Guarantees and Limits of the Independence and Impartiality of the Judge

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I. ENGLAND AND HER NORTH AMERICAN COLONIES

Judicial independence has always formed an integral part of the legal system of the United States. Indeed, it is a legacy that we inherited from the English common law. To be sure, the post-Conquest curia regis judges served under the effective control of the Norman Kings of England, who used them to consolidate royal power throughout the realm. At this early stage in the formation of the English common law,

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it is therefore impossible to speak of judicial independence. But with the Glorious Revolution of 1688 and the Act of Settlement of 1701, a dramatic change took place. English judges now served not at the pleasure of the Crown, but during good behavior. Thus, the English acknowledged that, in order to have an independent judiciary, it was essential that judges be guaranteed a tenure of office adequate to ensure freedom from political and economic pressure.[1] A Canadian scholar considers this development as "perhaps the single most important element of the common law tradition."[2] Judges could thenceforth be removed only by joint addresses of the two legislative Houses of Parliament, an extremely difficult procedure.

It should be noted that the Act of Settlement of 1701 did not apply to the English colonies in North America. Colonial judges were regarded by most American colonists as subservient agents of the King. Indeed, royal interference in judicial affairs was cited in the Declaration of Independence as one in "a long train of abuses and usurpations" that impelled the American colonists to separate themselves from England: "[The King of England] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[3] Independence from England, achieved with the aid of France after a protracted military conflict, transformed the thirteen English colonies into the thirteen original States of the United States.

II. JUDICIAL INDEPENDENCE UNDER THE ARTICLES OF CONFEDERATION

Prior to the ratification of the 1787 Federal Constitution, there were no Federal courts. Each State, however, had its own court system. The principle of judicial tenure during good behavior prevailed, effectively protecting the State judiciary against State executive (but not legislative) branch interference.[4] The notion of popular sovereignty, analogous to Rousseau's *volonté générale*, argued in favor of judicial submission to legislation. This concept, so characteristic of the philosophy underlying the French *code civile* of 1803, was articulated already in 1776 by Thomas Jefferson, who felt that the judge, in relation to the legislator, should be a "mere machine."[5] As it turned out, State court judges in the

1. Act of Settlement, 1701, 12 & 13 Will. 3, c.2, § 3 (Eng.).
2. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 224 (2000).
3. DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).
4. *See* Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1152–56 (1976); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787 160–61 (1969).
5. 5 THE FOUNDERS' CONSTITUTION 374 (Philip B. Kurland & Ralph Lerner eds., 1987).

United States did not become "mere machines" of the legislator. Drawing on the tradition of the common law, State court judges were destined to make new law by shaping common law rules to meet the needs of a rapidly expanding economy.[6] Such judicial activism was deplored by some as unwanted judicial legislation, but was applauded by others as a necessary corrective to unimaginative formalism and legislative abuses. Unresolved by the passage of time, the debate concerning the proper role of judges continues until the present day.[7]

III. JUDICIAL INDEPENDENCE AND ACCOUNTABILITY UNDER THE FEDERAL CONSTITUTION OF 1787

By overly restraining the power of the central government, the Articles of Confederation (1781–1787) proved to be ineffective and unworkable. The 1787 Constitution created a much needed and remarkably enlarged Federal governmental structure. The powers delegated to Congress, although intended to be limited, were nevertheless quite extensive.[8] Article III of the Constitution, the Judicial Article, created the U.S. Supreme Court. It also empowered Congress to establish and determine the jurisdiction of lower Federal courts. The *original jurisdiction* of the U.S. Supreme Court is fixed by Article III (all cases affecting ambassadors, other public ministers and consuls, and cases in which a State is a party) and may not be enlarged or diminished by Congress.[9]

But there is textual authority in the Constitution giving Congress the power to limit the *appellate jurisdiction* of the U.S. Supreme Court. Article III provides that the Court shall have appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[10] Clearly, the most important part of Article III, at least for

6. ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 182–83 (Beacon Press 1966); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 73–74 (1960); ELISABETH ZOLLER, LE DROIT DES ETATS-UNIS 80–96 (2001); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 685 (2d ed. 1985).

7. See the multifaceted views presented in *Symposium: Judges as Tort Lawmakers*, 49 DEPAUL L. REV. 275–565 (1999).

8. Article I, Section 8 contains a list of some of the most important delegated legislative powers: the power to tax, to borrow and to spend money, and to regulate interstate and foreign commerce. U.S. CONST. art. I, § 8. Article II, the Executive Article, empowers the President, inter alia, to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

9. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 139–44 (1803).

10. U.S. CONST. art. III, § 2, cl. 2. In *Ex Parte* McCardle, 74 U.S. (7 Wallace) 506,

judicial independence purposes, is the so-called "Tenure and Salary Clause": all federal judges enjoy lifetime tenure with a guarantee that their salary "shall not be diminished during their Continuance in Office."[11]

In sum, the Tenure and Salary Clause of the U.S. Constitution guarantees the personal (or decisional) independence of all federal judges. The Judiciary as an institution, however, is considerably less independent of the other co-ordinate branches of the government. Reference has already been made to the power of Congress to establish (or disestablish) lower federal courts, and to assign (or withdraw) the jurisdiction of such courts. All this is part of the U.S. system of checks and balances which, together with the doctrine of separation of powers, must be considered America's greatest contribution to the notion of constitutionalism (a government of limited powers responsible to the people).

IV. CONSTITUTIONALISM

Judicial independence forms an integral part of the doctrine of separation of powers. The person who deserves the most credit for modern development of this theory is the 18th century French philosopher Montesquieu. Writing in 1734, Montesquieu outlined the dangers of concentrating political power in any one governmental institution:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty . . . . Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[12]

The men who drafted the American Constitution of 1787 were well acquainted with Montesquieu's theory that a tripartite separation of powers is essential to civil liberty.[13] It is impossible to understand the American Constitution, and for that matter the legal system of the United States, without appreciating the vital role that the doctrine of separation of powers plays in an overall system of checks and balances. The Constitution itself reflects this tripartite division of governmental

514–15 (1869), the U.S. Supreme Court upheld the constitutionality of a recently enacted federal law that withdrew the previously existing statutory right of appeal from a pending habeas corpus case.

11. U.S. CONST. art. III, § 1.

12. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 70 (Thomas Nugent trans., William Benton 1952).

13. Alexander Hamilton, quoting Montesquieu, strongly endorsed an independent judiciary. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

powers: Article I (legislative powers); Article II (the executive power); Article III (the judiciary).[14] The separation of these powers, although institutionally distinct, was never intended to be airtight. An intricate series of interdependencies were blended into a systemic whole. Each branch of the government carries out its delegated functions constitutionally protected from encroachment by the others, but also for some purposes dependent on their cooperation. Thus, the President participates in the legislative process by exercising the veto power and Congress can override a veto by voting to pass the vetoed legislation by a two-thirds majority. Further, legislation, once enacted, can be interpreted or even declared unconstitutional by the Judiciary. Such restraints by one branch against another reveal the essence of the American concept of constitutionalism: a written Constitution intended to protect individual liberty by preventing the accumulation of too much political power in any one branch of the government.

The founding fathers of the U.S. Constitution, true children of the Enlightenment, knew very well that they were not writing a formula for an earthly Utopia. Accepting the fact that human nature is and will remain flawed and susceptible to base passions (lust for power; greed; dishonesty; megalomania), they crafted a document that gave the government enough power to be effective, while at the same time preserving a maximum of political and civil liberty.

V. THE SELECTION OF JUDGES FOR THE FEDERAL JUDICIARY

All federal judges are nominated by the President, confirmed by the Senate, and serve for life.[15] They may be removed only through impeachment, discussed below. The process of Executive Branch selection and Senatorial confirmation is unabashedly political. The President, assisted by advisors on the White House staff and the Attorney General's office, seeks out individuals who are not only well qualified

14. This scheme sets forth a horizontal diffusion of power between co-ordinate branches of the Federal Government. In addition, the U.S. Constitutional structure also divides power between the central government and the several States of the United States. *See* ZOLLER, *supra* note 6, at 36–69. Americans have had over 200 years of experience working with federalism. Will this experience be useful to Europeans when the time comes to draft a European Constitution?

15. U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. III, § 1. *See also* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2000); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997).

professionally, but also whose social, economic, and political views are acceptable to him. A clash of wills takes place when the ideology of a federal judicial nominee is viewed by the Senate as a threat to the achievement of its defined political agenda. This happened in 1987 when President Ronald Reagan nominated Robert H. Bork for a position on the U.S. Supreme Court. Bork, with extensive experience in the federal appellate judiciary, in academia, in private law practice, and in public service (as Solicitor General of the United States), possessed a brilliant intellect and was in all respects exceptionally well qualified for the position. The Senate, however, voting on partisan political lines, refused to confirm him. As Bork later explained, the campaign against him, both within and outside the Senate, was characterized by deliberate distortion, lies, and abuse.[16]

By rejecting Bork's nomination for the U.S. Supreme Court, the Senate expressed its opposition to Bork's conservative philosophy of judicial restraint. Fearful of losing ground in the struggle for cultural influence in the country, left-liberal special interest groups convinced a majority of Senators to vote against the Bork nomination. Had he taken his seat on the Court, Bork would surely have upheld state and federal legislation restricting privacy and other judicially created rights falling outside the original understanding of the Constitution. The Senate at that time was led by politicians desirous of placing on the Supreme Court progressive activist judges capable of imaginatively using general clauses in the Constitution to advance the civil libertarian agenda of the Left.

From the above discussion it should be clear that the federal judicial appointment process is highly political. The policy beliefs of nominees are closely scrutinized by the Executive Branch prior to nomination, and subsequently by the Senate during the confirmation proceedings. Does this practice undermine the independence of the Federal Judiciary?[17] Apparently not. Once a judicial nominee takes office, the confirmation "ordeal by fire" is of no legal significance whatsoever. Assured of a decent salary and life tenure, federal judges decide individual cases free of any and all influence from Congress or the President.

As noted above, a distinction may be drawn between personal or decisional judicial independence (freedom to decide any given case without extraneous interference) and branch independence (the ability to carry on activities without substantial and significant support from the

16. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 267–343 (1990).

17. *See* CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 161–73 (1997).

other branches of the Federal Government).[18] Decisional judicial independence remains strong; a much more realistic threat lies in the possibility that Congress may attempt to diminish or regulate the powers of the Judiciary as a whole. As a political science professor has pointed out, these attempts "can take many forms: nibbling away at court jurisdiction by removing cases to administrative tribunals, altering rules of court procedure, limiting the number of judgeships or failing to fill vacancies that exist, and failing to give full effect to court orders."[19] The federal court structure could therefore be described as an arrangement of independent judges within a dependent judiciary. Governmental powers are separated yet interdependent, a typical feature of the American system of checks and balances.

VI. IMPEACHMENT OF FEDERAL JUDGES

All federal judges hold their offices *during good behavior*.[20] Should a federal judge misbehave, he may be impeached by Congress and removed from office: "The President, Vice President and 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."[21]

Treason is narrowly defined in the Constitution as "levying War against . . . [the United States], or in adhering to their enemies, giving them Aid and Comfort."[22] Bribery has a fairly well settled meaning in substantive criminal law.[23] The term "high crimes and misdemeanors," however, continues to puzzle scholars.[24] Does it mean only some kind

18. John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 355 (1999).

19. *Id.* at 361. The Senate is currently controlled by the Democratic Party. Since his inauguration in January 2001, President George W. Bush, a Republican, has nominated ninety persons to the federal bench. To date, the Senate has voted on less than half the nominees. Alberto Gonzales, writing in the *Wall Street Journal*, considers this to be a violation of the Senate's Constitutional responsibility. Alberto Gonzales, *The Crisis in Our Courts*, WALL ST. J., Jan. 25, 2002, at A18.

20. U.S. CONST. art. III, § 1 (emphasis added).

21. *Id.* art. II, § 4.

22. *Id*. art. III, § 3, cl. 1.

23. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 526–38 (3rd ed. 1982).

24. EMILY FIELD VAN TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT 91–185 (1999) (reviewing all judicial impeachments and concluding that impeachability may depend on the particular facts of the case).

of already defined and indictable criminal offense, or was it intended to have broader scope to include nonindictable violations of public trust and duties?[25] Suppose a federal judge were to decide a case, not by applying the law, but by arbitrarily applying her own idiosyncratic standards of social justice? Are there limits to judicial independence? Is such judicial conduct impeachable? How far can federal judges go, even U.S. Supreme Court Justices, in rendering Constitutional interpretations with "no support in law or logic"?[26]

Over the course of American history Congress has impeached thirteen judges. Seven were convicted and removed from office, four were acquitted, and two resigned before Senate trial.[27] Articles of Impeachment (essentially a legislative indictment of alleged impeachable offenses) are voted on in the House of Representatives, then sent for a guilt-or-innocence trial before the bar of the Senate. A vote in the Senate of two-thirds or more on any article results in the judge's conviction and automatic removal from office.[28] This impeachment procedure is the exclusive means provided by the Constitution for removal of judges.[29] It was deemed by the drafters of the U.S. Constitution to be a necessary and sufficient means to remedy judicial misbehavior. At that time, the Federal Judiciary was regarded as "the least dangerous" branch of the Government.[30] But times change. Modern federal courts actively make policy by overturning legislative choices and assuming administrative functions that arguably fall within the province of the States or of the Executive Branch of the Federal Government.[31] The threat of impeachment may serve as a meaningful deterrent to dishonest judges tempted by bribery, but it is clearly inadequate to rein in an activist

25. Alexander Hamilton was convinced that abuse or violation of some public trust is an impeachable offense. *See* THE FEDERALIST NO. 65 (Alexander Hamilton); RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 59 (1974) (finding that it has been the practice of the Senate that "impeachment lies for nonindictable offenses").

26. Romer v. Evans, 517 U.S. 620, 640 (1996) (Scalia J., dissenting); *see also* Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT U. L. REV. 111, 148–53 (1998) (asserting that the six U.S. Supreme Court Justices who comprised the majority in *Romer v. Evans* are guilty of high crimes and misdemeanors because they rendered an unconstitutional opinion, subverted fundamental law, and introduced arbitrary power). Is it possible for the U.S. Supreme Court to render an unconstitutional decision in interpreting a clause in the U.S. Constitution?

27. MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 23–35 (2d ed. 2000).

28. *Id.* at 35.

29. THE FEDERALIST NO. 79, at 108–09 (Alexander Hamilton) (Tudor Publishing Co. 1942).

30. THE FEDERALIST NO. 78, at 99 (Alexander Hamilton) (Tudor Publishing Co. 1942).

31. Edwin Meese III & Rhett DeHart, *Reining in the Federal Judiciary*, 80 JUDICATURE 178, 178–83 (1997).

Judiciary intent on using the law as an instrument to realize its personal notions of liberty, equality, and social justice.[32]

VII. THE INDEPENDENCE AND ACCOUNTABILITY OF STATE COURT JUDGES

Most studies dealing with judicial independence and accountability fail to treat the judiciary of the several state courts.[33] This is understandable because federal law has national significance while state law is normally enforceable only within the territorial boundaries of the State. In addition, there are fifty states, and each state has its own rules pertaining to the selection, retention, and removal of its judges.[34] But despite the difficulties in addressing the issue, it should be noted that most of the litigation in the United States is handled in the state courts and not in the federal courts.[35] It should therefore be obvious that the several state court judiciaries form an important part of the American scheme of federalism and should be examined, however briefly, in order to gain a more complete picture of the nature of the tension between judicial independence and judicial accountability.

There is no uniform scheme for selecting state court judges. Broadly speaking, three methods of selection may be identified: (1) elective, (2) appointive, and (3) the so-called "merit" system.[36] This last named scheme is used by thirty-four states where at least some judges are initially appointed by the Governor (the Chief Executive of the State) from a list of candidates nominated by a nonpartisan unelected commission.[37] Four states employ executive appointment without the aid of

32. Judicial activism in the United States is not new. It was discussed by Edouard Lambert in EDOUARD LAMBERT, LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LEGISLATION SOCIALE AUX ETATS-UNIS (Paris: M. Giard & Cie. 1921).

33. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 331 (1999).

34. *See* THEODORE J. BOUTROUS, JR. ET AL., STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 16–19 (Roger Clegg & James D. Miller eds., 1996); Larry C. Berkson, *Judicial Selection in the United States*, 64 JUDICATURE 176 (1980).

35. It has been estimated that, in the year 1999, 91.5 million cases were filed in state courts compared to less than 2.4 million in federal courts. *See* NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS 1999–2000 13 (Brian J. Ostrom et al. eds., 2001).

36. Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1 (1994). *See also* The Fund for Modern Courts, *Methods of Judicial Selection*, *at* http://www.moderncourts.org/js-methods.htm (last visited July 22, 2004) (discussing the first two methods).

37. A merit selection sounds good, but is it really an improvement over alternative

a nominating commission, subject to confirmation by the legislature. In two other states, judges are elected by the State legislature. Twenty states hold partisan elections for some or all of their state court seats. In only three states (Rhode Island, Massachusetts, and New Hampshire) do high court judges, after Executive appointment, enjoy life tenure. Many states, like California, use both methods of selection (appointive and elective). In California, high court and intermediate appellate court judges are appointed by the Governor and confirmed by the Commission on Judicial Appointments. A vacancy at trial court level may be filled either by a popular election or by Executive appointment. All appointed judges must prevail at the next regularly scheduled general election in order to be retained in office.[38]

As a rule, California judges are routinely confirmed by the electorate at such regularly scheduled retention elections. Occasionally, however, judges are voted out of office by an aroused public. This happened in 1986 when the electorate rejected three California Supreme Court justices in a highly publicized retention election.[39] The most influential factor in this electoral campaign was the unpopularity of Chief Justice Bird.[40] She had done everything in her power to prevent the application of the death penalty, a penal measure held in high regard by most California voters.[41] The event dramatically illustrates the irreconcilable differences between majoritarian democracy (judicial accountability) and countermajoritarian aristocracy (judicial independence).

Campaigning in judicial retention elections in states like California

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selection methods? See E.M. Gunderson, *"Merit Selection": The Report and Appraisal of a Participant Observer*, 10 PAC. L.J. 683 (1979), for a negative answer.

38. CAL. CONST. art. VI, § 16. California Supreme Court and intermediate appellate court judges serve for terms of twelve years; trial court judges serve for terms of six years. The pros and cons of electing judges are discussed by Dorothy W. Nelson, *Variations on a Theme—Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4, 28–30 (1962).

39. The event attracted nationwide attention. *See* John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987); Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988).

40. For two contrasting views of the judicial performance of the California Supreme Court and of Chief Justice Bird see PHILLIP E. JOHNSON, "THE COURT ON TRIAL": THE CALIFORNIA JUDICIAL ELECTION OF 1986 (1985) (critical) and BARBARA BABCOCK ET AL., THE COURT ON TRIAL: AN ANALYSIS OF PHILLIP JOHNSON'S ATTACK ON THE CALIFORNIA SUPREME COURT (1986) (supportive).

41. As of two weeks before the election, Chief Justice Bird had voted to reverse the death sentence in all fifty-nine of the capital cases that came before her. *See* Stephen R. Barnett, *California Justice*, 78 CAL. L. REV. 247, 254 (1990) (reviewing JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE (1989)); John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 473–74 (1999).

costs money.[42] The voters most interested in the outcome of such elections, and the ones most likely to make financial contributions to the judicial candidates are the attorneys who periodically make court appearances before the campaigning judge on behalf of their clients.[43] Reforming the system to prohibit lawyers from contributing (or even from contributing more than a certain amount) to judicial election campaigns may violate freedoms of association and expression protected by the First Amendment.[44] But efforts are nonetheless being made. In 1995, Alabama enacted a law that disqualifies judges who accept specified ($2,000 at trial court level; $4,000 at appellate level) large campaign contributions from parties or lawyers who later appear before the judge.[45]

There is no question that state court judges consider the requirement of periodic popular elections (and the concomitant need to raise money to finance them) not only as a danger to the continuation of a judicial career, but also as an indefinable external influence on unfettered judicial decisionmaking and thereby on the principle of judicial independence.

VIII. CONCLUSION

Judicial independence in the United States forms an integral part of the political doctrine of separation of powers. Judges must be able to decide cases free from undue outside influence, especially from the other branches of the government, but also from the press, from public

42. *See* Gerald F. Uelmen, *Crocodiles in the Bathtub*, 72 NOTRE DAME L. REV. 1133, 1151 (1997) ("Ohio experienced one of the costliest judicial elections in American history in 1986, when [the] incumbent Chief Justice . . . spent $1.7 million to keep his seat, only to lose to [the challenger], who spent $1 million.").

43. Sometimes campaign contributions are made by opposing parties to a judge presiding over pending litigation. *See* Kathryn Abrams, *Some Realism About Electoralism: Rethinking Judicial Campaign Finance*, 72 S. CAL. L. REV. 505, 516–17 (1999).

44. Buckley v. Valeo, 424 U.S. 1 (1976). *See also* Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 139–49 (1998) (arguing that expenditure limits on judicial elections are constitutional because "there is a compelling interest in preserving the integrity and appearance of integrity of the bench and no other alternative is likely to succeed").

45. ALA. CODE § 12-24-2 (1995). This provision is discussed by Boutrous, *supra* note 34, at 71–86. The Alabama statute also requires a judge to recuse herself from hearing a case "in which there may be an appearance of impropriety" because of judicial campaign contributions from parties or lawyers. ALA. CODE § 12-24-1.

opinion, from attorneys and their clients, and from whomever also might be interested in disrupting the proper conduct of judicial affairs. Yet the right of the judiciary to act independently does not give judges the license to act irresponsibly. In order to prevent arbitrary and capricious judicial behavior, limits must be set on the independence of the judiciary. These limits can either form part of the judicial process: lower courts are responsible to higher courts; or, in cases of serious judicial misconduct, they may be imposed by a co-ordinate branch of the government: impeachment and removal by the Legislature, and ordinary criminal prosecution by the Executive. In this way, and consistent with the American scheme of checks and balances, governmental power is dispersed and the liberties of the people are preserved from the despotism that inevitably flows from an accumulation of too much power in the hands of an unscrupulous few.

In a larger sense, judicial independence in any country must begin with a genuine commitment to democracy and the rule of law. In countries plagued by war and political instability, judicial independence will remain programmatic, irrelevant, and unattainable.[46] Even in countries more closely associated with the traditions of Western Civilization, the experience of the past and the legal culture developed over time will invariably condition the way in which judicial independence is conceived and practiced.[47]

In which branch of the government do people place their greatest

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46. On November 7, 1985, a group of rebels seized the Palace of Justice in Bogota and assassinated twelve of the justices of the Supreme Court of Colombia. William R. Long, *12 Colombian Justices Dead*, L.A. TIMES, Nov. 9, 1985, at A1. Argentina, renowned for once (1976–1983) making its troublesome citizens "disappear" (*los desaparecidos*) is currently suffering from the disappearance of an independent judiciary. Brink Lindsey, *How Argentina Got Into This Mess*, WALL ST. J., Jan. 9, 2003, at A14, states: "The Supreme Court, the supposed bulwark of the rule of law, [has been] reduced to a puppet of executive power." In 1995, the President of Mexico persuaded all twenty-six justices of the Mexican Supreme Court to retire early in order to replace them with persons sympathetic to his national reform policies. *See* Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 AM. U. J. INT'L L. & POL. 295, 297 (1996).

47. The Minister of Justice of Italy, allegedly for political reasons, recently attempted to have a judge hearing a bribery-of-the-judiciary case against the Italian Prime Minister transferred to another job in the Milan courts. *Italy, Its Prime Minister and the Law: He's Not Safe Yet*, THE ECONOMIST, Jan. 19, 2002, at 42–43. In France, a judge investigating corruption involving high ranking government officials (right up to the President himself) resigned because of alleged "politically motivated sabotage." *France, Corruption and the Law: The Bitterness of a Judge*, THE ECONOMIST, Jan. 19, 2002, at 43. Germany, having bridged successful transition from dictatorship (JUSTIZ IM DRITTEN REICH 173–74 (Ilse Staff ed., Fischer Bücherei 1964)) to democracy (§ 97 GG), nonetheless has also experienced problems where politically sensitive issues are involved. *See* von Prof. Dr. Ingo Mittenzwei, *Richterliche Unabhängigkeit und ihre Grenzen*, *in* ZIVILPROZESS UND PRAXIS 375 (1997).

trust? Starting at least with *Marbury v. Madison* (1803), we in the United States have been willing to permit the Judiciary to tell us, in the last analysis, "what the law is."[48] France, having suffered greatly from the excesses of judicial intervention during the *ancien regime*, placed its trust in the legislature, prohibiting its judiciary from deciding cases by laying down general principles for the future.[49] France's traditional fear of a "Government of Judges" subsided somewhat with the adoption of the 1958 Constitution, Articles 56–63 of which create the *Conseil constitutionnel* and invest it with the power to review proposed legislation (after passage but before promulgation) for compatibility with the Constitution.[50]

In time, the people of France, as well as of other European countries, will come to accept an enhanced role of the judiciary as a key institutional element in the maintenance of a stable and balanced governmental structure.[51] We in the United States take pride in having over 200 years of experience in encouraging judges to be both independent and accountable. Our history has shown that no branch of government has a monopoly on wisdom. Mistakes have been made, and surely will continue to be made, by all three coordinate branches of government.[52] This is inevitable in public affairs, the consequence of the

48. To quote from what may be the most famous case in the world: "It is, emphatically, the province and duty of the judicial department, to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

49. Article 5 of the French Civil Code states: "Judges are forbidden to pronounce decisions by way of general and regulative disposition on causes which are submitted to them." The French Civil Code 2 (John H. Crabb trans., 1995); *see also* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 125–26 (3rd ed. 1998) (discussing the structure of French judicial positions).

50. JOHN BELL, FRENCH CONSTITUTIONAL LAW 227–42 (1992), evaluates this experiment with judicial review as a success.

51. Of great assistance in this regard has been the success of both the European Court of Justice in Luxembourg and the Council of Europe's Human Rights Court in Strasbourg.

52. Examples of three of the most egregious mistakes are: (1) by the Legislature: The Alien and Sedition Acts of 1798, in particular, An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 596–97 (1798), which threatened criminal punishment to anyone defaming the U.S. Government, Congress, or the President. It was aggressively used to silence critics of the Administration of John Adams; (2) by the Executive: On February 19, 1942, President Franklin D. Roosevelt, fearing invasion, sabotage, and espionage, issued Executive Order No. 9066, leading to the internment of, inter alia, U.S. citizens of Japanese descent; and (3) by the Judiciary: Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). In *Dred Scott*, by finding that black slaves were not U.S. citizens, possessed no rights under the Due Process Clause of the U.S. Constitution, and could not sue in courts, the U.S. Supreme Court mistakenly believed

fallibility of human nature.

The Founders of the American Republic took all this into consideration when they set the doctrine of separation of powers firmly in place as the keystone in the institutional architecture of the U.S. Constitution. In the American legal culture, separation of powers means at the same time independence as well as interdependence. Therein lies the genius of the American Constitutional order.

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that it had settled the question of the legality of slavery once and for all.