THE THREE INDEPENDENCES

H. Jefferson Powell *

I. INTRODUCTION

The topic of judicial independence is, of course, an especially fitting one for us to consider as we gather to honor Chief Justice Carrico. On many occasions, I am sure, he has had cause to reflect on the meaning and purpose of an independent judiciary, and I hope that my observations are ones that he will find consistent with his own experience of the actual workings of the American legal system.

At first glance, however, one might worry that the fundamental notion of judicial independence is too uncontroversial to repay close attention. Surely we can expect rather little in the way of dissent. The independence of the judiciary is a commonplace, a settled presupposition of the constitutional system of government in the United States. It is, I suppose, always possible to find someone, somewhere who will dispute any proposition, but in the context of our Republic and our legal system and profession, it would sound more eccentric than interesting if one of today's speakers simply denounced judicial independence as a bad idea. In the early twenty-first century, the truly controversial issues relating to the independence of the courts are to be found in the sometimes troubled relationship between that independence and other political principles and practices in our system—the election of judges in many states, for example, or the role of the United States Senate in the appointment of federal judges. The

* Professor of Law, Duke University School of Law. B.A., 1975, St. David's University College, University of Wales; A.M., 1977, Duke University; M. Div., 1979, Yale Divinity School; J.D., 1982, Yale Law School; Ph.D, 1991, Duke University. I am most grateful to the Honorable Donald W. Lemons for his comments and encouragement.

existence and fundamental value of judicial independence per se are not generally in dispute.

Other speakers in today's symposium will address some of these questions that are currently at the forefront of discussion and debate. My task, however, is to ask you to spend some time thinking about what I have just been calling commonplaces, settled presuppositions, and matters free of controversy. Doing so will not be pointless and I hope it will not be boring. The problem with a legal or political practice or principle becoming uncontroversial is that we can, bit by bit, without noticing that we are doing so, lose a clear sense of what the point of the practice is, or what the principle really means. It is no bad thing every so often to take out our shared presuppositions and ask why we presuppose them, and whether we are truly acting in accordance with them or just paying them lip service. What seems simple or obvious may turn out to be more complicated than it first appears. In drafting the Declaration of Independence, Thomas Jefferson charged King George III with the political crime of "ma[king] Judges dependent on his Will alone,"[1] and Jefferson was almost as harsh in his criticism of the Virginia state legislature's domination of the state courts under the Commonwealth's original constitution.[2] But Jefferson also wrote that judicial "independence of the will of the nation is a solecism, at least in a republican government."[3] In my remarks I propose that we explore the complexity that Jefferson's comments suggest, that we consider the questions of what judicial independence really means, and what its purpose or purposes are.

1. THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776).

2. For Jefferson's criticism of the dependence of the post-revolutionary Virginia courts on the legislature, see Thomas Jefferson, Notes on the State of Virginia, Query 13, 120–21 (1784), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 319–20 (Philip B. Kurland & Ralph Lerner eds., 1987).

3. Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 171 (Paul Leicester Ford ed., 1899).

II. BLACKSTONE AND TUCKER: DEFINING THE VALUE OF JUDICIAL INDEPENDENCE

Let us start where founding-era lawyers often began, with Blackstone. In the first volume of the *Commentaries*, Blackstone wrote:

> In th[e] distinct and separate existence of the judicial power, in a peculiar body of men . . . consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law . . . . Were it joined with the executive, this union might soon be an overballance for the legislative.[4]

It will repay us to linger a few moments over what Blackstone is saying here. As a preliminary matter, let us recall what he isn't saying. Blackstone firmly rejected any notion that a court could disregard or set aside an act of Parliament; for him judicial independence depended not at all on any power of judicial review of legislation.[5] In that respect, the great commentator differed from his American disciples. From *The Federalist* on, the Founders cited the courts' power of constitutional review as one of the rationales for judicial independence.[6] But, as I hope to show, the Founders followed Blackstone in identifying other factors as crucial to the case for judicial independence.

Blackstone defined the value of judicial independence primarily in terms of the dangers of its absence. If the judicial power were "joined with the legislative," he warned, "life, liberty, and property . . . would be in the hands of arbitrary judges," and decisions would be "regulated only by [the] opinions" of the decisionmakers

4. 1 WILLIAM BLACKSTONE, COMMENTARIES *259–60.

5. 1 *id.* at *259.

6. *See* THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (stating that ascertaining the meaning of laws and constitutions is the courts' proper province).

"and not by any fundamental principles of law."[7] But why? Blackstone commented, to be sure, that "legislators may depart from, yet judges are bound to observe" the "fundamental principles of law,"[8] but Blackstone, remember, didn't have a concept of judicial review of legislation, and if the legislators enact arbitrary or oppressive laws, the judges' only choice, in his view, would be to enforce those laws.[9] Something else must be going on. A bit later in this passage, Blackstone expressed the danger that the assimilation or subordination of the judiciary to the executive would incline the judges "to pronounce that for law, which was most agreeable to the prince or his officers."[10] It is a reasonable fear, but it wasn't his first or seemingly his most weighty argument which was, in the language I've already quoted, that the union of judicial and executive power "might soon be an overballance for the legislature."[11] Again, something else is at stake beyond the danger of arbitrary decisions in themselves, important as that may be. There is, I think, some distinct and fundamental significance for Blackstone in the independence of the judiciary that is linked directly and positively to the distinction he draws between the legislature and the executive.[12] Judicial independence, in short, is grounded in a more general view of the necessary separation of powers, in what he called a bit later in his discussion "a free constitution."[13]

All of Blackstone's arguments for judicial independence are picked up and amplified by leading American Founders, including the link we've just seen between judicial independence and the overall goal of separating and dividing governmental power. James Madison in *The Federalist*, for example, wrote that "[t]he accumulation of all powers legislative, executive and judici[al] in the same hands . . . may justly be pronounced the very definition of tyranny,"[14] quite apart, it would seem, from any specific ways in which such unified powers might be misused. The most sugges-

---

7. 1 BLACKSTONE, *supra* note 4, at *259.

8. 1 *id.*

9. *See* 1 *id.* (noting that judges, unlike legislators, are bound to observe fundamental principles of law).

10. 1 *id.* at *260.

11. 1 *id.*

12. *See* 1 *id.* at *259—60 (stating that the judicial branch is unique because of its separate existence and its look of susceptibility to the crown).

13. 1 *id.* at *260.

14. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

tive founding-era discussions of why this is so are those of St. George Tucker, the great Virginia judge and legal scholar, whose 1803 American edition of *Blackstone's Commentaries* was a milestone in the development of American legal thought.[15] In part, Tucker traveled over familiar ground, repeating all of the pragmatic points that Blackstone and others had made. As Tucker put it in 1803, judicial independence is "absolutely necessary" to enable the courts to make decisions, "without the hope of pleasing, or the fear of offending" the legislative or executive branches.[16] And, like his fellow Americans, Tucker added to these arguments the existence of judicial review as a reason for protecting judicial independence.[17] But he went beyond earlier discussions by giving clearer content to the idea that judicial independence is a specific and vital aspect of the structure of constitutional government itself.[18]

Judicial independence, Tucker asserted in his 1803 edition of *Blackstone's Commentaries*, stems from "the letter of the [federal] constitution which defines and limits the powers of the several coordinate branches of the government"[19] and does so, most fundamentally, by securing to each branch "the free exercise of their constitutional functions."[20] The key words here are "defines" and "functions." For Tucker, the courts ought to be independent because, by definition, what courts do—their "function"—is distinct from the functions of legislatures and executive officers. Tucker was echoing something he had written in his great opinion in the case of *Kamper v. Hawkins*,[21] decided in 1793. The constitution (meaning the Virginia Constitution on that occasion) makes "the legislative, executive, and judiciary . . . separate and distinct," therefore, "neither [ought to] exercise the powers properly belong[ing] to the other."[22] Judges are independent for the same reason that executive officers and legislators are independent—because what each branch does is in some core way distinctive

15. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES (Philadelphia, Birch & Small 1803).

16. 1 *id.* app. at 359.

17. *See* 1 *id.* (discussing the importance of the complete independence of the judiciary).

18. 1 *id.*

19. 1 *id.* app. at 354.

20. 1 *id.* app. at 359.

21. 3 Va. (1 Va. Cas.) 20 (1793).

22. *Id.* at 79 (Tucker, J., seriatim opinion).

and unique. The reason that a system of imperfectly separated powers is tyrannical by definition is that such a system permits a department of the government to carry out or control a function that it is ill-suited to exercise in due responsibility to the people. For Tucker, in other words, it is quite wrong to think of the courts as less "responsible" than the so-called political branches.[23]

That absolute independence of the judiciary, for which we contend, is not then incompatible with the strictest responsibility; "for a judge is no more exempt from [such responsibility] than any other servant of the people, according to the true principles of the constitution."[24]

Tucker's answer to Jefferson's worry, quoted earlier, is that judicial independence is the very means of securing the judiciary's "strictest responsibility"[25] to the people, not a grant of independence from "the will of the nation."[26] Judicial independence is the form republican principles take when they are applied to the shaping and activities of the courts.

III. THE THREE STRANDS OF JUDICIAL INDEPENDENCE

To see how this is so, I think it will be helpful to distinguish three separate strands in the concept of judicial independence—"three independences," I am going to call them—each of which I believe to be part of traditional American constitutional and legal thought, although the terminology I am going to employ may not be completely familiar. The American constitutional and legal tradition expects and requires that the courts possess and act on *independence of position*, *independence of decision*, and *independence of thought*. Only where all three of these independences are present do the courts possess that "absolute independence" that Tucker and the other Founders believed to be essential to a free and republican constitution.[27] Any serious lapse in the maintenance of any of these three independences, whether by pressure from without the courts or failure within, renders the courts de-

23. *See id.* at 82–84 (Tucker, J., seriatim opinion).
24. 1 TUCKER, *supra* note 15, app. at 359.
25. 1 *id.*
26. *See* Letter from Thomas Jefferson to Thomas Ritchie, *supra* note 3, at 171.
27. *See* 1 TUCKER, *supra* note 15, app. at 359.

pendent in a fashion inimical to their ordained and vital role in our constitutional system—renders them in fact less responsible to "the will of the nation."[28]

Let us turn first to that independence which can most easily be observed—*independence of position*. The courts are only truly independent, our tradition has maintained, when the judges hold their positions free of personal worry that a decision obnoxious to the powerful can lead to a loss of position, status, or salary. The function of adjudication involves by definition the reality that the judge will give disappointment and offense from time to time, to unhappy litigants, uncomprehending public opinion, and the members of the other two branches of government. As Alexander Hamilton wrote in *The Federalist No. 78*, an "independent spirit in the judges . . . must be essential to the faithful performance of so arduous a duty."[29] But magistrates, whose positions are in the control of those they may offend, can hardly be expected in the long term to disregard the consequences of their decisions. Theoretical responsibility to the administration of the people's law would be overshadowed by de facto subservience to those who cannot claim to be the people, even if they constitute a momentary popular majority. It is vital, therefore, that in devising free and republican constitutional structures of government the people create such safeguards for the independence of the courts as will foster the "firmness and independence,"[30] "integrity and moderation"[31] "of the judicial magistracy."[32] "Considerate men of every description," Hamilton concluded, "ought to prize whatever will tend to beget or fortify that temper in the courts."[33] Only if they possess independence of position can judges truly be responsible to the people for the execution of their function of impartial and unbiased judgment in individual cases. On this basis, Hamilton commended the federal Constitution's provisions ensuring to the federal judges tenure during good behavior and prohibiting the diminution of their compensation.[34]

---

28. *See* Letter from Thomas Jefferson to Thomas Ritchie, *supra* note 3, at 171.

29. THE FEDERALIST NO. 78, *supra* note 6, at 527 (Alexander Hamilton).

30. *Id.* at 523.

31. *Id.* at 528.

32. *Id.*

33. *Id.*

34. *Id.* at 522–24, 530; THE FEDERALIST NO. 79, at 531–32 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Independence of position, then, is concerned with tangible, external threats to the courts' proper exercise of their constitutional function, and it is secured in the Founders' view by external structural protections for the individuals who exercise the power of the courts.[35] But I want us to take note of the way in which Hamilton links these external factors to the internal subjectivities of the judges—to their "temper" as he puts it.[36]

The second strand in the weave making up judicial independence is what I am calling *independence of decision*. The courts are only truly independent, our tradition has maintained, when the decisions of the judges take effect, are enforceable and enforced, without circumvention or defiance by legislatures and executive officers. The function of adjudication involves by definition the actual resolution of disputes, not the abstract expression of juristic opinion. (The practice of providing advisory opinions that exists under some state constitutions is, I think, only an apparent exception and is in any event a minor one.) Writing in 1800, Madison sharply distinguished an "expression[] of opinion, unaccompanied with any other effect than what [it] may produce on opinion, by exciting reflection" from the decisions of the courts, which "are carried into immediate effect by force."[37] When the judiciary makes decisions, it "enforces the general will, whilst that will and that opinion continue unchanged."[38] No matter how carefully and impartially judges interpret the "general will"[39] expressed in constitutional provisions and statutes, their ability to turn theoretical responsibility to the people into reality will be an illusion if the executive refuses to execute their judgments or the legislature subjects their decisions to review, express or de facto, by non-judicial officers. "For what avails it," Tucker commented, "that an impartial tribunal have decided" a case in accordance with the people's law, if the other branches of government can ignore the court?[40] Only if they possess this independence of decision can the judges truly carry out their constitutional function. A

35. THE FEDERALIST NO. 78, *supra* note 6, at 527 (Alexander Hamilton).

36. *Id.* at 528.

37. James Madison, *Report on the Virginia Resolution, reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 346 (Marvin Meyers ed., rev. ed. 1973).

38. *Id.*

39. *Id.*

40. 1 TUCKER, *supra* note 15, app. at 352–53.

clear and very early example of the necessity for independence of decision can be seen in the refusal by the federal courts to resolve claims about the validity of pension claims because their conclusions were subject to approval by the Secretary of War.[41]

Independence of decision, then, is also concerned with an external threat to the execution of the judicial task, but it can only be secured, in the end, through the living, day-to-day adherence to its principle by legislators and executives. As the *Ex parte Merryman*[42] case from the Civil War shows, even the most vigorous assertion of judicial authority is meaningless in the teeth of an executive willing and able to ignore a court's decision.[43] The same could be said, I believe, about legislation that ignores a settled judicial understanding of the Constitution. The external guaranty of the courts' independence of decision lies in the settled understanding, among government officials, the legal profession, and the citizenry as a whole, about the authority of judicial decrees. And that external understanding to be efficacious must be subjective—an internalized attitude about our system.

The third element that I believe is woven into the general concept of judicial independence is what I am calling *independence of thought*. The courts are only truly independent, our tradition has maintained, when the judges reach their conclusions through a process of thought and decision that is significantly different from the forms of decisionmaking the other branches of government employ. The function of adjudication involves by definition the exercise of a type of judgment that proceeds from different premises and operates within different constraints than those which characterize the activities of the legislature and the executive. This idea was truly universal in the founding era. To take only one of a myriad of examples, in his 1793 *Kamper* opinion, St. George Tucker wrote that "it is the province of the legislature to make, and of the executive to enforce obedience to the laws,"

---

41. *See* Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

42. 17 F.Cas. 144 (C.C.D. Md. 1861).

43. In the *Merryman* case, Chief Justice Taney issued a writ of habeas corpus at the petition of a man being held in military custody on the suspicion of being a secessionist. *Id.* at 147. The officers with custody of Merryman, acting under presidential order, declined to obey the writ despite Taney's ruling that President Lincoln's suspension of habeas corpus was unauthorized under Article I, section 9 of the United States Constitution. *Id.* at 148.

while the judiciary's "office" is that of "expounding" the laws.[44] Judges who fail to maintain and respect the difference between judicial and extrajudicial reasoning are not independent in the American constitutional sense, no matter how secure their positions and how respected their judgments, for those judgments will then necessarily be subservient to something other than the people's law. Through their failure to maintain their independence of thought, such judges will lack that "strictest responsibility" to the people from which Tucker said that "a judge is no more exempt . . . than any other servant of the people, according to the true principles of the constitution."[45] A good early example of this independence in action can be found in Justice William Paterson's opinion in the 1798 case of *Calder v. Bull*,[46] where Paterson explained why, as a judge, working within the constraints of judicial thought, he could not read a constitutional provision to address a grave political evil which, in his opinion, the Constitution *ought* to address.[47]

Unlike the independences of position and decision, then, independence of thought is not directed at ensuring the proper responsibility of the courts to the people by protecting their personnel and judgments against external threat. Independence of thought is concerned with the internal threat to judicial responsibility posed by the judges' own predispositions, beliefs, and commitments. Contrary to what is sometimes assumed, the founding generation was well aware of the role such subjective factors play in coming to conclusions on legal issues, and not only when criticizing decisions and judges a given Founder did not like! As John Marshall wrote about the great question of the national bank, "[t]he judgment is . . . much influenced by the wishes, the affec-

---

44. Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 79 (1793).

45. 1 TUCKER, *supra* note 15, app. at 359.

46. 3 U.S. (3 Dall.) 386 (1798).

47. *Id.* at 397 (Paterson, J., seriatim opinion).

> I had an ardent desire to have extended the provision in the Constitution to retrospective laws in general. There is neither policy nor safety in such laws; and, therefore, I have always had a strong aversion against them. It may, in general, be truly observed of retrospective laws of every description, that they neither accord with sound legislation, nor the fundamental principles of the social compact. But on full consideration, I am convinced, that *ex post facto* laws must be limited in the manner already expressed; they must be taken in their technical, which is also their common and general acceptation, and are not to be understood in their literal sense.

Id.

tions, and the general theories" of those who must come to an answer.[48] Constitutional questions, to be sure, may be particularly likely to intersect with a judge's theories, but Marshall's statement points to a general truth, which is that nothing external prevents a judge from "exercis[ing] WILL instead of JUDGMENT," as Hamilton put it in *The Federalist*.[49] The guaranty of judicial independence in this regard must lie, finally, in the judges' own adherence to a conception of their function that distinguishes it from that of a legislator or executive officer. Here too, however, there is an external as well as a subjective element, for we cannot long expect independence of thought on the part of our judges unless our schools of law, our profession, and the citizenry at large see courts as something other than a third set of policymakers.

IV. CONCLUSION

This then is my claim to you, that in the American legal tradition, as classically formulated during the founding era, the concept of judicial independence encompasses three distinct elements—the three independences of position, decision, and thought. All are necessary to ensure that the courts, in their proper manner, act under that strict responsibility to the people, which is the shared obligation of all three branches of government under a free constitution. The Founders thought it axiomatic that all governmental power must be exercised with a due responsibility to the people: as Hamilton put it in 1791, it is the "republican maxim, that all government is a delegation of power."[50] The agent must be subordinate to the principal. And they further agreed that governmental institutions should be structured so as to create external incentives to that end—hence, among other devices, judicial independence of position. But the Founders did not think governmental structures operate mechanically. It is living, flesh and blood human beings with individual minds, hearts, and wills who must decide how to respond

48. 4 JOHN MARSHALL, GEORGE WASHINGTON 243 (Arthur M. Schlesinger, Jr. ed., Chelsea House 1983) (1805).

49. THE FEDERALIST NO. 78, *supra* note 6, at 526 (Alexander Hamilton).

50. Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), *in* LANGUAGES OF POWER: A SOURCEBOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY 45 (Jefferson Powell ed., 1991).

to incentives, and so external structures also ought to foster the appropriate internal and subjective attitudes toward whatever constitutional function a given official must carry out. Recall Hamilton's comment about the desirability of "beget[ting] or fortify[ing]" a certain "temper in the courts."[51] The three independences of position, decision, and thought converge on the goal of making it possible—more than possible, of making it likely—for judges to carry out their function of adjudication independently of the distortions of influence, futility, or self-will. The extent to which each independence can be safeguarded through external guaranties varies, but none can achieve their goal unless the judges themselves cultivate a certain temper in the execution of their office.

But this necessity and obligation, as I've already suggested in discussing the independence of decision, does not rest on judges alone. In a world in which we as the legal profession—and the broader we that is the American people—do not understand the judicial function as distinct from that of other parts of government, we cannot expect our judges to enjoy or act upon these independences of position, decision, and thought. Judicial independence, as we have traditionally understood it, will not long survive unless we in the legal profession—and the much broader we that is the American people—understand and respect it.

51. THE FEDERALIST NO. 78, *supra* note 6, at 528 (Alexander Hamilton).