

# SEPARATING JUDICIAL POWER

DAVID P. CURRIE\*

## I

### INTRODUCTION

It seems most appropriate that the topic of this symposium is not simply judicial independence but judicial accountability as well. For while we want judges to be independent so that they can administer the law without fear of reprisal, we also want to find some way of controlling them. For independent power, as Jefferson wrote, is absolute power;<sup>1</sup> there must be checks on judicial, as well as legislative and executive, authority. Our dilemma is like that of the King of Siam in Rogers and Hammerstein's play:

Shall I join with other nations in alliance?  
If allies are weak, am I not best alone?  
If allies are strong, with power to protect me,  
Might they not protect me out of all I own?<sup>2</sup>

Thus the critical question is neither how to make judges independent nor how to control them, but rather how best to reconcile the competing values, to find the happy medium, the golden mean—how, in other words (for I come from Chicago), to optimize the costs and benefits of judicial independence and accountability.<sup>3</sup>

Other articles in this symposium explore particular aspects of this problem: judicial selection, discipline, retention, and conflicts with other branches. My task is to provide the historical and comparative perspective. This article outlines the development of the status of judges in England and in this country, with a brief reference to the German system. I shall remind the reader of some of the more important controversies over judicial independence and accountability that have arisen under the U.S. Constitution. I shall close with a tentative assessment of where we stand.

---

Copyright © 1998 by Law and Contemporary Problems

This article is also available at <http://www.law.duke.edu/journals/61LCPCurrie>.

\* Edward H. Levi Distinguished Service Professor of Law, The University of Chicago.

Copious thanks to James C. Ho for invaluable research assistance and to Barbara Flynn Currie for advice and encouragement.

1. See Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 12 THE WORKS OF THOMAS JEFFERSON 135, 137 (Paul Ford ed., 1905).

2. RICHARD RODGERS & OSCAR HAMMERSTEIN, THE KING AND I act 1, sc. 3.

3. As the ABA's Commission on Separation of Powers and Judicial Independence recently concluded, "maintaining the appropriate balance between independence and accountability of the federal judiciary is of critical importance to our democracy." ABA Comm'n on Separation of Powers and Judicial Independence, Informal Op. 43 (1997).

## II

## ENGLAND

I shall make no effort to explore the law of Babylon or ancient Rome, or even the first years after the Norman Conquest, when justice was administered by the King and his immediate agents or by the local courts. By the sixteenth century, Holdsworth tells us, the law was applied by a corps of professional judges. Though it is usually said that most of them held office at the pleasure of the Crown (*durante bene placito*), their independence was generally respected. Typically, they upheld and enforced the law, protecting the liberty of the subject even against the interest of the Crown. During the reign of Elizabeth I, Holdsworth concludes, there was only "one doubtful instance . . . of the dismissal [of a judge] for political reasons."<sup>4</sup>

Matters took a dramatic turn for the worse in the seventeenth century under the Stuarts. Judges (of whom Coke was the most famous example) were "frequently dismissed for political reasons."<sup>5</sup> They were pressured to delay cases in which the Crown had an interest, and they were importuned to give extrajudicial opinions under the implied threat of dismissal. Even a Baron of the Exchequer, who unlike most judges held office during good behavior (*quamdiu se bene gesserit*), was suspended from his functions in 1630. The judges "tended to become identified with the party and policy of the king"; they became his "civil servants . . . and not . . . independent expositors of the law."<sup>6</sup>

Things were apparently better under Cromwell, but after the Restoration the Stuarts went back to their bad old ways.<sup>7</sup> There was much dissatisfaction with this state of affairs, and after the Revolution, William III began appointing judges to hold office during good behavior. This practice was entrenched in 1701 by the famous Act of Settlement, which provided for passage of the Crown to the House of Hanover if both William and his successor died without issue, as of course they did. Once the first Hanoverian ascended the throne, all judges were to be appointed during good behavior, and their salaries were to be "ascertained and established"<sup>8</sup>—apparently to preclude subsequent executive revision. The Act further provided that "upon the address of both Houses of Parliament" the judges could be removed.<sup>9</sup>

---

4. 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 346 (1927); see also THOMAS PITT TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 464-65 (Sweet & Maxwell 11th ed. 1960) (1875); Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1105-06 (1976). But see THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF ENGLISH LAW 248 (Little, Brown 5th ed. 1956) (1929) (suggesting that at-will appointments began with Charles II).

5. 5 HOLDSWORTH, *supra* note 4, at 352.

6. 5 *id.* at 350-55; see also TASWELL-LANGMEAD, *supra* note 4, at 465.

7. New judges were appointed to serve at pleasure, and political dismissals were once again common. Even a Justice of Common Pleas with a commission during good behavior was denied the right to hear cases, although he retained his salary. See Smith, *supra* note 4, at 1108-09.

8. Act of Settlement, 12 & 13 Will. 3, ch. 2, § III, para. 7 (1701) (Eng.).

9. *Id.*; see TASWELL-LANGMEAD, *supra* note 4, at 460-66.

“[T]he complete independence of the bench,” wrote Plucknett, “was thus permanently established.”<sup>10</sup> What he meant was independence from the Crown (subject to interpretation of the flexible term “good behavior”), not from Parliament.<sup>11</sup> The joint-address provision apparently enabled Parliament to depose a judge without cause (although the question is not free from dispute).<sup>12</sup> Indeed, Parliament could not have renounced control over the judges if it had tried. The one thing it was always understood Parliament could not do was surrender its powers; if a statute had required high crimes or misdemeanors or a two-thirds majority to remove a judge, it could have been repealed.<sup>13</sup> Thus, after the Act of Settlement, the danger to judicial independence came from Parliament, not from the Crown.<sup>14</sup>

### III

#### THE NEW WORLD

The Act of Settlement did not apply to the colonies, and their judges generally served at the pleasure of the Crown. Colonial legislatures, moreover, typically voted judicial salaries on an annual basis, so that judges were dependent on the legislature as well. As Barbara Black has written, this arrangement tended to make the judges impartial between the Crown and the people by creating a sort of balance of terror: The judges were afraid to offend either party.<sup>15</sup>

This was the antithesis of independence; it was double dependency. The balance, such as it was, was gravely upset in Massachusetts when the King took over the payment of judges' salaries.<sup>16</sup> The colonists cited the resulting pattern in the Declaration of Independence as one of their grievances against George III: “He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.”<sup>17</sup>

Against this background, it was perhaps not surprising that the first state constitutions tended to make judges independent of the executive by assuring them tenure during good behavior.<sup>18</sup> They provided less protection, however, against legislative interference. In Rhode Island and Connecticut, which retained their colonial charters, judges were appointed annually by the legislature. Several states in which judges served during good behavior subjected

---

10. PLUCKNETT, *supra* note 4, at 61.

11. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 270 (Liberty 8th ed. 1982) (1885).

12. See Barbara Black, *Massachusetts and the Judges: Judicial Independence in Perspective*, 3 LAW & HIST. REV. 101, 105-08 (1985) (adding that the King's concurrence was required but, by the time of George III, this had become a formality, so that the judges were wholly dependent on Parliament).

13. See DICEY, *supra* note 11, at ch. I.

14. See TASWELL-LANGMEAD, *supra* note 4, at 466.

15. Black, *supra* note 12, at 108-12; see also Smith, *supra* note 4.

16. See Black, *supra* note 12, at 115-19.

17. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

18. Delaware, Maryland, Massachusetts, New Hampshire, New York, North Carolina, South Carolina, and Virginia. Pennsylvania adopted a good-behavior standard in 1790. A few states, however, prescribed fixed terms, with or without possible reappointment.

them to removal on joint address, as in England.<sup>19</sup> Even those that provided for removal only by impeachment (for such causes as crime, misbehavior, maladministration, absence, or incapacity) tended to do nothing to prevent the legislature from reducing judicial salaries.<sup>20</sup> Thus, the burden of the early state constitutions was not that judges should be independent but that they should be subject only to legislative control—as they were in England under the Act of Settlement.

The U.S. Constitution, of course, went further. Article III guaranteed federal judges both tenure during good behavior and an irreducible salary. There was no provision for removal on joint address; the sole remedy mentioned was impeachment. There was some question as to the relationship between the good-behavior standard and Article II's reference to "high crimes and misdemeanors" as a basis for removing federal officers; it was even disputed whether high crimes and misdemeanors were the sole basis of impeachment. Nevertheless, it has been generally understood that Article III protects the tenure and salary of federal judges from both executive and legislative interference. Hamilton explained why in *The Federalist*: Judicial independence was essential to ensure the impartial administration of justice and to enable the courts to act as a check on other branches of government.<sup>21</sup>

#### IV

#### ACCOUNTABILITY

It was not long before people began to ask whether, in guaranteeing judicial independence, the Constitution had gone too far. What could be done, for example, if a judge lost his mind? The example was far from hypothetical; the first three judges appointed to the District Court for New Hampshire went mad.

John Pickering, the second of them, was impeached and removed in 1804. This proceeding created a scandal, for insanity is not commonly considered a high crime or misdemeanor. Indeed, the Senate refused to say that it was, contenting itself with finding poor Pickering "guilty as charged," that is, of having committed acts that might have qualified as crimes if he had been of sound mind. Madison in the Convention and Hamilton in *The Federalist* had rejected maladministration and incapacity as grounds for impeachment because they would effectively have meant tenure at the pleasure of Congress; impeachment was not the answer to insanity.<sup>22</sup>

---

19. Delaware, Massachusetts, New Hampshire (1792), Pennsylvania (1790), and South Carolina.

20. Only Delaware, North Carolina, Pennsylvania, and South Carolina protected judicial salaries. The early constitutions are reprinted in *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS* (Francis N. Thorpe ed., 1909). Their provisions regarding the status of judges are summarized in William F. Swindler, *Seedtime of the American Judiciary: From Independence to the Constitution*, 17 WM. & MARY L. REV. 503, 506-07 (1976).

21. See *THE FEDERALIST* No. 78 (Alexander Hamilton).

22. See David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 238-49 (1998).

As early as 1805, John Randolph proposed that the Constitution be amended to permit removal of judges on joint address,<sup>23</sup> and the suggestion was repeated a number of times during the next few years. This procedure would have been even more fatal to judicial independence; it really meant service at congressional pleasure.

When John Sullivan, the first New Hampshire District Judge, went mad in 1794, Congress had developed a simpler solution: It transferred his jurisdiction to the Circuit Court by statute. This maneuver may have improved the quality of justice in New Hampshire in the short run, but it exposed a dangerous gap in the protections of Article III. Tenure and salary guarantees were plainly not enough to secure judicial independence; statutory transfer of jurisdiction was arguably inconsistent with the spirit of the Constitution.<sup>24</sup>

A fourth possibility was to assign a substitute to perform the functions of a disabled judge, as in the case of presidential incapacity under Article II. The crucial question, of course, was who was to decide whether the judge was incapable of performing his job. (In the case of the President, this question was unconscionably left open until adoption of the Twenty-Fifth Amendment.<sup>25</sup>) In 1812, Madison, arguing that it gave the Executive too much power over the courts, appropriately vetoed a bill that would have granted such authority to the President.<sup>26</sup> The 1801 Judiciary Act had sensibly entrusted the job to other judges, and they had quietly put Pickering on the shelf. But the Republicans heedlessly repealed the whole statute in 1802 and put him back on the Bench.<sup>27</sup>

The provision for judicial control of incompetent judges was reenacted in time to deal with New Hampshire's third crisis, and a modern variant is in force today.<sup>28</sup> This approach is not unattractive. While it reduces the independence of the individual judge from his judicial peers, it preserves the freedom of the courts from legislative and executive interference and thus leaves them in a position to act as watchdogs on the other branches of government.<sup>29</sup>

Incapacity, however, is not the sole problem. The crucial question is how to control lawless judges who exceed their authority. A variety of devices have

---

23. See 14 ANNALS OF CONG. 1213 (1805).

24. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 198-200 (1997).

25. Unless the President declares himself disabled, the initial determination is now made by the Vice-President and a majority of the Cabinet, unless Congress otherwise provides by law. If the President objects, a two-thirds vote of both Houses is required. See U.S. CONST. amend. XXV, §§ 3-4.

26. See 1 JAMES D. RICHARDSON, *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 511 (1900).

27. See 2 Stat. 89, 97, § 25 (Feb. 13, 1801); 2 Stat. 132, § 1 (Mar. 8, 1802); see also Currie, *supra* note 22, at 248-49.

28. See 2 Stat. 534 (Mar. 2, 1809); 28 U.S.C. § 372(c) (1994) (empowering the Judicial Council of each circuit to declare judges disabled and, upon a finding of "conduct prejudicial to the effective and expeditious administration of the business of the courts," to censure them, invite them to retire, or even order that they be assigned no further cases). There is no comparable provision for Justices of the Supreme Court.

29. Comparable provisions are common in the states. See, e.g., ILL. CONST. art. VI, § 15 (1970).

been tried. Justice Chase was impeached, but the Senate failed to convict him.<sup>30</sup> The Jeffersonians in 1802 unburdened themselves of a whole raft of Federalist judges by abolishing their courts and then postponing the Supreme Court's term.<sup>31</sup> Congress stripped the Court of jurisdiction over a pending case to avoid a test of the legality of Reconstruction.<sup>32</sup> President Roosevelt threatened to pack the Court with additional Justices in order to salvage the New Deal.<sup>33</sup> As early as the 1820s, Members of Congress proposed to require a supermajority to invalidate state or federal laws.<sup>34</sup> Other stratagems may be imagined: Congress might reduce the judicial budget, burden the judges with onerous duties, or refuse to keep their salaries abreast of inflation.

We tend to condemn these devices as incompatible with judicial independence. Although Congress has express authority to establish inferior tribunals, to make exceptions from the Supreme Court's appellate jurisdiction, and to enact all laws necessary and proper to the exercise of judicial powers, there is a plausible argument that all of them are unconstitutional. In Henry Hart's words, these options are all arguably inconsistent with the essential position of the courts in the constitutional plan.<sup>35</sup> But this argument places us in a real dilemma. If we take away all imaginable tools for controlling the courts, how are we to protect against runaway judges? As Gerhard Casper has pointed out, the jury was intended as a check on judicial arrogance;<sup>36</sup> but what are we to do if a judge sets the jury's work aside? Constitutional amendments may overrule erroneous decisions,<sup>37</sup> but the judges will construe them.

It may be that judges were meant to be more accountable than that.

## V

### ANALOGY

The problem of judicial independence and accountability is universal; the experience of other countries may help us to approach its solution. I offer one example: the Federal Republic of Germany.<sup>38</sup>

---

30. See Currie, *supra* note 22, at 249-59.

31. See *id.* at 222-38.

32. See *Ex Parte* McCardle, 74 U.S. 506 (1869); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 304-07 (1985). Similar proposals were made following controversial Supreme Court decisions in such matters as subversion, reapportionment, and abortion.

33. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 235-36 (1990).

34. 41 ANNALS OF CONG. 28 (1823) (proposal by Sen. Johnson).

35. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363-65 (1953). The opposite argument is also plausible: The Framers *deliberately* protected only tenure and salary, leaving such devices as jurisdiction-stripping and court-packing as intended means of controlling the courts.

36. See GERHARD CASPER, *SEPARATING POWER* ch. 5 (1997).

37. See U.S. CONST. art. V; see also *id.* amends. 11, 14, 16.

38. For a more detailed discussion, see DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 153-72 (1994).

In some respects, the German Constitution is more protective of judicial independence than that of the United States. It guarantees judicial review of administrative action;<sup>39</sup> it ensures the right to attack the constitutionality of government action before the Constitutional Court;<sup>40</sup> it permits judges to be disciplined or removed only by other judges.<sup>41</sup> Unless the Constitution itself is amended, there can be neither jurisdiction stripping nor impeachment of judges in Germany.

There is no provision, however, for tenure during good behavior. Justices of the Constitutional Court serve twelve-year terms (subject to mandatory retirement at the age of sixty-eight); they may not be reappointed.<sup>42</sup> This ingenious scheme may be essentially as protective of judicial independence as life tenure, and it keeps the Court more in touch with the times. However, it is not anchored in the Constitution; it is Parliament's job to regulate the composition of the Court, and the relevant provisions have, on occasion, been altered.<sup>43</sup>

Similarly, the German Constitution specifies neither the number of Justices nor the grounds for their removal, and it says nothing about irreducible salary. Yet Article 97(1) declares in unambiguous terms that judges are "independent and subject only to law."<sup>44</sup> This provision has been held to require that judges be paid an adequate salary,<sup>45</sup> and it could equally be read to plug other holes in the specific provisions as well. It would be easier to find Court-packing unconstitutional in Germany, for example, than in the United States; only the German Constitution contains an explicit guarantee of judicial independence as such.

In short, Germany's constitution is more protective of judges than ours in some respects and arguably less protective in others. The generality of the basic guarantee leaves its scope uncertain. The trick is to interpret it in such a way as to permit the judges to check other branches without making it impossible to check the judges themselves.

## VI

### CONCLUSION

Our constitutional scheme for judicial independence and accountability is imprecise and untidy. From the standpoint of independence there are obvious gaps: The Constitution says nothing about protecting the courts from packing, jurisdiction-stripping, or a host of other potential assaults. Yet there are corresponding gaps in the fabric of accountability: It is debatable whether the Con-

---

39. See GRUNDGESETZ [Constitution] art. 19 (4) (F.R.G.).

40. See *id.* art. 93(1) Nr 4a.

41. See *id.* art. 97(2).

42. See Gesetz über das Bundesverfassungsgericht § 4(1)-(3), v.12.3.1951 (BGBl. I S.243). Similarly, the French and Italian Constitutions provide nine-year unrenovable terms for constitutional judges. See CONST. art. 56 (1958) (Fr.); COSTITUZIONE art. 135 (Italy).

43. See GRUNDGESETZ art. 94(2) (F.R.G.).

44. *Id.* art. 97(1).

45. See 12 BVerfGE 81, 88 (1961).

stitution provides *any* effective check on runaway judges. Worst of all, perhaps, it is unclear what the relevant law is; *we do not know* how independent or accountable federal judges are.

And yet, by and large, it works. Sometimes, it is true, the courts are too timid. We all have our pet examples; one of mine is the great Witch Hunt we associate with Senator Joe McCarthy.<sup>46</sup> On other occasions, in contrast, they are not timid enough; we can all agree the *Dred Scott* decision fits this category.<sup>47</sup> Conversely, legislative or executive officers occasionally make thoughtless threats to retaliate against judges who render unpopular decisions. In the main, however, the system works like a charm. The courts effectively check the other branches; the other branches effectively check the courts.

Why? Because, by and large, both the courts and the political branches tend to avoid confrontation. The President and Congress threaten the courts but seldom take action; the courts exercise restraint and pull back in the face of danger.

Why? Partly for fear of losing power. If they go too far, judges may get their wings clipped; legislators may not be reelected. The very uncertainty of the law may contribute to prudence: We may all be more reasonable when we do not know what we can get away with. To that extent, as in the colonies, we may have established a new balance of terror.

But I think the principal reason our untidy arrangement works is that the players respect the system. The judges know they are expected to follow the law; legislators and executives know the judges are supposed to be independent. Nobody wants to destroy the system—a system in which no one has absolute power; in which there are effective checks on all branches of government; in which judges are both independent and accountable; in which we eat our cake and have it, too.<sup>48</sup> It is impossible, of course. But it works. And it will continue to work so long as we believe the impossible dream.

Like so much else in this wonderful country, the delicate balance between judicial independence and accountability rests less on the words of the Constitution than on the good sense of the American people—and of those who serve them in the legislative, executive, and judicial branches.

---

46. See, e.g., *Barenblatt v. U.S.*, 360 U.S. 109 (1959); CURRIE, *supra* note 33, at 392-96.

47. See *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); CURRIE, *supra* note 32, at 263-73.

48. Once again I find myself in agreement with the ABA's Commission on Separation of Powers and Judicial Independence, which concluded that "a common purpose and mutual respect for the doctrine of separation of powers [have] prevented each branch from pressing its power to the outer limit." ABA Comm'n on Separation of Powers and Judicial Independence, *supra* note 3, at i.