

# Chilling Judicial Independence

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If there is any lesson to be drawn from the political turmoil of recent years, it is the indispensable need for a judiciary able to serve, in the words of Edmund Burke, as a “safe asylum” during times of crisis.<sup>1</sup> Federal judges have been increasingly entrusted with basic and vital questions regarding the structure of our society and its allocation of wealth and power, ranging from the admissions policy of a California medical school<sup>2</sup> and the landing rights of the *Concorde*,<sup>3</sup> to governmental funding for abortions<sup>4</sup> and possession of subpoenaed White House tape recordings.<sup>5</sup>

No institution, of course—and least of all one composed of unelected officials who serve for life—can hope to resolve issues of such significance without frequently incurring the wrath of many members of the society. Displeasure with the outcome or trend of decisions provokes cries for replacing objectionable judges with others less irritating and more pliable. It is hardly surprising that the increased prominence of our courts in nearly every aspect of human endeavor coincides with a period of renewed agitation to place constraints on federal judges.

Two distinct lines of thought account for the renewed interest in the character of the bench. There is, first, the idea that because courts are part of our political structure and become involved in issues with profound political repercussions, they should be held politically accountable. This view is rarely stated, and indeed is more often disclaimed,<sup>6</sup> but I believe that it lurks dangerously beneath the surface.<sup>7</sup> Although the premise underlying this view may be partially correct, its

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1. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 242 (T. Mahoney ed. 1955).

2. *Regents of Univ. of Cal. v. Bakke*, 98 S. Ct. 2733 (1978).

3. *British Airways Bd. v. Port Auth.*, 564 F.2d 1002 (2d Cir. 1977).

4. *Beal v. Doe*, 432 U.S. 438 (1977).

5. *United States v. Nixon*, 418 U.S. 683 (1974).

6. *See, e.g.*, 116 CONG. REC. 11,912 (1970) (Rep. Ford).

7. Only occasionally does this concern break through into the open, as it did in 1937 when President Roosevelt defended his Court-packing plan in these striking words: “We have reached the point as a nation where we must take action to save the Constitution from the court and the court from itself.” *N.Y. Times*, Mar. 10, 1937, at 1, cols. 6-7 & 15, col. 3. Note also Roosevelt’s famous “NOW” speech. *Id.*, Mar. 5, 1937, at 1, cols. 6-7 (only with favorable Court can New Deal confront national problems “now”).

conclusion is wrong, and dangerously so. Courts may be deciding more issues of political consequence, but they are still, at the core, exactingly judicial. Independence becomes more—not less—critical as the issues faced by the courts expand.

The second threat to the independence of the federal judge stems from an impulse to streamline the complex procedure for ridding the bench of what some captious critics seem to think is a plethora of drunks and other misfits.<sup>8</sup> Congress has considered alternatives to impeachment with increasing frequency ever since Senator William McAdoo sponsored one such proposal in 1936.<sup>9</sup> On September 7, 1978, the Senate, acting on a nearly unanimous report of its Judiciary Committee,<sup>10</sup> passed by a 43-32 vote<sup>11</sup> the proposed Judicial Tenure Act.

This latest proposal would establish a complex, multitiered structure, operating in Washington and featuring a twelve-judge Judicial Conduct and Disability Commission, assisted by an Executive Director and an extensive staff, and a special seven-judge Court on Judicial Conduct and Disability empowered to remove any miscreant federal judge below the Supreme Court.<sup>12</sup>

Neither the specific flaws in this arrangement, nor the provisions authorizing the newly created court to impose disciplinary measures short of removal will be discussed here.<sup>13</sup> Rather, this article seeks to demonstrate that the premises underlying the principle of a judicial removal power are rooted in a series of grave misconceptions. Proposals

8. See, e.g., H. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* 189 (1972); J. GOULDEN, *THE BENCHWARMERS* 3-20, 291-347 (1974).

9. A useful review of the legislative history, from the McAdoo bill to the Nunn bill, the immediate predecessor of the currently pending proposal, is given in Battisti, *An Independent Judiciary or an Evanescent Dream?* 25 *CASE W. RES. L. REV.* 711, 728-31 (1975).

10. S. REP. No. 1035, 95th Cong., 2d Sess. (1978). Senators Bayh and Mathias filed dissenting reports. See *id.* at 63, 73.

11. 124 *CONG. REC.* S14,782 (daily ed. Sept. 7, 1978). The Record has since been corrected to include the negative vote of Senator McGovern, originally counted as not voting. See *id.* at S14,918 (daily ed. Sept. 11, 1978).

12. S. 1423, 95th Cong., 2d Sess., S. REP. No. 1035, 95th Cong., 2d Sess. 47-61 (1978). The proposed Commission would be composed of one judge "in regular active service or senior status" from each judicial circuit and one "selected collectively by the judges of the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court." See *id.* § 381(b)(1). The major substantive provision of the Senate bill is that "[a]ny person may file a complaint with the Judicial Conduct and Disability Commission setting forth the condition or conduct of a judge of the United States, alleging that such condition or conduct violates the good behavior standard required by article III, section 1 of the Constitution." *Id.* § 383(a). Conduct violating this standard is further defined to include, "but [not be] limited to, willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, or other conduct prejudicial to the administration of justice that brings the judicial office into disrepute." *Id.* § 388(b).

13. Besides removal or dismissal of the complaint, involuntary retirement or censure could be ordered. See *id.* § 385(d)(1).

## Judicial Independence

like the Senate bill are fatally misguided and pose an ominous threat to the judicial independence so necessary to our form of government. The bill is unconstitutional, unnecessary, and, indeed, counterproductive. Impeachment was the only procedure the Framers allowed for judicial removal, and they deliberately made it unwieldy. Manifold protections against judicial aberrance, including informal peer influence, have already been molded into our system and make change unnecessary. Moreover, to allow any simpler process for judicial removal, even one under the control of judges themselves, would eviscerate the independence of the individuals on the bench and undermine the sense of collegiality so necessary to the work of federal judges.<sup>14</sup>

### I. Judicial Independence and Its Critics

#### A. *The Traditional View*

When the American Bar Association's Special Committee on Standards of Judicial Conduct drafted the *Code of Judicial Conduct*, we decided, after careful consideration, to declare at the outset that "[a]n independent and honorable judiciary is indispensable to justice in our society."<sup>15</sup> Before examining the constitutional and policy arguments about judicial tenure, it is important to recall why the independence

14. This article will focus only on the role of federal judges. The concept behind the state judiciary differs dramatically from that which demanded the creation of the federal courts. This was apparent as early as 1789, when the First Congress decided to establish a federal judiciary beneath the Supreme Court mandated by the Constitution. See Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. Madison argued that in many states the courts were "so dependent on State Legislatures," for their salaries and otherwise, that it would be unwise to leave the application of federal law exclusively to them. 1 ANNALS OF CONG. 844 (Gales & Seaton eds. 1789). For a survey of state practice in selection and tenure of judges at the time of the Constitutional Convention, see Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 138-47.

Even today the state courts are more dependent than the federal judiciary on the good will of legislatures and political parties. Many state judges are popularly elected for limited terms. See, e.g., N.Y. CONST. art. 6, §§ 2, 6, 10, but all federal judges are appointed to serve during good behavior. It stands to reason, therefore, that one cannot profitably compare the state and federal practices for removal of judges from office.

The case of California Superior Court Judge Alfred Gitelson, defeated in his bid for reelection shortly after he ordered busing to desegregate the Los Angeles public school system, is a striking example of how the state system of judicial selection entails an unavoidable loss of independence. Note Gitelson's own comments on the dangers to a judiciary able "to preserve for all people their human rights," L.A. Times, Nov. 5, 1970, at 1, col. 3 & 32, col. 5 and the editorial comment, *Judicial Independence and Politics*, in *id.*, Nov. 10, 1970, § 2, at 6, cols. 1-2. For a survey of state practice for disciplining judges, see Comment, *The Procedures of Judicial Discipline*, 59 MARQ. L. REV. 190 (1976), and, more particularly, Comment, *Selection and Discipline of State Judges in Texas*, 14 HOUS. L. REV. 672 (1977).

15. ABA CODE OF JUDICIAL CONDUCT CANON 1 (1976). This recollection is confirmed by E. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 45 (1973).

of federal judges is such a fundamental postulate of our political system. Adjudication based on the noble precept "equal justice under law" requires impartiality, and impartiality demands freedom from political pressure. This is especially true under a written constitution, guaranteeing for the ages certain individual rights even against the democratically determined actions of the majority, and in our federal system of government, in which the federal courts are the ultimate guarantor of state observance of federal rights.<sup>16</sup> As Justice Frankfurter explained, "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society."<sup>17</sup>

Our legal tradition emphasizes that an independent judiciary is most essential to the protection of democracy and of individual liberty "in dangerous times" when, as Judge William Cranch wrote, it "becomes the duty of the Judiciary calmly to poise the scales of justice, unmoved by the armed power, undisturbed by the clamor of the multitude."<sup>18</sup> Yet our history has demonstrated the fragility of this independence; the "least dangerous branch"<sup>19</sup> has often been the most vulnerable. The low standing of the Supreme Court during the Reconstruction era, when ideological opposition drove it into "ineffable contempt,"<sup>20</sup> is but one example of how even the profound American reverence for the judiciary can be shaken by the pressures of convulsive times.

The independence of our judiciary has survived the popular outcry against its most famous—as well as its most infamous—decisions. But today we must ask whether the role of the courts in our society has so changed that the traditional notion of judicial independence has become outmoded.

### B. *The Contemporary Reconsideration*

The courts have always adjudicated thorny issues in America, but until modern times the most well-known and controversial exercises

16. See Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 510 (1963); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045-46 (1977).

17. *Dennis v. United States*, 341 U.S. 494, 525 (1951) (concurring opinion). Frankfurter continued: "Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence." *Id.*

18. See I C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 303 (1926) (quoting dissenting opinion of Cranch, J., in unnamed case).

19. The original phrase came from Alexander Hamilton in *THE FEDERALIST* No. 78, at 522 (J. Cooke ed. 1961) ("the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution"), and was built into a theory of judicial restraint by the late Professor Bickel. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

20. *C. BOWERS, THE TRAGIC ERA v* (1929). "[N]ever," records Bowers, "has that tribunal so often cringed before the clamor of the mob." *Id.*

## Judicial Independence

of judicial power were negative actions limiting the scope of government.<sup>21</sup> In recent years, the judiciary has often been an accelerator of governmental activity rather than a brake. In the last few decades the courts have given broad construction to affirmative personal rights and manifested an increasing willingness to articulate and implement new ones. The roll call of causes dealt with by the judiciary sounds like a litany of the most vexing questions in current American political history: racial discrimination and segregation,<sup>22</sup> school admissions and affirmative action,<sup>23</sup> busing,<sup>24</sup> free speech and political protest,<sup>25</sup> internal and foreign security,<sup>26</sup> the rights of criminal defendants,<sup>27</sup> church-state relations from prayers in public schools<sup>28</sup> to public funding for parochial schools,<sup>29</sup> legislative reapportionment,<sup>30</sup> obscenity,<sup>31</sup> the draft,<sup>32</sup> abortion,<sup>33</sup> the death penalty,<sup>34</sup> women's rights,<sup>35</sup> and ecology.<sup>36</sup> Moreover, the complex subject matter of modern statutes and Congress's tendency to legislate by exhortatory generality<sup>37</sup> have

21. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure Case), 343 U.S. 579 (1952) (restricting President's inherent executive power); *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled*, *United States v. Darby*, 312 U.S. 100 (1941) (child labor case) (restricting Congress's commerce power); *Lochner v. New York*, 198 U.S. 45 (1905) (striking down state regulation of maximum hours of work).

22. *See, e.g.*, *Runyon v. McCrary*, 427 U.S. 160 (1976) (prohibiting commercially operated, nonsectarian schools from denying admission to black students).

23. *See, e.g.*, *Regents of Univ. of Cal. v. Bakke*, 98 S. Ct. 2733 (1978).

24. *See, e.g.*, *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971).

25. *See, e.g.*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (ordinance prohibiting picketing near school invalid); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Pentagon Papers case).

26. *See, e.g.*, *United States v. United States Dist. Court*, 407 U.S. 297 (1972) (surveillance for domestic security); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (foreign security).

27. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial in state criminal prosecutions); *Mapp v. Ohio*, 367 U.S. 643 (1961) (inadmissibility of illegally obtained evidence).

28. *See, e.g.*, *Engel v. Vitale*, 370 U.S. 421 (1962).

29. *See, e.g.*, *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973).

30. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

31. Perhaps no area of the law has witnessed greater changes in the governing rules than has obscenity. *Compare* *Roth v. United States*, 354 U.S. 476 (1957) (early standards) with *Miller v. California*, 413 U.S. 15 (1973) (current standards).

32. Some of these were among the many vexing cases brought to the federal courts because of the divisions engendered by the Vietnam War. *See, e.g.*, *Welsh v. United States*, 398 U.S. 333 (1970).

33. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973).

34. *See, e.g.*, *Jurek v. Texas*, 428 U.S. 262 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

35. *See, e.g.*, *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

36. *See, e.g.*, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (snail darter case).

37. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1314 (1976); Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243, 247-52 (1978) (noting this congressional tendency in health care legislation).

propelled the courts into what may appear to be an unaccustomed regulatory and quasi-legislative role.<sup>38</sup> Both the pettiest details and the broadest concepts of government have come within the judicial ambit. Ideally, the modern judge should be, in the phrase describing Justice Brandeis, a master of both microscope and telescope.<sup>39</sup>

Moreover, the judge of today cannot retain his earlier passive judicial role. The extraordinary complexity of modern litigation requires him, if his cases are not to linger for years, to exercise a crucial management function. And when the judge decides that relief is warranted, he must often command rather than merely prohibit.<sup>40</sup> The lawsuit does not simply clarify the law and allow the parties to order their affairs in accord with it; often the suit establishes "a complex, on-going regime" subjecting the parties—and even absentees—to continuing judicial oversight.<sup>41</sup> It is not enough for justice to be declared. The judge must assure that justice is done.

Together, these developments—the judge's more comprehensive role in defining the substance of the law, and his more intensive procedural role in implementing it—have confronted judges with novel bureaucratic and administrative functions, such as overseeing schools,<sup>42</sup> men-

38. *But see* p. 687 & note 48 *infra* (courts in past became involved at times in regulating and administering institutions).

39. The metaphor is that of Chief Justice Hughes. *See* A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 629 (1946).

40. *See* O. FISS, *THE CIVIL RIGHTS INJUNCTION* 9 (1978) (civil rights injunctions no longer simply preventive, but often command restructuring of institutions); Chayes, *supra* note 37, at 1284 (judge as "creator and manager of complex forms of ongoing relief" in public law litigation also evident in other fields of law, e.g., antitrust, securities fraud, union governance, and environmental management); Schmitt & Pasterczyk, *Specific Performance Under the Uniform Commercial Code—Will Liberalism Prevail?* 26 *DE PAUL L. REV.* 54, 63-66 (1976) (citing cases under UCC in which specific performance commanded, rather than money damages).

41. Chayes, *supra* note 37, at 1298. Professor Chayes is concerned about the new functions assumed by judges, but he concludes that the judiciary is well suited to its new role in public law litigation and that the assumption of that role is necessary to accomplish justice in an increasingly regulated society. *Id.* at 1307-16.

Senator Moynihan, in his recent Herbert H. Lehman Memorial Lecture, is not so sanguine:

But if the federal courts are going to make law (a legislative function) and enforce law (an executive function)—which is what Chayes's term "the public-law litigation model" implies—they are inevitably going to find themselves in conflict with the legislative and executive branches. In that conflict they will just as ineluctably be led to adopt the techniques of the other two branches in order to prevail in the ensuing conflict . . . They will thus develop a "rigid, multilayered hierarchy of numerous officials" of their own.

D. Moynihan, *An Imperial Presidency Leads to an Imperial Congress Leads to an Imperial Judiciary: The Iron Law of Emulation* 11 (Mar. 28, 1978) (Lehman College Publications No. 13).

42. *See, e.g.,* *Hart v. Community School Bd.*, 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975) (Coney Island schools); *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (Boston schools).

## Judicial Independence

tal hospitals,<sup>43</sup> and prisons.<sup>44</sup> In the Second Circuit last term, *Wolfish v. Levi*<sup>45</sup> presented a challenge by inmates of the new Manhattan Correctional Center to almost all of the facility's policies and practices down to the clothing requirement for inmates.<sup>46</sup> The opinion I wrote for a panel of the court touched on a dozen distinct issues—and many more contentions had already been resolved below.

These developments, of course, do not represent a completely new phenomenon. The evolution of substantive rules and rights is not surprising; since the end of the eighteenth century, judges have explicitly taken account of the social and economic ramifications of common law rules.<sup>47</sup> The principal procedural novelty is not the quality of a court's involvement in particular cases, but the vast increase in the quantity of cases demanding an active judicial role.<sup>48</sup> Formerly they were considered exceptional, but now they seem routine.

Yet, as the judiciary more frequently assumes functions ordinarily associated with the representative branches and bases its decisions on the same criteria used by those divisions, it is a natural tendency to treat and think of judges as political officials. Solicitor General Wade McCree has acutely observed: “[W]hen courts begin to make law wholesale, or if you will, act like legislatures, they quickly come under attack from many sources for their alleged usurpation of power as they appear to exceed the proper role perceived for them in our scheme of

43. See, e.g., *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), discussed in Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

44. See, e.g., *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part and rev'd in part sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977); *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973), *aff'd in part and rev'd in part sub nom. Finney v. Board of Correction*, 505 F.2d 194 (8th Cir. 1974), *on remand sub nom. Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 98 S. Ct. 2565 (1978).

45. 573 F.2d 118 (2d Cir.), *cert. granted sub nom. Bell v. Wolfish*, 99 S. Ct. 76 (1978) (No. 77-1829).

46. *Id.* at 124.

47. See Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974).

48. The increasing use of what Professor Fiss terms the “structural injunction” reflects a modern reemphasis and development of the courts' equity jurisdiction. O. Fiss, *supra* note 40, at 9-10. A structural injunction is one that “[seeks] to effectuate the reform of a social institution.” *Id.* at 9. It is not without historical antecedents. In the late nineteenth century, equity courts were involved in reorganizing and running the railroads. *Id.* at 9-10; see Cover & Aleinikoff, *supra* note 16, at 1038. See generally Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change*, 1976 Wis. L. Rev. 1161, 1167-72. Fiss also points to the more recent antitrust divestiture cases as historical antecedents of the structural injunction developed in civil rights cases. See O. Fiss, *supra* note 40, at 10 & n.3 (citing *United States v. E.I. Du Pont De Nemours & Co.*, 366 U.S. 316, 326-35 (1961)); O. Fiss, *INJUNCTIONS* 325-414 (1972) (citing history of meat packers decree, beginning with *Swift & Co. v. United States*, 276 U.S. 311 (1928)).

government."<sup>49</sup> But despite the profound evolution in the role of the judiciary, its independence remains both essential and proper because that role continues to be a judicial one. In each important aspect of the litigation, traditional constraints continue to apply, even if in somewhat evolved form.

First, judges are not free to search out issues for resolution. If the rules of standing have lost much of their rigidity, courts are no less bound by the constitutional limitation of their jurisdiction to "cases or controversies."<sup>50</sup> Access to the federal courts has been made easier for those aggrieved—and access has been created by statute as well as by case law—but an issue is adjudicated only if and when presented by a litigant in a live controversy.

Second, judges are not free in deciding issues to give untrammelled effect to their personal preferences. Even on the most novel issues of law, the decision does not result from intuition or judicial idiosyncrasy. "We do not sit like a kadi under a tree," declared Justice Frankfurter, "dispensing justice according to considerations of individual expediency."<sup>51</sup>

That the process of judicial decisionmaking is not idiosyncratic, of course, does not imply that it is mechanical. Assuming that "conscientious, able and independent men" are chosen for the bench, one must, in the words of Charles Evans Hughes, examine a judge's "bedrock of conviction as to what are conceived to be fundamental principles of government and social relations" to predict how he will decide.<sup>52</sup> There are variations in judges' points of departure and processes of reasoning, but they are variations on a common theme. They arise in the fixed context of interpreting and implementing the commands of the Constitution, statutes, and precedents.

These first two limitations were eloquently captured by Benjamin Cardozo: "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at

49. W. McCree, Address to the Annual Dinner Meeting of the Judicial Administration Division of the American Bar Association 2 (typescript of speech given Aug. 7, 1978); see note 41 *supra* (quoting Sen. Moynihan).

50. U.S. CONST. art. III, § 2, cl. 1; see *Muskrat v. United States*, 219 U.S. 346 (1911).

51. *Terminiello v. Chicago*, 337 U.S. 1, 11 (1949) (concurring opinion).

It is interesting that Justice Holmes, one of the foremost "legal realists," see, e.g., O.W. HOLMES, *THE COMMON LAW* xii, xix, 5 (M. Howe ed. 1963), was also one of the leading proponents of judicial self-restraint, see, e.g., *Baldwin v. Missouri*, 281 U.S. 586, 595-96 (1930) (dissenting opinion); *Lochner v. New York*, 198 U.S. 45, 74-76 (1905) (dissenting opinion). In *Lochner*, Holmes declared, "If it were a question whether I agreed with [the economic theory upon which the case was decided], I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty . . ." *Id.* at 75.

52. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 49 (1928).

## Judicial Independence

will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.”<sup>53</sup>

Third, although a decree issued by a judge may substantially affect persons not party to the litigation,<sup>54</sup> it is nevertheless formulated to remedy what has been adjudicated to be specific legal injury. When we grant relief to a party—even the most far-reaching and detailed injunctive relief—we do so because we are compelled to. To deny that relief would be to turn our backs on what our learning, our consideration, and our deepest convictions persuade us is a right under the law and the Constitution. In a real sense, we do what we must.

In this connection, it is important to remember the rationale of the most important case in American judicial history, *Marbury v. Madison*.<sup>55</sup> There Chief Justice Marshall asserted the power of judicial review as a natural consequence of the judicial function—to relieve parties aggrieved under the law. Because a court must determine the application of the law to the particular case before it, he declared, “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>56</sup> And, when a practice of the executive or a statute of the legislature is in conflict with the command of the Constitution, it is clearly the latter that must be heeded. Unless the question of constitutionality has been committed to another branch, the judiciary must decide it, and it must then give full effect to that decision.<sup>57</sup>

Only the “considered judgment”<sup>58</sup> of the courts can guarantee our constitutional liberties, and only in an atmosphere of judicial independence can that judgment thrive. As we perceive an increasing breadth to our fundamental, affirmative rights, and so rely increasingly on the courts for their development and protection, the process does not become less judicial. And it is thus more crucial than ever that judicial independence be preserved. The commitment to the rule of law transcends the diversity in style and substance evident in judicial opinions; it is the principal justification for according judges their independence.

The decisions of such contemporary judges as Frank Johnson of Alabama, upholding against vitriolic opposition the rights of disad-

53. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921).

54. See O. FISS, *supra* note 40, at 14, 17 (beneficiaries of injunction may not be identifiable individuals, but social group; addressees may be anyone with actual notice of decree); CHAYES, *supra* note 37, at 1284 (relief granted by judge in typical public law litigation has “widespread effects on persons not before the court”).

55. 5 U.S. (1 Cranch) 137 (1803).

56. *Id.* at 177.

57. *Id.* at 177-78.

58. The phrase is from *United States v. Butler*, 297 U.S. 1, 62-63 (1936).

vantaged minorities,<sup>59</sup> provide illustrations as impressive as any in history of the importance of independence. And the billboards that demanded the impeachment of Chief Justice Warren, together with the efforts to impeach Justice Douglas, warn us that the stature of the judiciary remains in constant danger. Nor have the onslaughts against the entire Supreme Court waned. The attempts during Reconstruction by Northern radicals to limit the Court's appellate jurisdiction<sup>60</sup> were echoed after the *Brown* case by the efforts of Southern conservatives to achieve the same goal.<sup>61</sup>

Criticism is not only inevitable but healthy; we would not eliminate it even if we could. But the modern judge, no less than his predecessors, must act independently if he is to perform the function we demand of him, and he must feel secure that such action will not lead to his own downfall.

## II. Protecting Judicial Independence: Security of Tenure

The question, then, is how the judge's independence may be protected. In principle, the answer is clear: the judge must be assured unequivocally that his legal decisions, no matter how unpopular, will not threaten his term of office and that the only indignity he may suffer for error is reversal. In short, he must be certain that disagreeable views will not lead to personal punishment. Judges should be removable only for the most serious offenses, and then only by an especially cautious procedure. It is essential to remember that provisions protecting judicial tenure were "not created for the benefit of the judges, but for the benefit of the judged."<sup>62</sup>

### A. *The Constitutional Guarantees*

The Framers of the Constitution were well aware of the encroachments on judicial independence that would surely follow if secure tenure were not fixed for the federal judiciary. Indeed, one of the

59. *E.g.*, *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

60. The notorious Reconstruction episode, which culminated in the celebrated case of *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869), is related in 2 C. WARREN, *supra* note 18, at 464-88, and I C. FAIRMAN, *RECONSTRUCTION AND REUNION 1864-88*, at 433-514 (1971) (6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Oliver Wendell Holmes Devise, P. Freund ed. 1971)). Perhaps the greatest threat to the Court's independence came in 1937, when Franklin D. Roosevelt very nearly succeeded in his attempt to pack the bench of "The Nine Old Men." See generally L. BAKER, *BACK TO BACK* (1967) (describing FDR's battle with Supreme Court).

61. See *N.Y. Times*, May 14, 1956, at 25, col. 1; *id.*, May 15, 1956, at 1, col. 3 & 26, col. 8.

62. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 698 (1969).

## Judicial Independence

grievances against George III listed in the Declaration of Independence was: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Our Founding Fathers were determined that the judiciary of the new Republic would not be so feeble. In Article III of the new Constitution, therefore, they provided that the salaries of federal judges must not be diminished during their tenure and that they should continue in office "during good Behaviour."<sup>63</sup>

The difficulty is that neither "good Behaviour" nor the procedure for determining its breach is anywhere explicitly defined in Article III—or, in fact, anywhere else in the Constitution. Article II, section 4, however, provides that "all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."<sup>64</sup> It has long been settled that federal judges are "Civil Officers" within the meaning of this clause.<sup>65</sup> Indeed, judges have been removed by impeachment ever since the first decade of the nineteenth century.<sup>66</sup>

And yet it has often been argued, and with mounting vehemence in recent years, that impeachment is not the exclusive method for judicial removal.<sup>67</sup> The currency of this theory is surprising, to say the least, in view of the Supreme Court's statement in *United States ex rel. Toth v. Quarles*<sup>68</sup> in 1955 that Article III courts are "presided over by judges appointed for life, subject only to removal by impeachment."<sup>69</sup> But those who lack faith in the impeachment process argue that, since Article III does not explicitly refer to Article II's impeachment clause, there might be transgressions of the good behavior standard that do not rise to the level of impeachable offenses.<sup>70</sup> Thus, scholars such as

63. U.S. CONST. art. III, § 1.

64. *Id.* art. II, § 4.

65. See, e.g., *Shurtleff v. United States*, 189 U.S. 311, 316 (1903) (dictum); *United States v. Isaacs*, 493 F.2d 1124, 1142 (7th Cir.), cert. denied, 417 U.S. 976 (1974) (dictum).

66. See Thompson & Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C.L. REV. 87 (1970) (describing impeachment episodes).

67. See note 70 *infra*.

68. 350 U.S. 11 (1955).

69. *Id.* at 16. In *Toth*, the Court held that a civilian ex-soldier was entitled to be tried by an Article III court (rather than a military court created under Article I powers) for crimes allegedly committed during his military service. Part of the underlying rationale of the decision was the difference in independence between Article III courts and military tribunals, as exemplified by the difference in the judges' tenure. See *id.* at 17.

70. The argument was made on the floor of the House of Representatives as early as 1801, see Kurland, *supra* note 62, at 674, but the first modern scholarly presentation of it was by Professor Shartel in his article, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution* (pts. 1-3), 28 MICH. L. REV. 485, 723, 870 (1930). Shartel's position has been supported by, among others, Raoul Berger, see R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 122-80 (1973), and the Senate Judiciary Committee, see S. REP. No. 1035, *supra* note 10, at 5-11.

Raoul Berger contend, it is constitutionally permissible to establish a removal procedure other than impeachment for judges whose conduct falls in the substantive gap between "high Crimes and Misdemeanors" and violations of "good Behaviour."<sup>71</sup>

The durability of this argument cannot be ascribed to any logical merit. The very absence of a removal provision in Article III indicates that the Framers must have implied a reference to the impeachment clauses and thereby intended that bad behavior be dealt with exclusively by impeachment. Otherwise, the silence of Article III would leave no restrictions whatsoever on the identity of the persons to whom Congress might delegate the power of removal. Even the President—or a lesser officer—under this interpretation might be authorized to remove a judge on a finding of malconduct.<sup>72</sup> Of course, it is perfectly fitting for the President to remove his own executive subordinates without invoking the impeachment process—indeed, as the *Myers*<sup>73</sup> case shows, his removal power over certain officials cannot be expunged.<sup>74</sup> A simplified process may even be applied against the "legislative" judges whose very offices are created by Congress in the exercise of its general authority under Article I.<sup>75</sup> But if such procedures for removal

71. See note 70 *supra* (citing sources).

72. The danger of legislative control over the judicial branch is not necessarily diminished by a congressional delegation of its removal power to judges, since the latter might be handpicked. See Otis, *A Proposed Tribunal: Is it Constitutional?* 7 U. KAN. CITY L. REV. 3, 29 (1938). Judge Otis also effectively anticipated and rebutted Berger's argument, see R. BERGER, *supra* note 70, at 174, that Congress has power under the "necessary and proper" clause to devise appropriate means for judges to enforce the good behavior standard. See Otis, *supra*, at 34-35.

73. *Myers v. United States*, 272 U.S. 52 (1926).

74. *Id.* at 176. *Myers* held that an Act of Congress requiring the President to procure the advice and consent of the Senate before dismissing a postmaster unconstitutionally interfered with the executive power. The *Myers* Court relied heavily on the debate in the First Congress recognizing that the power to remove executive subordinates is vested in the President alone. See *id.* at 174-76; cf. *Parsons v. United States*, 167 U.S. 324 (1897) (presidential discretion to remove district attorney when removal is in public good). James Madison, the leader in the congressional debate as well as in the Constitutional Convention, stated that impeachment could not be the exclusive means for removing subordinate officers, but added that this "might be the case" "as applied to Judges," 1 ANNALS OF CONG. 389 (Gales & Seaton eds. 1789), as did his colleague Elias Boudinot, *id.* at 390-91. See Note, *Judicial Disability and the Good Behavior Clause*, 85 YALE L.J. 706, 716 (1976). "Throughout the debate the speakers contrasted executive officials with judges who held office during good behavior . . .")

75. The distinction between Article I "legislative" judges and Article III "constitutional" judges, drawn by Chief Justice Marshall in *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828), clarifies the argument often cited by advocates of alternatives to impeachment that "courts can exercise jurisdiction to declare judicial conduct and other offices forfeit for misconduct or neglect of duty," Shartel, *supra* note 70, at 885. Professor Shartel's assertion was based on the fact that Attorney General Charles Lee advised the House of Representatives in 1796 that action against Judge George Turner might be taken by indictment or "information" as well as by impeachment. But Turner's judgeship was created by Congress's assertion of its Article I powers in the Organic Law of

## Judicial Independence

are appropriate for the judges in whom Article III vests the judicial power of the United States, then the independence of this entirely different class of officers is a snare and a delusion.

The logical flaws in Berger's gap theory run deeper. Article II allows the cumbersome tool of impeachment to be wielded against judges, but only as to those who have committed the most serious treachery or corruption. Moreover, Article I limits the procedures and consequences of impeachment; only the House may impeach, only the Senate by a two-thirds vote may convict,<sup>76</sup> and the sole penalties are removal and disqualification from office. How, then, can one reasonably contend that those precise penalties may be imposed for a lesser offense, and by a lesser tribunal acting under a less stringent procedure?

Confronted by the possibility of this anomaly, the proponents of easy judicial removal are forced to contend that Article III contemplated the development of alternatives to impeachment not only for actions falling in the perceived gap between "good Behaviour" and "high Crimes and Misdemeanors," but for *all* transgressions against the "good Behaviour" standard—including impeachable offenses. In thus attempting to rescue their hypothesis, however, the gap theorists only compound their troublesome dilemma.<sup>77</sup> They are driven to the proposition that the impeachment process may be ignored altogether in removing federal judges. But how, one wonders, can they ignore two hundred years of history? They will have difficulty explaining Alexander Hamilton's statement that trial for removal from office on the grave charges specified by the impeachment clauses must be held before

the Northwest Territory. See 3 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 981-83 (1907). He was therefore a legislative rather than a constitutional judge. The two classes of judges must be treated differently with regard to their tenure. See *Myers v. United States*, 272 U.S. 52, 154-58 (1926). The crucial factor is whether the tenure of an officer is determined by the Constitution. See *Shurtleff v. United States*, 189 U.S. 311, 316 (1903) (dictum) (life tenure provided for federal judicial officers, but not for territorial judges); *McAllister v. United States*, 141 U.S. 174, 187-88 (1891) (tenure of Article III judges distinguished from that of territorial judges). Thus, in *Burton v. United States*, 202 U.S. 344 (1906), the Court carefully construed a statute purporting to render any senator convicted of taking a bribe "forever hereafter incapable" of holding any office under the United States. The statute, the Court said, did not of its own force remove Burton from office, for that remained the sole prerogative of the Senate under Article I, § 5. *Id.* at 369-70.

76. The fact that Article I gave the Houses of Congress the sole powers to impeach and to try impeachments, when other options such as trial by the Supreme Court were considered and rejected, see *Otis, supra* note 72, at 29-30 & nn.12-13, vitiates the argument sometimes made that the impeachment clauses were meant as limitations only on Congress, see R. BERGER, *supra* note 70, at 153-54; *Otis, supra* note 72, at 21-32; *Shartel, supra* note 70, at 894 (Congress has "a concurrent, not an exclusive, power of removal"). Rather, the power of removal was deliberately granted to the legislature in its historic role as the great and solemn public tribunal of the nation. See THE FEDERALIST No. 65, *supra* note 19, at 440-41.

77. *Otis, supra* note 72, at 33-34.

the Senate, because of "[t]he awful discretion, which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community."<sup>78</sup> And they will have problems in accounting for the nine impeachments of judges that have already occurred. The Jeffersonian Congress, so eager to remove Federalists from the bench, wasted much effort in the cases of John Pickering and Samuel Chase<sup>79</sup> if, instead of twice running the gantlet of impeachment, it might have utilized a more streamlined and far simpler procedure to accomplish the same result.

Led by Berger, the gap theorists have reached across the ocean in an attempt to bolster their position. Judicial offices were granted in England by royal letters patent, Berger points out, and good behavior was a condition of the tenure.<sup>80</sup> Breach of such a condition resulted in forfeiture of the office, and the judicial writ of *scire facias* was then available to repeal the patent.<sup>81</sup> English judges were therefore subject to judicial removal. Since the constitutional draftsmen chose the same substantive term—"good Behaviour"—in limiting the tenure of Article III judges, and since they employed "a common law term of ascertainable meaning, with no indication that they were employing it in a new and different sense," Berger concludes that they implicitly adopted the judicial enforcement machinery that traditionally went along with it.<sup>82</sup>

The most daring aspect of this argument is Berger's hypothesis that by adopting the substantive standard of good behavior the Framers implied the availability of a particular procedural device, *scire facias*. But the Framers never felt the need to mention *scire facias* in their debates or to refer to it in the Constitution itself. Berger thus bears the burden of proving that they believed the writ was so inextricably intertwined with judicial tenure during good behavior that its use was implicit in all they did. It is a burden he cannot carry.

Indeed, Berger himself recognizes the first gaping hole in his armor: the fact that "there is no English case wherein a judge comparable to a federal judge was removed in a judicial proceeding."<sup>83</sup> But, he responds, the *scire facias* procedure was clearly used to oust other of-

78. THE FEDERALIST No. 65, *supra* note 19, at 441-42.

79. See p. 705 *infra*.

80. R. BERGER, *supra* note 70, at 125-26.

81. *Scire facias* was a prerogative judicial writ issued to revoke or repeal grants or charters of the Crown. 2 A. KEITH, ANSON'S LAW AND CUSTOM OF THE CONSTITUTION (pt. 1) 235-36 (4th ed. 1935).

82. R. BERGER, *supra* note 70, at 131 (footnote omitted).

83. *Id.* at 127 (footnote omitted). The *scire facias* cases are analyzed in Otis, *supra* note 72, at 49 app. and Ziskind, *supra* note 14, at 153-54 app.

## Judicial Independence

ficers who enjoyed good behavior tenure, and the fact “that there is no precise precedent for application of that procedure to judges” should be held of little account, for the keystone of the common law is the extension of consistent principles when analogous circumstances arise.<sup>84</sup> “Impeccable conduct, not atrophy of process,” he suggests, may explain the absence of any attempts to remove an English judge by *scire facias* in over two and a half centuries.<sup>85</sup>

The suggestion is rather surprising in light of the assertion by Thomas Denman, later a well-known Lord Justice and one of the barristers quoted by Berger to prove the availability of *scire facias* for judicial removal,<sup>86</sup> that “[t]he misconduct of Judges had frequently come under the consideration of Parliament.”<sup>87</sup> Moreover, judges cannot, as Berger posits,<sup>88</sup> be easily analogized to inferior officers. A simple removal procedure is appropriate for such officers because it is not necessary that they have the independence expected of judges; indeed, it is more often essential that such inferior officers be accountable to their superiors and to the public.<sup>89</sup> Furthermore, all conceptions of judicial hierarchy would be toppled if the tenure of any judge could be ended by any other judge issuing a writ, an unavoidable result if a judge’s tenure were terminable by a finding of bad behavior in a *scire facias* proceeding.

It is not surprising, then, that Berger’s evidence does not prove his assertion that *scire facias*, though never used for the purpose, was available to remove English judges. He cites three cases of judges who claimed that their offices could be forfeited by *scire facias* proceedings.<sup>90</sup> But all three made the argument only because they were then fending off removal by another procedure that, they attempted to demonstrate, was improper. It is weak evidence indeed that a judge endangered in one forum pleads that another one is appropriate.<sup>91</sup>

Berger then cites us to an opinion rendered in 1753 by Attorney General Ryder and Solicitor General Murray, later Lord Mansfield,

84. R. BERGER, *supra* note 70, at 128.

85. *Id.* at 130 n.42; see Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 HARV. L. REV. 330, 335 & n.38 (1937) (no attempt to use *scire facias* since 1700).

86. R. BERGER, *supra* note 70, at 130 n.40.

87. 24 PARL. DEB. (2d ser.) 965 (1830).

88. R. BERGER, *supra* note 70, at 127-28.

89. See *Myers v. United States*, 272 U.S. 52, 121-22 (1926).

90. The three judges were Sir John Walter, Sir John Archer, and Sir Jonah Barrington. R. BERGER, *supra* note 70, at 128-29, 130 n.40.

91. Particularly in Barrington’s case it was clear that the judge, through his counsel, Denman, was attempting, in the words of the Solicitor General, “to throw every obstacle in the way of a speedy decision.” 24 PARL. DEB. (2d ser.) 966 (1830).

that the commission of a colonial judge mistakenly appointed during good behavior "cannot be revoked without misbehaviour." That Ryder and Murray said "revoked" rather than "impeached" is significant, Berger argues, and "it is highly improbable that they confused 'misbehavior,' the classic *scire facias* formula, with impeachment, which proceeds for 'high crimes and misdemeanors.'"<sup>92</sup> This argument assumes the very point Berger is trying to prove: that the substantive standard of good behavior carried with it the procedural implication of *scire facias*. And the argument is mystifying as well. No one contends that impeachment was the only method for ousting a miscreant judge in England, for in 1700 the Act of Settlement<sup>93</sup> had explicitly provided for removal by the Crown upon the address of both Houses of Parliament.<sup>94</sup>

92. R. BERGER, *supra* note 70, at 129.

93. Act of Settlement, 1700, 12 & 13 Will. 3, c. 2.

94. The statute provided that "Judges Commissions be made *Quandiu se bene gesserint* [during good behavior], and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them." *Id.* § 3. According to Maitland, the statute attempted to prevent the servility to the Crown that had characterized the judiciary serving at the pleasure of the Stuart kings. See F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 312 (1908). Under the Act, the monarch was no longer empowered to remove judges at will, but only upon conviction or address of Parliament. *Id.* at 313. Thus, the address procedure, as a limitation on the power of the monarch to remove disfavored judges, stands in contrast to impeachment, which allowed Parliament to remove the King's favorites. See R. BERGER, *supra* note 70, at 26. Unlike impeachment, which required a trial and bore potentially heavy penalties, address was merely a petition to the Crown for the removal of an objectionable judge. See note 115 *infra* (quoting Edmund Burke); A. BRADLEY, WADE & PHILLIPS'S *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 316-17 (9th ed. 1977).

Impeachment, as Berger shows, could only be predicated on a claim of a serious offense. See R. BERGER, *supra* note 70, at 53-78. Berger argues that removal upon address, by contrast, was not conditioned on misbehavior; the provision for address was thus a qualification, rather than a consequence of the good behavior tenure. See *id.* at 151 n.131.

If Berger were correct it would follow that the good behavior standard was implicitly understood to relate to a common law removal procedure, presumably that of *scire facias*. But this does not seem to be the most persuasive interpretation of the statute, at least not that which prevailed by the middle of the eighteenth century. In 1760 Parliament repeated the provisions of the Act of Settlement in a new statute, 1 Geo. 3, c. 23 (1760), designed to ensure the continuance of judicial tenure despite the demise of the monarch. The elaborate preamble to that statute enumerated the benefits incident upon "the Independency and Uprightness of Judges" with the consequent desirability of making "further Provision for continuing Judges in the Enjoyment of their Offices during their good Behaviour." Neither judicial "independency" nor good behavior tenure could be regarded as more than hollow and pious hopes if a judge could be removed at any time at the whim of Crown and Parliament. Berger's attempt to invoke the 1760 statute in aid of his construction of the Act of Settlement, see R. BERGER, *supra* note 70, at 151 n.131, thus backfires. His argument is based on the clause of the later statute that read "Provided always . . . That it may be lawful for his Majesty . . . to remove any Judge or Judges upon the Address of both Houses of Parliament." 1 Geo. 3, c. 23, § 2 (1760). But "provided always" was standard language in that period for statutory provisos and indicated not an exception but a further elucidation, see, e.g., *id.* c. 7, §§ 8, 17, 25, 26, 34,

## Judicial Independence

The most Berger can demonstrate is that there was total confusion in England as to the practices available for judicial removal. One example is Lord Chancellor Erskine's statement in the House of Lords in 1806 opposing the use of address to remove an Irish judge. Would it not be wiser, he asked, "to let the guilt or innocence of the honourable judge be decided by a jury upon a *scire facias* to repeal the patent by which he held his office?"<sup>95</sup> Berger excises the words "by a jury" in reporting this statement<sup>96</sup> because they indicate Erskine's confusion about the nature of *scire facias*. The writ was issuable in a civil proceeding, but, as Erskine's complete speech makes clear, he was discussing the procedures employed in a criminal trial under the "penal law."<sup>97</sup> Indeed, the entire debate demonstrates that their Lordships were uncertain about the most basic mechanics of removing a judge.<sup>98</sup>

Even the most eminent students of English constitutional law have not been able to avoid this uncertainty. Berger relies heavily on his reading of the great constitutional historian W.S. Holdsworth.<sup>99</sup> Not surprisingly, though, he does not quote Holdsworth, for that would undermine his case. Holdsworth merely wrote that judges "may, it is said," be removed by several procedures other than address: "either by *scire facias* . . . , criminal information, or impeachment, or by the exercise of the inquisitorial and judicial jurisdiction vested in the House of Lords."<sup>100</sup> Holdsworth's qualified statement of this view indicates that he was not vouching for its truth—and with good reason.

and the phrase "any Judge" indicates only that any judge was subject to removal by address, not that judges could be removed by address for any reason.

Later codifications, too, indicate that, whatever had been the intention of the 1701 Parliament, its successors did not believe that it had intended to allow a common law removal procedure. Thus, the Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 49, § 12(1), provided that judges of the High Court "shall hold their offices during good behaviour subject to a power of removal . . . on an address presented to His Majesty by both Houses of Parliament." Two English authorities (one an Attorney General) have interpreted this clause as providing that a High Court judge "is only removable on an address to the Crown." Inskip & Bridgman, *Courts*, in 8 HAILSHAM, HALSBURY'S LAWS OF ENGLAND ¶ 1299, at 590 (2d ed. 1930); see Lawson & Davies, *Constitutional Law*, in 8 HAILSHAM, HALSBURY'S LAWS OF ENGLAND ¶ 813, at 537 n.7 (4th ed. 1974) (calling address "the only practical way of removing judges of the Supreme Court").

95. 7 PARL. DEB. (1st ser.) 769 (1806).

96. R. BERGER, *supra* note 70, at 130.

97. 7 PARL. DEB. (1st ser.) 768 (1806).

98. Indeed, almost the entire debate in the House of Lords centered on the question whether the Lords could make an address before the Commons. And their Lordships displayed a marked lack of certainty as to the consequences of their refusal to vote an address. *Id.* at 755-71.

99. R. BERGER, *supra* note 70, at 130 & n.42, 142, 151.

100. Holdsworth, *Constitutional Law*, in 6 HAILSHAM, HALSBURY'S LAW OF ENGLAND ¶ 783, at 609 (2d ed. 1932). It is significant that in the latest edition, revised by new authors, the sentence otherwise repeating Holdsworth's words omits the reference to *scire facias*. See Lawson & Davies, *supra* note 94, ¶ 1107, at 680.

Except for the mention of address, it was lifted almost verbatim from his only source on the point: Denman's petition in the House of Lords for an accused judge, Sir Jonah Barrington.<sup>101</sup> Holdsworth even adopted Denman's apparently unprecedented language on the removal power of the House of Lords.<sup>102</sup>

Holdsworth's caution is well founded, for other eminent scholars appear to differ on the point.<sup>103</sup> Most, however, seem to believe that the Act of Settlement did not allow judicial removal by *scire facias*. Berger's assertion to the contrary is based on a highly selective reading of the texts.<sup>104</sup>

It seems unlikely, then, that at the time of our Constitutional Convention an English judge comparable to a federal judge could have been removed by *scire facias* proceedings. That English judges themselves, as well as modern scholars, have been confounded by the entire subject of judicial removal is convincing evidence that the Framers did not silently imply the availability of that unused, unmentioned procedure when they adopted the simple words "good Behaviour."

Berger's fallback position is that, whatever procedural remedies the good behavior standard implied in England, the standard clearly did not draw the same demarcation as the "high Crimes and Misdemeanors" test that had long been used for impeachment. Thus, he contends, by use of two terms of art the Framers indicated that judges could be removed in certain cases in which impeachment would not lie; it must therefore be possible to create an alternative removal procedure.<sup>105</sup>

Once more, however, Berger is forced to concede the weakness in his own position, for he admits that "[t]he early law does not define 'misbehavior' in so many words."<sup>106</sup> Indeed, he presents weighty evidence

101. 62 H.L. JOUR. 602 (1830).

102. See Holdsworth, *supra* note 100. It appears evident that Denman used this unusual verbiage in a vain attempt to persuade the Lords not to employ the simple address procedure to remove his client. See note 91 *supra*.

103. Compare F. MAITLAND, *supra* note 94, at 312-13 (criminal conviction and address are exclusive procedures for removing English judges; *scire facias* is not available) with McIlwain, *The Tenure of English Judges*, 7 AM. POLITICAL SCI. REV. 217, 225 (1913) (English judges may be removed by *scire facias*, address, or impeachment).

104. In addition to Holdsworth, Berger also erroneously relies on H. BROOM, CONSTITUTIONAL LAW VIEWED IN RELATION TO THE COMMON LAW (London 1866). See R. BERGER, *supra* note 70, at 130 n.42. Broom simply stated that the "judges of our inferior courts," who had been placed "under the general supervision of the Queen's Bench," might be removed at common law or by statute for misbehavior. H. BROOM, *supra*, at 790-91. Broom said of judges generally, however, that they "are only removable on the address of Parliament." *Id.* at 789. This distinction in tenure between the superior judges (those of the High Court and the Court of Appeal) and the lower ranks of the judiciary is also emphasized in H. WADE, ADMINISTRATIVE LAW 71-72 (4th ed. 1977), and in *Terrell v. Secretary of State for the Colonies*, [1953] 2 All E.R. 490, 494-95 (Q.B.).

105. R. BERGER, *supra* note 70, at 131-33.

106. *Id.* at 160.

## Judicial Independence

that “[m]isdemean’ and ‘misbehave’ were sometimes interchangeable terms.”<sup>107</sup> Nevertheless, he argues, the fact that the terms might have been interchangeable “for purposes of forfeiture” does not indicate that they were equivalents “for purposes of impeachment.”<sup>108</sup> English impeachments, he points out, were never grounded on breaches of good behavior but only on “high treason” or “high crimes and misdemeanors.”<sup>109</sup>

But since “misbehavior” and “misdemeanor” were often used synonymously, Berger bears the onus of proving that the Framers regarded it as clear that the substantive “good Behaviour” standard must refer to a removal procedure other than impeachment. Not only does he fail once more to carry his burden, but the evidence points unmistakably in the opposite direction. The Framers believed that the tenure of judges should be established in terms of good behavior and the remedy for a breach should be impeachment. In an essay published in 1776 and distributed widely in the South,<sup>110</sup> John Adams, a prominent lawyer, declared: “The judges . . . should hold estates for life in their offices; or, in other words, their commissions should be during good behavior. . . . For misbehavior, the grand inquest of the colony, the house of representatives, should impeach them before the governor and council . . . .”<sup>111</sup>

Similarly, the constitution drafted for Massachusetts two years later would have vested in the state house of representatives “the power of impeaching all officers of the State for misconduct in their respective offices.”<sup>112</sup> When the citizens of Essex County met to consider the proposed constitution, they declared, in rejecting it and in formulating the principles properly governing the judicial power, that all judicial officers should “be removable only for misbehaviour. Let the senate be the judge of that misbehaviour, on impeachment of the house.”<sup>113</sup> The constitutions of other states also indicate that the lawyers of the

107. *Id.* at 161.

108. *Id.* (emphasis deleted).

109. *Id.* at 162.

110. Ziskind, *supra* note 14, at 143.

111. J. ADAMS, *Thoughts on Government*, in 4 THE WORKS OF JOHN ADAMS 189, 198 (C. Adams ed. 1851). These words were quoted verbatim, and apparently without attribution, in a letter by Thomas Jefferson the same year. See Letter from Thomas Jefferson to George Wythe (July 1776), reprinted in 2 THE WRITINGS OF THOMAS JEFFERSON 59-60 (P. Ford ed. 1893). The letter was revealed with great delight by Federalists, 2 THE BALANCE, AND COLUMBIAN REPOSITORY (Hudson, N.Y.) 146, at col. 1 (1803), when, as President, Jefferson's regard for an independent judiciary deteriorated.

112. Massachusetts Draft Constitution of 1778 art. 20, reprinted in THE POPULAR SOURCES OF POLITICAL AUTHORITY 198 (O. Handlin & M. Handlin eds. 1966) (later rejected in popular referendum).

113. The Essex Result (1778), reprinted in THE POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note 112, at 364.

new republic regarded impeachment as an appropriate remedy against judges enjoying tenure during "good Behaviour."<sup>114</sup> Therefore, it is clearly incorrect to argue that in adopting that substantive standard, the Framers must have had in mind a removal procedure other than impeachment.

The American draftsmen were not concerned with whether tenure during good behavior had taken on a technical meaning in England, where an offense could be sufficient for simple removal by address and yet not sufficiently grave to invoke the severe additional penalties of impeachment.<sup>115</sup> Judicial tenure during good behavior was widely adopted in America not because it indicated the possibilities of unspoken methods of removal but, as the Adams statement<sup>116</sup> demonstrates, because it was this formulation that had guaranteed English judges life tenure since the beginning of the century. Denial to the colonies of the benefits of an independent judiciary enjoyed in England was one of the grievances that led to the Revolution.<sup>117</sup> It was thus only natural that the constitutions of the new republic borrowed the description of tenure from the mother country.

Nor is it surprising that, from the beginning of their deliberations, the delegates to the federal Constitutional Convention assumed that federal judges should sit during good behavior. Indeed, in its only substantial debate on the question of judicial tenure, the Convention manifested an unmistakable intention to make judicial removal even more difficult than in England.<sup>118</sup> The Framers never explicitly dis-

114. See THE FEDERALIST No. 79 (A. Hamilton) (discussing impeachment procedure in New York constitution); Ziskind, *supra* note 14, at 139-44 (discussing early Delaware, New York, North Carolina, and Virginia constitutions).

115. The English distinction is demonstrated by Burke, who is partially quoted in R. BERGER, *supra* note 70, at 151 n.132:

We may, when we see cause of complaint, administer a remedy; it is in our choice by an address to remove an improper judge, by impeachment before the peers to pursue to destruction a corrupt judge, or by bill to assert, to explain, to enforce, or to reform the law, just as the occasion and necessity of the case shall guide us.

1 SPEECHES OF EDMUND BURKE 80-81 (London 1816) (from speech in House of Commons on powers of juries in prosecutions for libels).

116. See p. 699 *supra*. Similarly, Hamilton wrote: "The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government." THE FEDERALIST No. 78, *supra* note 19, at 522; see Note, *supra* note 74, at 718.

117. See pp. 690-91 *supra*.

118. John Dickinson of Pennsylvania moved to amend the judiciary article to provide for removal of federal judges, in effect, by joint address, but he encountered vigorous opposition. That such a procedure would be more dangerous in the United States than in England was asserted by John Rutledge and James Wilson, the former because the Supreme Court would be called on to judge between the United States and the particular states, the latter because the House of Lords and the House of Commons would be less

## Judicial Independence

cussed how breaches of good behavior were to be determined, but the explanation by Gouverneur Morris erases doubt that impeachment was the intended remedy:

Misbehaviour is not a term known in our law; the idea is expressed by the word misdemeanor; which word is in the clause respecting impeachments. Taking, therefore, the two together, and speaking plain old English, the Constitution says: "The judges shall hold their offices so long as they demean themselves well; but if they shall misdemean, if they shall, on impeachment, be convicted of misdemeanor, they shall be removed."<sup>119</sup>

Berger's answer to this striking quotation is that Morris was incorrect in claiming that the term misbehavior was unknown to the American law, because two of the early state constitutions expressly made misbehavior triable.<sup>120</sup> The response is inadequate for two reasons. Whether Morris was correct in describing the prior status of American law is irrelevant. Morris's statement is highly significant because, as the most important member of the Committee on Style and Revision,<sup>121</sup> he is generally regarded as having had the last word on the choice of language in the Constitution. No one else was as qualified to define precisely the meaning and interrelation of its clauses.

Moreover, the Morris statement confirms Berger's mistake in assuming that the Framers ascribed a well-defined technical meaning to the standard "good behavior," under which it was clearly possible for an offense to be cause for removal even without crossing into the narrow region of impeachable transgressions. Good behavior was chosen simply to give judges secure tenure;<sup>122</sup> elaboration of proper causes for removal was left to the impeachment clause of Article II.<sup>123</sup>

likely to concur on such issues than would the Houses of Congress. The proposal was rejected by a vote of one state for, seven against, and three absent. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 428-29 (M. Farrand rev. ed. 1937), discussed in Ziskind, *supra* note 14, at 150-51.

119. 11 ANNALS OF CONG. 90 (1802).

120. R. BERGER, *supra* note 70, at 148 n.120.

121. Ziskind, *supra* note 14, at 150.

122. See p. 700 & note 116 *supra*.

123. Berger points out that the Framers decided to specify the causes for impeachment with a narrow and technical phrase, "high crimes and Misdemeanors," rather than with a more general term resembling "misbehavior," because they feared the latter would be too vague. Thus, he contends, it is clear that they believed the "good behavior" language to allow removal of judges on grounds broader than the strict classification of impeachable offenses. R. BERGER, *supra* note 70, at 163-65. But this reasoning backfires against Berger. It seems clear that the use of "good behavior" in Article III was meant to protect tenure, not to categorize grounds for removal. When the Framers did confront the removal question, they insisted on using a phrase of well-defined scope because, as Madison argued, a

Certainly this was understood when ratification of the new charter was debated. Indeed, opponents of the Constitution argued as a reason for rejection that it allowed no alternative to impeachment for the removal of federal judges.<sup>124</sup> Alexander Hamilton offered a different assessment of the value of the impeachment and conviction clauses, but not a different reading. "[Judges] are liable to be impeached for malconduct by the house of representatives, and tried by the senate," he wrote in *The Federalist*. "This is the only provision on the point, which is consistent with the necessary independence of the judicial character . . . ." <sup>125</sup>

It is enlightening, moreover, to scrutinize the proceedings of the First Congress on removal of executive officers and on the first Judiciary Act.<sup>126</sup> That great statute, which gave flesh to the skeletal structure of our nation's courts as established by the Constitution, was discussed in depth by Congress.<sup>127</sup> The common assumptions under-

"vague . . . term will be equivalent to a tenure during pleasure of the Senate." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 118, at 550, *quoted in* R. BERGER, *supra* note 70, at 163. Clearly the Framers did not contemplate giving federal judges so tenuous a hold on their offices; the very generality of the good behavior standard thus indicates that the Framers implied a connection to the impeachment clause.

124. "Brutus," *The Power of the Judiciary* (pt. 1), in THE ANTIFEDERALIST PAPERS NOS. 78-79, at 222, 224 (M. Borden ed. 1965).

125. THE FEDERALIST NO. 79, *supra* note 19, at 533.

126. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (establishing lower federal courts). Berger quotes several statements from congressional debate to the effect that impeachment is the exclusive means to remove judges. He dismisses them as "broad dicta," however, since they were made in a debate over presidential power to remove executive officers and in refutation of the argument that the power to appoint is the power to remove. *See* R. BERGER, *supra* note 70, at 147-50. Even if somewhat tangential to the issue debated, however, such unambiguous statements as that of Abraham Baldwin, who had been a delegate to the Constitutional Convention, cannot be so easily dismissed: "The judges are appointed by the President, by and with the advice and consent of the Senate; but they are only removable by impeachment." 1 ANNALS OF CONG. 579 (Gales & Seaton eds. 1789).

127. *See* 1 ANNALS OF CONG. 47-51 (Gale & Seaton eds. 1789). This is in marked contrast to the Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, cited by Berger to show that the First Congress believed judges could be removed without impeachment, *see* R. BERGER, *supra* note 70, at 150. That statute prescribed punishment for a judge who accepts a bribe, as well as for the person offering it, and also declared that persons convicted "shall forever be disqualified to hold any office of honour, trust or profit under the United States." But it appears from the congressional debates on the act that there was no mention in either House of the bribery penalties, constituting a brief portion of a long statute aimed at punishing crimes against the United States. Discussion focused rather on a section allowing dissection of the bodies of malefactors. *See* 1 & 2 ANNALS OF CONG. 976-77, 1572-74 (Gales & Seaton eds. 1790). Moreover, the statute has never been invoked against a federal judge; indeed, the constitutional considerations have led scholars to the conclusion that the disqualification provision was not intended to operate before impeachment and conviction. *See* Shipley, *Legislative Control of Judicial Behavior*, 35 LAW & CONTEMP. PROB. 178, 200 n.104 (1970); Clark, Book Review, 34 OHIO ST. L.J. 94, 97-98 (1974). This is comparable to the reading that the Supreme Court has given a similar statute, applicable to members of Congress, that has since been consolidated with the 1790 Act. *See* *Burton v. United States*, 202 U.S. 344 (1906), *discussed in* note 75 *supra*.

## Judicial Independence

lying the debates of 1789, in which many of the Framers participated, are persuasive evidence of the intentions of the Convention of 1789.<sup>128</sup> Not surprisingly, we find that the congressmen “agreed that judges with good behavior tenure could only be removed by impeachment.”<sup>129</sup>

### B. *Secure Tenure Evaluated*

Both logic and history, then, compel the conclusion that the Constitution intended impeachment to be the only permissible procedure for judicial removal. Furthermore, the architects of the Constitution stood on solid ground as a matter of policy. Neither the standards nor the procedure for removing judges may be cut too fine. We must tolerate some judges without whom the system would be better off, because the dangers are greater on the side of an overly potent removal power. The possibility of judicial removal for vague grounds of dissatisfaction would create a dragnet that would inevitably sweep into its grasp the maverick, the dissenter, the innovator, the reformer—in a word, the unpopular. Even apparently innocent attempts to rid the bench of its disabled members—those suffering from senility, drunkenness, mental instability, or other unfortunate “status” defects—may mask something more sinister. A provision allowing removal on grounds of disability, wrote Hamilton, “would be more liable to abuse

Another early statute often cited to show that impeachment was not intended as the exclusive means of removing judges was passed during the Jefferson Administration. In the closing days of the Adams Administration, Congress created a set of circuit courts to be presided over by newly appointed judges. *See* Act of Feb. 13, 1801, ch. 4, § 7, 2 Stat. 89. The following year, the Jeffersonian Congress removed the thorn of these Federalist “midnight judges,” *see* 2 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 561-62 (1916), by the simple expedient of eliminating their offices and providing instead that the circuit courts would consist of one Supreme Court justice and the district judge of the district in which the circuit court was sitting, *see* Act of Apr. 29, 1802, ch. 31, § 4, 2 Stat. 156. The constitutionality of the statute was never judicially tested. Moreover, from Professor Kurland’s account of the incident, it is clear that the bill’s proponents made no attempt to link the removal of an entire category of judges to the good behavior standard. *See* Kurland, *supra* note 62, at 670-78. The statute, therefore, does not demonstrate objective constitutional interpretation, but merely the Jeffersonian hostility to the federal judiciary that marked the first decade of the nineteenth century.

128. *Myers v. United States*, 272 U.S. 52, 136 (1926).

129. Note, *supra* note 74, at 712 n.31. A few examples will suffice to prove the point. Mr. Smith of South Carolina stated: “The judges are to hold their commissions during good behavior, and after they are appointed, they are only removable by impeachment.” 1 ANNALS OF CONG. 828 (Gales & Seaton eds. 1789). No less an authority than Madison is reported to have said: “The judges are to be removed only on impeachment, and conviction before Congress.” *See* 11 ANNALS OF CONG. 738 (1802) (Rep. Rutledge quoting unattributed statement by Madison). Elbridge Gerry echoed Madison’s words, *see* 1 ANNALS OF CONG. 860 (Gales & Seaton eds. 1789), and others agreed, *see* R. BERGER, *supra* note 70, at 149-50.

than calculated to answer any good purpose."<sup>130</sup> Half a century later, Justice Story added:

An attempt to fix the boundary between the region of ability and inability would much oftener give rise to personal, or party attachments and hostilities, than advance the interests of justice, or the public good. And instances of absolute imbecility would be too rare to justify the introduction of so dangerous a provision.<sup>131</sup>

These words are a striking reminder that judgments of inability involve a crucial subjective element.

Despite this caution, many have argued from the Jeffersonian era to this day that judicial removal should be made easier, because of the frustrations encountered in impeachment procedures.<sup>132</sup> Jefferson himself, thwarted in an attempt to secure the removal of Justice Chase, called impeachment "a bungling way of removing judges,"<sup>133</sup> and "not even a scare-crow"<sup>134</sup>—even as he conceded that the Constitution forbade other measures.<sup>135</sup> Lord Bryce, one of our most acute observers from overseas, commented that impeachment

is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at.<sup>136</sup>

130. THE FEDERALIST No. 79, *supra* note 19, at 533. Antifederalists, too, believed that the Constitution did not allow judicial removal for incapacity. See "Brutus," *supra* note 124, at 224.

131. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 486 (Boston 1833) (footnote omitted). It is interesting to note that at the 1804 impeachment trial of the Federalist Judge John Pickering, Republicans "made the most strenuous efforts . . . to deny even the admission of evidence as to Pickering's insanity," which was raised as a defense, "and attempted only to show him guilty of crime." Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485, 493 (1949). Thus, it was early assumed that the Constitution did not allow removal for disability, a principle well documented in Note, *supra* note 74, at 713.

132. See pp. 691-92 & note 70 *supra*.

133. See W. PLUMER, JR., LIFE OF WILLIAM PLUMER 325 (Boston 1856) (quoting conversation between Thomas Jefferson and author's father, Sen. Plumer, during trial of Judge Pickering).

134. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *reprinted in* 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 111, at 141; *accord*, Letter from Thomas Jefferson to James Pleasants (Dec. 26, 1821), *reprinted in* 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 111, at 199 (impeachment "is a bugbear which . . . [the judges] fear not").

135. See Letter from Thomas Jefferson to James Pleasants, *supra* note 134 (comparing English practice of joint address with American requirement of impeachment).

136. I J. BRYCE, THE AMERICAN COMMONWEALTH 212 (rev. ed. 1913). Bryce nevertheless regarded it as clear that impeachment was the only means for removing federal judges. See *id.* at 111.

## Judicial Independence

The simple response to these complaints is that they prove that the constitutional draftsmen performed their task well, for they intended that the removal process not be easily invoked. Impeachment was meant to be a drastic remedy, essential but dangerous, to be used only in imperative cases.

Even the clearest words, however, do not provide impregnable protection. The Framers may have anticipated that resourceful legislators would seek to evade the constitutional standard. Indeed, Congress has at times distorted the “high Crimes and Misdemeanors” language in judicial impeachments. Such incidents, though, are not examples of legitimate constitutional interpretation, but of the dangers inherent in a legal process in which any indictment or conviction is decided by a political body. Thus, in 1804, the Jeffersonians, encouraged by their success in removing District Judge John Pickering on charges that included his “‘being a man of loose morals and intemperate habits,’”<sup>137</sup> sought bigger quarry and impeached the irascible Justice Samuel Chase. Impeachment, proclaimed William Giles of Virginia, the Jeffersonian leader in the Senate, “‘is nothing more than an enquiry, by the two Houses of Congress, whether the office of any public man might not be better filled by another.’”<sup>138</sup> A majority in the Senate voted to remove Chase, but not the two-thirds necessary for conviction. “For the first time since Jefferson’s election,” Albert Beveridge wrote in his distinguished biography of Marshall, “the National Judiciary was, for a period, rendered independent.”<sup>139</sup>

But attempts to gloss over the “high Crimes and Misdemeanors” standard did not end there. In 1830, District Judge James H. Peck of Missouri was impeached because the House found one of his contempt orders “unjust, oppressive and arbitrary.”<sup>140</sup> In this decade a prominent member of Congress claimed, in proposing action against Justice Douglas, that “an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment

137. Turner, *supra* note 131, at 496 (quoting fourth article of impeachment).

138. See 3 A. BEVERIDGE, *supra* note 127, at 173 (quoting speech of Sen. Giles).

139. *Id.* at 220. Marshall was fearful of the Chase impeachment because it was thought that the Republican plans would soon spread to the entire Federalist Supreme Court. See L. BAKER, JOHN MARSHALL 421-22 (1978). Indeed, he suggested in a letter to Chase the idea of trading the congressional impeachment power for a surrender of the independence of the judiciary. He wrote: “I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the judge . . . .” Letter from John Marshall to Samuel Chase (Jan. 23, 1804), *quoted in* L. BAKER, *supra*, at 422. Of the end of the ordeal, Baker states: “John Marshall’s reactions to the votes [at the Senate trial] are unrecorded but he was obviously relieved.” *Id.* at 438.

140. Thompson & Pollitt, *supra* note 66, at 101-02.

in history."<sup>141</sup> The threat to judicial independence created by such a position more than answers the argument that the Framers chose an overly rigid impeachment mechanism. Impeachment, moreover, has not been an idle threat. Fifty-five judges have been charged on the floor of the House with impeachable offenses, nine have been impeached, and four convicted; more than a score have resigned rather than risk trial and exposure.<sup>142</sup> And yet, it is reassuring to note that Congress has found such action justified with increasing rarity. No judges have been impeached since 1936.

### III. Protection Against Judicial Aberrance—Formal and Informal

If impeachment is designed for occasional use only, there must be some other means of ensuring that judges do not abuse their trust. The judge who has committed a crime, whether before or after he dons the judicial ermine, is not the problem; he, like other criminals, may be indicted and convicted, in our courts, and thereafter removed from the bench. The cases of Judges Kerner and Manton show that judges, as well as other criminals, may be incarcerated.<sup>143</sup> "Protection of tenure," the Seventh Circuit Court of Appeals said in the Kerner case, "is not a license to commit crime . . . ."<sup>144</sup>

Because a judge is not a criminal does not, of course, qualify him for the bench. There are ample protections, however, in our system against the unfit judge, and they accomplish their purpose without transgressing the independence of the judiciary.

The first operates before the judge ever assumes the federal bench. For decades federal judges have been required to pass the extraordinarily thorough clearance procedures of the Justice Department, its investigating arm the FBI, and the organized bar, as well as the close scrutiny of the Senate.<sup>145</sup> The chances of a venal person becoming a

141. 116 CONG. REC. 11,913 (1970) (remarks of Rep. Ford). Similar sentiments were put forth in the trial following the impeachment of Justice Chase. Senator Giles, leader of the Jeffersonian faction, told Senator Plumer: "We have authority to remove a judge, if he is disagreeable in his office, or wrongheaded, and opposed to the administration though not corrupt in conduct." See L. BAKER, *supra* note 139, at 424 (quoting Sen. Giles). Interestingly enough, when Senator Giles became annoyed at how time-consuming impeachment was, he came to favor the idea of amending the Constitution to have judges removable by the President "on the application of Congress." WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803-1807, at 239 (E. Brown ed. 1923).

142. R. BERGER, *supra* note 70, at 166; Thompson & Pollitt, *supra* note 66, at 118.

143. For a detailed narrative of the Manton episode, see J. BORKIN, *THE CORRUPT JUDGE* 23-93 (1962). Manton resigned his judgeship before his trial. *Id.* at 27.

144. *United States v. Isaacs*, 493 F.2d 1124, 1142 (7th Cir. 1974).

145. As a measure of how the confirmation process has become more intensive, it is interesting to note the statement read by Felix Frankfurter when he appeared before the

## Judicial Independence

federal judge are slim indeed. After all, the ability, the habits, and the honesty of those selected are generally well known to their peers, whose views the bar committees and the FBI always seek.

If a prospect for the federal bench passes the “strict scrutiny” to which he is subjected, he does not, of course, become free from restraints. The most important of these is one to which I have already referred:<sup>146</sup> the responsibility to decide cases according to the law by adhering to the principles laid down by Constitution, statutes, and precedent. Among the limitations the judge discovers are those he must place on his own role: he must act impartially—indeed, he must disqualify himself if even the appearance of justice would suffer by his sitting on a case<sup>147</sup>—and he cannot reach out like a legislator to resolve pressing social issues.<sup>148</sup> These restraints are, in the first instance, self-imposed, but they are powerful nonetheless for the overwhelming majority of judges who have no desire to abuse their power or make unprincipled decisions.

To ensure that the individual judge has heeded those restraints in good faith and has fully considered the “consecrated principles”<sup>149</sup> of law, appellate review is available as a corrective process. Those who call for a regime of judicial discipline, however, argue that appellate review is not adequate to the task because of the powerful strategic position occupied by trial judges. The appellate process, though, is hardly a toothless animal; it is able to excise not only error but also bias, impropriety, irrationality, and abuse of discretion.<sup>150</sup> The celebrated *Reserve Mining*<sup>151</sup> case is but one illustration of this fact. The

Senate Judiciary Committee after his nomination for the Supreme Court in 1939:

I, of course, do not wish to testify in support of my nomination. Except only in one instance, involving a charge concerning an official act of an Attorney General, the entire history of this committee and of the court does not disclose that a nominee to the Supreme Court has appeared and testified before the Judiciary Committee.

While I believe that a nominee's record should be thoroughly scrutinized by this committee, I hope you will not think it presumptuous on my part to suggest that neither such examination nor the best interests of the Supreme Court will be helped by the personal participation of the nominee himself.

N.Y. Times, Jan. 13, 1939, at 1, col. 4 & 7, col. 4. Today, of course, it would probably be considered presumptuous if a nominee did not participate in the Judiciary Committee's investigation.

146. See p. 688 *supra*.

147. See 28 U.S.C. § 455(a) (1976) (judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned”); *id.* § 455(b) (setting out specific, additional circumstances requiring disqualification).

148. See p. 688 *supra*.

149. B. CARDOZO, *supra* note 53, at 141.

150. Of course, appellate review is not always an infallible safeguard against a trial court's occasional abuse of its power. See Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 YALE L.J. 39, 69-70 (1978).

151. *Reserve Mining Co. v. Lord*, 529 F.2d 181 (8th Cir. 1976).

Eighth Circuit found that the district judge had "shed the robe of the judge and . . . assumed the mantle of the advocate," thereby demonstrating "great bias" and "substantial disregard for the mandate of this court."<sup>152</sup> The appellate court remanded the case to the district court and ordered that it be retried before a different judge. And this, significantly, occurred in a complex environmental case—precisely the kind that has engendered particular anxiety on the part of Congress and the public over the sweep of judicial decisionmaking.

But what if the perverse or inadequate judge is himself an appellate judge? Who will guard the guardians? It is because of this concern, of course, that appellate decisions are made collectively. No opinion, whether idiosyncratic or exquisitely sculpted from crystalline premises, can become law without the agreement of at least half the author's colleagues.

The federal legislature, it is important to note, is not hierarchical, and the executive is not collective at the top. Only the judiciary, which because of its independence provides its own corrective mechanism, protects against its own errors by both hierarchical structures and collective decisionmaking. These are effective mechanisms, designed only to correct, not to punish: they act only against judge's opinions and decisions, and not against him personally.

But what if the judge's inadequate performance is more than occasional? A judge who falls significantly behind in his work is coaxed—and usually effectively—to keep up. If he is not incompetent but merely exhausted, not lazy but simply overworked, a brief respite can be arranged by his colleagues and may prove sufficient. The Circuit Judicial Councils are not without powers. They may reassign recalcitrant judges and may order them to eliminate their backlogs before taking on any new cases.<sup>153</sup> But such open activism is rarely necessary. Few judges are willing to risk public attention by persistently rejecting their colleagues' overtures.

If the disability is permanent, the judge will often recognize it and retire. If he does not, his fellow judges may—unless he is a Supreme Court justice—invoke 28 U.S.C. § 372(b) by certifying the judge's disability to the President and authorizing him to appoint an extra

152. *Id.* at 185.

153. See 28 U.S.C. § 332(d) (1976) ("Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit.") In a talk to the Conference of Chief Judges of the United States Circuit Courts on September 20, 1978, Steven Flanders, Esq., of the Federal Judicial Center indicated that he expected a report he is preparing for the Center to show that the Circuit Councils are able to handle disciplinary problems informally and effectively. Whether the Councils have on occasion exercised too much power was left unsettled in *Chandler v. Judicial Council*, 382 U.S. 1003 (1966), and *id.*, 398 U.S. 74 (1970).

## Judicial Independence

judge.<sup>154</sup> This statute, it should be noted, was framed with sedulous regard for constitutional limitations. It does not act against the judge; it does not attempt to remove or discipline him. It fulfills one entirely proper purpose: to ensure that the bench has its full complement of able members so that it may administer justice properly.

Invocation of section 372(b) is rarely needed, however.<sup>155</sup> The problem can almost always be managed effectively in a personal and informal manner. On occasion, close colleagues of an afflicted judge suggest that he retire. If necessary, other judges, attorneys, and even family members may approach the ailing jurist. Almost invariably he will acquiesce. At least four Supreme Court justices—Grier, Field, McKenna,<sup>156</sup> and the great Holmes—retired at the suggestion of their brothers. There is no record that any has ever refused. Field, reminded in his senescence of his own part in securing the retirement of Grier, said he had never done “a dirtier day’s work,”<sup>157</sup> and Hughes shed tears as he left the still-gallant Holmes.<sup>158</sup> Distasteful it is, but highly effective. Few judges would long withstand the united importunings of their peers. Even if the judge is slow to accept the suggestion of his brethren, this method is sure to accomplish his ouster faster than a formal procedure.<sup>159</sup> Peer pressure is a potent tool. It should not be underestimated because it is neither exposed to public view nor enshrined in law.<sup>160</sup>

154. See 28 U.S.C. § 372(b) (1976).

155. I have been able to find only two instances in which it has been employed.

156. A. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 215 (1964).

157. C. HUGHES, *supra* note 52, at 75-76.

158. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 29 (1967).

159. Such confrontations are rarely needed. In my 29 years on the district and circuit benches, I can recall very few occasions on which it became necessary for us to approach a disabled colleague. Not one of these involved a judge thought to be senile. In these few instances, after the judge was advised that his disability hampered his effectiveness, he promptly restored himself to sound condition. A formal disciplinary proceeding would not only have been cruel; it would have been less effective than a more personal approach. Sometimes, of course, an informal approach “takes a great deal of effort and quite a long time,” but it usually succeeds. *Hearings Before the Subcomm. of Improvements in Judicial Machinery of the Senate Comm. on the Judiciary on Procedures for the Removal, Retirement, and Disciplining of Unfit Federal Judges*, 89th Cong., 2d Sess. 15-16 (1966) (testimony of Judge John Biggs, Jr., former chief judge of Third Circuit) (recalling having had “a rather considerable experience in getting old and sick judges to retire”) [hereinafter cited as *1966 Senate Hearings*].

160. Judge Joseph T. Sneed of the Ninth Circuit Court of Appeals also expressed this view in a recent speech:

Numerous others sitting at the district and circuit level have been cajoled, despite serious doubts concerning the legitimacy of such efforts, *Chandler v. Judicial Council*, 398 U.S. 74 (1970), into taking senior status or retiring. Serious drinking problems have been confronted and the individual judge either rehabilitated or eased into retirement by quiet, but seriously intended, threats to remove all, or almost all, cases from his court.

J. Sneed, *Not Good Behavior* 12-13 (address to Chit Chat Club, San Francisco, Cal., Sept. 11, 1978).

## IV. Judge Against Judge: The Trojan Horse

It is fallacious, then, to claim that there is no adequate method of dealing with the disabled or incompetent judge, and it is therefore all the more difficult to understand the recent outbreak of anxiety over removing judges. It is certainly not attributable to any groundswell of federal judicial misbehavior. On the contrary, it is less of a problem than ever. The case of the late Judge Willis Ritter, so often cited, is not, as some have suggested, an egregious example of a common phenomenon. It is simply an aberration.<sup>161</sup>

Recognition of the constitutional infirmities that would attend any procedure dissolving the lines between the branches of government has dissuaded Congress from attempting to design a legislative removal procedure simpler than the extraordinary one of impeachment. But the proponents of facile removal believe that at last they have found the solution to their frustrations. They have embraced the notion that all constitutional impediments might be avoided by establishing the disciplinary power within the judiciary itself. This has been the conception behind the series of judicial tenure bills introduced over the last decade—including the one recently passed by the Senate.<sup>162</sup>

I have argued that the scheme as a whole is unconstitutional, since judges created under Article III may only be removed by impeachment, and that it is unnecessary to create formal mechanisms to remove disabled judges with greater ease, since the informal pressure of a judge's peers is both more humane and more efficient. An additional harmful aspect of the scheme remains to be considered: the fact that it would disrupt the delicate balance of collegiality and individualism that is so necessary to the work of the federal bench. Indeed, the Senate bill would tend in large measure to obstruct the very goals it was designed to attain.

Collegiality and individualism, it must be understood, are complementary, not conflicting qualities. If the judicial fraternity is tightly knit, its members will find suitable scope for a personal approach to their task, in much the same way that scholars draw both inspiration and confidence from the sustaining atmosphere of a healthy academic environment. The judicial community could not long maintain respect if it were merely a collection of fungible judges; nor could judicial

161. Senator Tydings, sponsor of one of the previous bills that would have limited judicial tenure, conceded that only a "tiny handful of judges . . . harm . . . the efficient administration of justice," 1966 *Senate Hearings, supra* note 159, at 1, and that "an exposé on the Federal judiciary . . . would undoubtedly find little to expose," *id.* at 4.

162. See p. 682 & notes 11-12 *supra* (describing plan passed by Senate).

## Judicial Independence

individualism long be tolerated if it were not rooted in a firm communal base.

### A. *Judicial Community*

The effectiveness of informal peer pressure in ridding the judiciary of disabled members is based substantially on the prevalence within the judiciary of an atmosphere of good faith and collegiality. This sense of judicial community, itself so vital to the proper functioning of our courts, would be gravely endangered if judges were compelled to accept the formal power to discipline their colleagues and thus bypass impeachment.

Judicial community is formed in the main in the conference room, and it is important that it be so. Judges remain acutely aware that too much dissension creates gnawing uncertainty in the law. Apart from the interests of legal uniformity and coherence, judges usually realize that continual dissent and refusal to accept settled doctrine undercut the weight their views carry with their brethren, the bar, and the public. In sum, judges must be willing to engage in a dialogue with their colleagues. Whether they employ legal argument, hard-nosed negotiation and compromise, or a combination of these techniques, that dialogue will not be productive in the absence of personal respect and confidence.

Sometimes, of course, ideological disagreements combine with personal incompatibilities to disrupt the working relationship. These rifts are unfortunate but tolerable. The other judges muffle the flames, and the consequences are rarely more severe than a few heated dissents and a mild increase in the number of cases heard en banc. But add a judicial mechanism for investigating judges and the problem would be magnified. A judge might see across the table not merely a working partner but a potential adversary. The dialogue would continue, of course. In most cases no change would be detectable. But there would be an inevitable loss of frankness if each participant feared that candor might one day build a case against him.

The sense of judicial community spreads beyond the conference rooms of our appellate courts. Judges at every level of the system interact frequently and in many ways. In every circuit, for example, district judges sit by designation on the Court of Appeals,<sup>163</sup> and circuit judges may try cases.<sup>164</sup> Judges of both courts often have chambers in the same building. In addition, they deal with one another on a

163. 28 U.S.C. § 292(a) (1976).

164. *Id.* § 291(c).

multitude of matters, such as the formulation and evaluation of Speedy Trial Plans,<sup>165</sup> necessary for the expeditious administration of justice. But we are not satisfied with the contacts that are required by statute. We make certain that there are numerous opportunities, such as our Circuit Conferences, for informal association and discussion. This contact is cherished, for it fosters the cross-pollination of ideas that is the genius of coherent growth in the law. Nearly all federal judges, I am sure, would be wary of driving the wedge of judicial discipline into this creative community.

The effect would be minimal, claim the proponents of disciplinary schemes, because a bureaucratic filter can obviate the necessity of judges hearing all but the most substantial of charges. It seems unwise to allow bureaucrats, whether lawyers or not, to determine, even in part, the fate of judges.<sup>166</sup> The sheer magnitude of the disciplinary engine, moreover, would be a major nuisance. Judges frequently receive hostile or threatening correspondence from disappointed litigants. Creation of a new disciplinary scheme would transform a minor annoyance into a constant threat of official action. At the very least, it would require time-consuming responses by the judge. Even if the judge were not eventually condemned, the mere invocation of the statutory provisions might taint him with a devastating stigma. The vestments of authority might remain but the aura of respect and confidence so essential to the judicial function would be forever dissipated. It is not at all surprising that three quarters of all federal judges responding to a recent questionnaire expressed "extreme concern" about the intrusion of this Trojan Horse.<sup>167</sup> And it was only natural that the United States Judicial Conference, in its latest pronouncement on September 22, 1978, expressed not only its concern over the constitutionality of, but also its flat opposition to, any attempts to short-circuit impeachment by delegating the removal power.<sup>168</sup>

### B. *Individualism on the Bench*

But, of course, the primary reason for opposing the idea of judicially enforced discipline is not that it would be bothersome, nor that it

165. These plans, required by the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1976), are reviewed by circuit and district judges under the provisions of § 3165(c).

166. This point was made forcefully by Judge Anthony M. Kennedy of the Ninth Circuit Court of Appeals at the Circuit Conference on May 19, 1978 (page 30 of the transcript on file in the Office of the Circuit Executive for the Ninth Circuit).

167. 124 CONG. REC. S14,758 (daily ed. Sept. 7, 1978) (Sen. Bayh).

168. The resolution expressed the Conference's "disapproval of any legislative provision which purports to delegate to any other tribunal or entity the constitutional power of Congress to remove a federal judge from office."

## Judicial Independence

would tear at the vital sense of judicial community, nor even that it is totally unnecessary to ensure proper judicial behavior. The fundamental flaw in judicially enforced discipline is that it would vitiate the independence of the judiciary.

This is not understood by the proponents of such projects. Thus, in its report on the currently pending bill, the Senate Judiciary Committee declared: "Judicial independence, a principle which is a precondition to an effective system of justice, [has] historically referred, not to the independence of judges from one another, but rather to the independence of the judiciary as an institution from other branches of government."<sup>169</sup>

The Committee based this assertion on the theory propounded by Raoul Berger that the common law writ of *scire facias* allowed one judge to remove another on breach of good behavior. I have already explained why I find this theory totally unconvincing.<sup>170</sup> Berger's historical misconceptions are less significant, however, than the Judiciary Committee's grievous conceptual error. The separation of powers is not the exclusive cause and guarantee of judicial independence. Of course, it is vital to protect the entire third branch from the others. What may be less apparent, but is no less true, is that it is equally essential to protect the independence of the individual judge, even from incursions by other judges. The heart of judicial independence, it must be understood, is judicial individualism. The judiciary, after all, is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own. This is true of trial courts, and it is no less true on the appellate level. The Supreme Court, Justice Powell commented, "is perhaps one of the last citadels of jealously preserved individualism. . . . [F]or the most part, . . . we function as nine small, independent law firms."<sup>171</sup> The mental processes of the judges, then, are those of individuals and not of cogs in a vast machine.

Perhaps that is why those Presidents who expect their appointees to hew to the party line have so often been surprised to learn that judges are independent-minded men. Justice Clark's vote in the *Steel Seizure Case*<sup>172</sup> was just one of many that displeased Truman and prompted him unfairly to call the appointment the worst mistake he ever made.<sup>173</sup> Earl Warren's record on the bench drew a similar assessment from

169. S. REP. No. 1035, *supra* note 10, at 8.

170. See pp. 694-98 *supra*.

171. L. Powell, Report on the Court 1-2 (address to ABA Labor Law Section, Aug. 11, 1976).

172. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660 (1952) (Clark, J., concurring).

173. M. MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN* 225 (1974).

Eisenhower.<sup>174</sup> Theodore Roosevelt was even more pungent than his successors. "I could carve out of a banana a judge with more backbone than that," he exclaimed after the dissent in the *Northern Securities Case*<sup>175</sup> of his first Supreme Court appointee, Oliver Wendell Holmes, Jr.<sup>176</sup>

No matter how strong an individual judge's spine, the threat of punishment—the greatest peril to judicial independence—would project as dark a shadow whether cast by political strangers or by judicial colleagues. A federal judge, wrote Justice Douglas, must be "independent of every other judge . . . [N]either one alone nor any number banded together can act as censor and place sanctions on him."<sup>177</sup>

It is vital to preserve the opportunities for judicial individualism. Cardozo realized that judicial decisions are not crystalline in nature. "What is it that I do when I decide a case?" he asked:

To what sources . . . do I appeal for guidance? . . . If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? . . . At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions.<sup>178</sup>

Not only are personal standards an element in the mixture, but finding the proper proportion of all the ingredients is itself a matter of personal judgment.

That personal element—that individual sense of justice—is not only inextinguishable, but essential for the orderly development of the law. For the law to progress it must occasionally adopt views that were previously in disfavor, and the intellectual foundations are often laid by the opinions of dissenting judges. A dissent, said Hughes, "is an appeal to the brooding spirit of the law, to the intelligence of a future day."<sup>179</sup> How often has that appeal been accepted! There are many familiar examples—the first Justice Harlan's dissent in *Plessy v. Fergu-*

174. Eisenhower's precise words were "'the biggest damned-fool mistake I ever made.'" Whitman, *For 16 Years, Warren Saw the Constitution as Protector of Rights and Equality*, N.Y. Times, July 10, 1974, at 24, col. 1.

175. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

176. W. HARBAUGH, *POWER AND RESPONSIBILITY* 162 (1961).

177. *Chandler v. Judicial Council*, 398 U.S. 74, 136 (1970) (dissenting opinion); see Wallace, *Judicial Administration in a System of Independents: A Tribe With Only Chiefs*, 1978 B.Y.U. L. REV. 39, 43-44.

178. B. CARDOZO, *supra* note 53, at 10.

179. C. HUGHES, *supra* note 52, at 68.

## Judicial Independence

son,<sup>180</sup> the minority opinions in the child labor<sup>181</sup> and minimum wage cases,<sup>182</sup> the noble writings of Holmes and Brandeis on freedom of speech.<sup>183</sup>

The First Amendment dissents are particularly significant. Individualism in expression and in judicial decisionmaking are important for the same reason. Holmes stated it well when he declared in *Abrams v. United States*<sup>184</sup> that “time has upset many fighting faiths.”<sup>185</sup> The wisdom of today may not be that of tomorrow. Recently, in *Herbert v. Lando*,<sup>186</sup> I wrote that “the lifeblood of the editorial process is human judgment. The journalist must constantly probe and investigate; he must formulate his views and, at every step, question his conclusions, tentative or otherwise.”<sup>187</sup> Those words are as true of judges as they are of journalists. We should not tamper with the working processes of either.

Judicial independence, like free expression, is most crucial and most vulnerable in periods of intolerance, when the only hope of protection lies in clear rules setting forth the bright lines that cannot be traversed. The press and the judiciary are two very different institutions, but they share one significant characteristic: both contribute to our democracy not because they are responsible to any branch of government, but precisely because, except in the most extreme cases, they are not politically accountable at all and so are able to check the irresponsibility of those in power. Even in the most robust of health, the judiciary lives vulnerably. It must have “breathing space.”<sup>188</sup> We must shelter it against the dangers of a fatal chill.<sup>189</sup>

## Conclusion

Our judicial system can better survive the much discussed but rarely existent senile or inebriate judge than it can withstand the loss of

180. 163 U.S. 537, 552 (1896).

181. *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918), *overruled*, *United States v. Darby*, 312 U.S. 100 (1941) (Holmes, J., dissenting).

182. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 618 (1936) (Hughes, C.J., dissenting); *id.* at 631 (Stone, J., dissenting); *Adkins v. Children's Hosp.*, 261 U.S. 525, 562 (1923) (Taft, C.J., dissenting); *id.* at 567 (Holmes, J., dissenting).

183. *See, e.g., Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

184. 250 U.S. 616 (1919).

185. *Id.* at 630 (Holmes, J., dissenting).

186. 568 F.2d 974 (2d Cir. 1977), *cert. granted*, 98 S. Ct. 1483 (1978) (No. 77-1105).

187. *Id.* at 983-84.

188. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).

189. The term “chilling effect,” most often used in relation to the First Amendment, has found appropriate application in other areas as well. *See Note, The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 808 & n.2 (1969).

judicial independence that would ensue if removal of judges could be effected by a procedure too facile or a standard too malleable.

Independence, I have argued, has always been crucial for judges to perform their function properly. It is more important as that function has expanded while retaining its fundamentally judicial character. The only way to protect judicial independence is to provide judges secure tenure. This the draftsmen of the Constitution did, allowing removal only for the most serious causes and by the strictest procedures. Their design has operated with great success and is supplemented by potent, yet informal and generally invisible restraints against aberrant behavior. Disciplinary schemes pitting judge against judge are not only unnecessary and of dubious constitutionality, but they would also disrupt the sense of community so essential to the functioning of the courts and would weaken the quality of judicial individualism that has been responsible for the bench's most creative advances and its noblest defenses of liberty.

Even in the post-Watergate age, I can think of no better words than those used by John Rutledge, Jr. in 1802 on the floor of the House of Representatives to describe the "shield" of the judiciary:

As long as this buckler remains to the people, they cannot be liable to much or permanent oppression. The Government may be administered with indiscretion and with violence; offices may be bestowed exclusively upon those who have no other merit than that of carrying votes at elections; the commerce of our country may be depressed by nonsensical theories, and public credit may suffer from bad intentions; but, so long as we may have an independent Judiciary, the great interests of the people will be safe. . . . Leave to the people an independent Judiciary, and they will prove that man is capable of governing himself; they will be saved from what has been the fate of all other Republics, and they will disprove the position that Governments of a Republican form cannot endure.<sup>190</sup>

190. 11 ANNALS OF CONG. 739-40 (1802).