoszynski points out social science research showing that independence (lifetime tenure with judges), dispersion (geographic with judges), and opportunities for reconsideration (lack of inter-circuit precedent) tend to reduce groupthink. He examines other social psychology pathologies of group decision making (choice-shifting pressures, group confirmation bias, social loafing, and herding), then examines how dispersion of judges, random assignment of judges to panels hearing cases, and diverse procedures for circulating and critiquing opinions, minimize these pathologies. As the author notes, "decentralized juridical bodies, working independently of each other, should in theory be better able to reason their way to sensible conclusions."

The article provides a fertile set of ideas for those who seek to advance the rule of law and should counterbalance reformers who suggest centralization of judicial power such as advocates of a national court of appeals to harmonize circuit court decisions. As Krotoszynski elegantly argues, such reforms might undermine virtues of the present "inefficient" system. Likewise, the article counsels against procedures that short-circuit rational explanations for decisions or undermine random assignments of judges to panels so only judges with particular expertise hear cases in that field. Information, nuance, ramifications, and new perspectives: altogether a successful article by my reckoning.

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