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The Essence of Judicial Independence

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The genius of the American Constitution is the creation of a national government that is at once powerful and effective, and yet restrained by internal checks and balances from tyrannical abuses of its power. The Framers were heirs to the inequities wrought by the British Crown upon the American colonists, and to the far older struggles between King and Parliament for supremacy in England. Aware that unbridled governmental prerogative can easily engender an unending cycle of tyranny followed by revolt, the Framers chose to make all exercises of national power subject to the rule of a higher law: a constitution drawing its authority directly from the will of the people.

This innovation—truly startling in a world of monarchy and empire—thrust the judiciary into an unaccustomed role as a co-equal branch of government, with the ultimate authority to interpret the Constitution's limitations on the powers claimed by the national government itself.

The doctrine of the separation of powers, the heart of our constitutional scheme, enables the judiciary to perform this role fearlessly, effectively, and independently. This doctrine reflects a sharp sensitivity to interference with any branch's fundamental role under the Constitution. In addition, by protecting each branch from encroachments by the others, the doctrine is a necessary precondition to the vindication of individual rights. Although the tenure and salary provisions of article III remain important, the separation-of-powers principle imposes additional limits on Congress's power to impede the functioning of the judicial branch.

Last year, in an article titled *Chilling Judicial Independence,*[1] I addressed the infirmities of a proposed statute that would have authorized removal of federal judges by means other than impeachment. This Article is a necessary sequel, because Congress has now proposed a procedure for investigating judicial conduct and censuring, rather than removing, judges.[2] A law that stops short of providing for removal may be no less destructive of the con-

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1. 88 Yale L.J. 681 (1979) (adapted from 34th Annual Benjamin N. Cardozo Lecture, delivered November 1, 1978, before Association of the Bar of the City of New York). This article focused on the construction of the "good Behaviour" tenure secured to judges by article III of the Constitution.

2. S. 1873, 96th Cong., 1st Sess. (1979). The Senate approved the bill in October 1979, see 125 Cong. Rec. S15,435 (daily ed. Oct. 30, 1979).

stitutional scheme if it destroys the capacity of federal courts to execute their fundamental responsibilities.

This Article explores the rise of an independent judiciary in British and colonial history and traces its development in modern constitutional law. An analytic framework derived both from history and case law is applied to the proposed judicial discipline legislation to illustrate the critical importance of a fully independent judiciary.

I. The Evolution of Judicial Independence

The independence of the federal judiciary has its origins in the courts of England, and in their subjugation, first to the will of the Crown, and then to Parliament. It is from this experience that the American colonists recognized the need to create an independent department of government to resolve disputes impartially. Moreover, from the English experience our forefathers learned the wisdom of restricting the legitimate powers of the political branches of government to those consistent with a fundamental law. In the Constitution, the Framers set forth this fundamental law and created a federal judiciary to uphold it against violation by the other branches.

A. *The English Heritage*

Although the history of the English judiciary is largely that of an institution dependent upon and deferential to the King or Parliament, our British heritage also boasts early recognition of the wisdom of providing for the "supremacy of law" over both legislative and executive power. It also suggests the essential role of a judicial body in ensuring that supremacy.

1. *The Supremacy of Law.* One of the earliest English commentators to address the limits of sovereign power was Bracton, Henry of Bratton. It was perhaps Bracton's thorough acquaintance with thirteenth century European thought that led him to share the widely held continental view [3] that all temporal authority was derived from, and ultimately limited by, law.[4] The law of which Bracton spoke was neither natural nor heavenly in origin, but rather strikingly positivistic: "whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the *res publica,* the authority of the king or prince having first been added thereto, has the force of law." [5]

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3. See Pound, Common Law and Legislation, 21 Harv. L. Rev. 383, 390 (1908). A justice of King's Bench during the reign of Henry III, Bracton was also a prodigious author and accomplished student of Roman and medieval civil law. See T. Plucknett, A Concise History of the Common Law 259 (5th ed. 1956).

4. 2 H. Bracton, On The Laws and Customs of England f.5b (S. Thorne trans. 1968).

5. Id. at f.1. Moreover, Bracton asserted that because England's laws and customs "have been approved by the consent of those who use them and confirmed by the oaths of kings, they cannot be changed without the common consent of all those by whose counsel and consent they were promulgated." Id. at f.1b.

The difficulty for Bracton, however, lay in identifying the temporal force that could hold the monarch to the laws. Since the King was author of all writs, no writ could run against the Crown.[6] Consequently, no citizen could be heard to question royal acts, and the King's judges were powerless to countermand, or even interpret, his will.[7] While cautioning that no man should presume to question royal acts, "much less contravene them," [8] Bracton nonetheless asserted that the Crown was accountable to God and to the law "because the law makes the king," [9] and was, therefore, obliged to "temper his power by law, which is the bridle of power . . . for the law of mankind has decreed that his own laws bind the lawgiver." [10] If the king failed to temper his power, then his *curia,* namely the earls and barons, "ought to put the bridle on him." [11] In short, the remedy for a sovereign who chose to violate the customs and usages of the realm lay not in legal redress but in open rebellion.

It was England's good fortune that no monarch chose to put Bracton's insight to the test until the accession of the House of Stuart in the early seventeenth century. Up to that time, Britain's monarchs had been content to express deference to the law's supremacy, even while circumventing its commands with parliamentary assistance.[12] When James I ascended the throne in 1603, however, all pretense of royal humility was quickly discarded. In its stead, James laid claim to divine right and absolute power. He thus sparked a bitter dispute with Parliament for political superiority, a struggle that involved Sir Edward Coke, the chief justice of the Court of Common Pleas. As the principal expositer of the common law, Coke became the leading proponent of that law's supremacy.[13]

Coke's conflict with the King centered upon the power to resolve the most pressing questions of law and governance. Determined to secure stricter control over the nation's political life, James attempted to broaden the jurisdiction of his prerogative courts. Against James's initiative, a growing coalition of nobles, lawyers, and merchants sought to check royal prerogative through enhanced parliamentary power. Positioned between these contending forces, Coke was faced with what he perceived to be two equally objectionable alternatives. To acquiesce in the Crown's pretention to unbounded power would subject English law to the vicissitudes and partiality of royal whim. But to side with Parliament in its claim to absolute lawmaking authority would subject the continuity and supremacy of the common law

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6. 3 id. at f.382b.
7. 2 id. at f.34.
8. Id. at f.5b.
9. Id.
10. Id. at f.107b.
11. Id. at f.34.
12. See Corwin, The "Higher Law" Background of American Constitutional Law, 42 Harv. L. Rev. 149, 365 (1928).
13. Ironically, as Attorney General, Coke had acquired a well-deserved reputation as an avid defender of royal prerogative. See 5 W. Holdsworth, A History of English Law 426-27 (1924).

to legislative fiat. Content with neither alternative, Coke struck out for a middle ground, in which the power of both King and Parliament would be subordinated to the common law.[14]

Although many of Coke's decisions served to limit royal power,[15] his most striking curtailment of the Crown's prerogative is found in the case of *Proclamations*.[16] In 1610, Parliament petitioned the King to renounce the recent extension of royal proclamations to matters concerning the inheritance or livelihood of private citizens.[17] By immemorial custom, it was contended, the power to affect property and other private interests was reserved to Parliament alone, and could not be exercised by the King's unilateral decree. The question was submitted to Coke and his colleagues by the Lord Chancellor, who advised the judges "to maintain the power and prerogative of the King; and in cases in which there is no authority and precedent, to leave it to the King to order in it, according to his wisdom." [18]

Despite this admonition, Coke reported that not only was the Crown powerless to change any part of the common or statutory law, but that royal proclamations "utterly against law and reason" were void. Even more unsettling for James's pretentions was Coke's further assertion, without citation of any authority or precedent, "that the King hath no prerogative, but that which the law of the land allows him." [19] Since Coke had claimed elsewhere that the King's judges alone were authorized to interpret the laws and customs of England,[20] his opinion in *Proclamations* necessarily subjected the Crown to ultimate judicial control.

Coke similarly sought to limit Parliament's power. In *Dr. Bonham's Case*,[21] which involved the scope of the authority of a statutorily created medical licensing board, Coke asserted in dictum that

> it appears in our Books, that in many Cases, the Common Law will controll Acts of Parliament, and sometimes adjudge them to be

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14. See id. at 428-31; Plucknett, Bonham's Case and Judicial Review, 40 Harv. L. Rev. 30, 30-31 (1926).

15. See, e.g., Prohibitions del Roy, 12 Co. Rep. 63b, 77 Eng. Rep. 1342 (C.P. 1608) (Crown may not personally adjudge any case, either criminal or civil, because courts alone are empowered to give judgment under law).

16. 12 Co. Rep. 74a, 77 Eng. Rep. 1352 (C.P. 1611).

17. See 4 W. Holdsworth, supra note 13, at 296.

18. Proclamations, 12 Co. Rep. at 74a, 77 Eng. Rep. at 1353.

19. Id. at 75a, 76a, 77 Eng. Rep. at 1353, 1354.

20. Nicholas Fuller's Case, 12 Co. Rep. 41, 42a, 77 Eng. Rep. 1322, 1323 (C.P. 1608).

21. 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610). Bonham, a graduate of Cambridge University, practiced medicine in London without license from the Royal College of Physicians. Under royal patent confirmed by statute, 14 & 15 Hen. 8, c.5, the College was empowered to examine and license practitioners in the City of London. Anyone found practicing medicine in London without license from the College was subject to a statutory fine and imprisonment, with one-half of the fine payable to the Crown and one-half to the College. In addition, the College was authorized to examine into the competency of London practitioners and sanction those found deficient. 8 Co. Rep. at 115b-117a, 77 Eng. Rep. at 648-51.

In April 1606 Bonham was summoned before the Board of Censors of the College for an examination into his competency to practice medicine. Despite his claim of statutory exemption, he was found incompetent, fined 100 shillings, and ordered to refrain from further practice until admitted to the College. When Bonham ignored the order, he was

> utterly void: For when an Act of Parliament is against Common Right and Reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void . . . .[22]

By all appearances, Coke's bold dictum claimed for the common law, and the judges who were its sole interpreters, the power to countermand an express legislative enactment of Parliament. Though often cited for this principle,[23] it is questionable whether this was in fact Coke's true meaning. In his *Institutes on the Laws of England,* Coke subsequently ascribed a far greater force to the acts of Parliament than *Dr. Bonham's Case* would appear to admit. "Of the power and jurisdiction of the parliament," Coke wrote, "it is so transcendant and absolute as it cannot be confined either for causes or persons within any bounds." [24] Although a few modern commentators would interpret his later assertion of Parliament's supremacy as a tacit renunciation of *Dr. Bonham's Case,*[25] an examination of Coke's medieval conception of Parliament as a primarily judicial body offers a more compelling explanation. As the *Institutes* repeatedly attest, Coke viewed Parliament not as a sovereign legislative body, but rather as the highest court of the realm.[26] In its judicial capacity, Parliament was indeed supreme, because

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resummoned in October 1606 but refused to appear. A fine of 10 pounds was imposed and a warrant issued for his arrest. The following month, when Bonham again refused to submit to examination, he was committed to prison by the Board. He then brought an action against various members of the College for false imprisonment. Id. at 109b-112a, 114a, 77 Eng. Rep. at 641-44, 647.

In rendering his decision against the Board, Coke focused on whether its statutory power over incompetent physicians was coextensive with its power to punish unlicensed practitioners. Coke noted that the power to inquire into a practitioner's competency did not necessarily include the power to fine and imprison those found deficient, because the statutory clause empowering the Board to fine and imprison unlicensed physicians was separate from the provision authorizing it to conduct competency examinations. Id. at 117b, 77 Eng. Rep. at 651. Since the statute did not expressly resolve the question, Coke resorted to several ancillary considerations bearing on a just and reasonable construction of the grant, one of which has since enjoyed much notoriety. If, as the Board argued, it was empowered to fine and imprison incompetent practitioners, the College would necessarily be an interested party in every competency examination, because it would share in any fine assessed. Since it was an established maxim of the common law that no one may be judge of his own case, Coke ruled that Bonham should be afforded an opportunity to traverse the Board's finding in a court. Id. at 121a, 77 Eng. Rep. at 657.

22. Id. at 118a, 77 Eng. Rep. at 652. Whether Coke's dictum is supported by the precedents cited has sparked great controversy. See, e.g., C. McIlwain, The High Court of Parliament and its Supremacy 144-92 (1910); Boudin, Lord Coke and the American Doctrine of Judicial Power, 6 N.Y.U. L. Rev. 223, 237-42 (1929); MacKay, Coke—Parliamentary Sovereignty or the Supremacy of the Law?, 22 Mich. L. Rev. 215, 223-25 (1924); Plucknett, supra note 14, at 35-45. Regardless of the opinion's legal merit, it is Coke's theoretical assertion and its subsequent use by American patriots that has established the decision as an important landmark. See notes 66 & 68 infra..

23. See, e.g., John Adams's report of James Otis's argument on the invalidity of "unconstitutional" parliamentary enactments in the Writs of Assistance Case, Quincy 496 (Mass. 1761), discussed in note 66 infra.

24. 4 E. Coke, Institutes on the Laws of England 36 (London 1797 ed.). The first edition of this work appeared in 1641.

25. See, e.g., Boudin, supra note 22, at 223.

26. 4 E. Coke, supra note 24, at 23. See Prohibitions del Roy, 12 Co. Rep. 63, 64, 77 Eng. Rep. 1342, 1342-43 (K.B. 1607); J. Gough, Fundamental Law in English Constitutional History 42-47 (1955); C. McIlwain, supra note 22, at 139-48.

there was no appeal against its judgment. In its legislative capacity, however, Parliament could not be expected to anticipate the innumerable inequities or impracticalities that might arise when its general commands were applied to particular cases. It was therefore incumbent upon the judges, as custodians of the "Common Right and Reason" that animated the common law, to identify those instances in which statutory law transgressed the customary legal principles of the kingdom. If a parliamentary enactment could not be construed to accord with these principles, it was the duty of the King's courts so to declare and thus bring the matter to Parliament's attention. If, however, sitting as a court of last resort, Parliament should insist upon the result challenged by the inferior court, then its power was so "transcendant and absolute" that its judgment could not be contradicted.[27]

Coke's effort to check the power of King and Parliament by elevating the common law to a position of supremacy was not looked upon with favor in seventeenth century England. Both the royalist and the parliamentary factions sought nothing less than unbounded sovereignty. To King James, Coke's restrictions of his royal prerogative constituted an unacceptable affront to his inherent majesty.[28] To Parliament, acceptance of the doctrine espoused in *Dr. Bonham's Case* would confer upon the King's judges far too great a power to obstruct and impede its legislative will. Royal judges were, after all, simply agents of the Crown,[29] and their impartiality was ever subject to promises of royal favor. Indeed, it was the courts' domination by James II that ultimately provided a final spark for England's Glorious Revolution, in which Parliament attained supreme authority within the British constitutional structure.[30]

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27. See, e.g., Prohibitions del Roy, 12 Co. Rep. 63, 77 Eng. Rep. 1342 (K.B. 1607); 4 E. Coke, supra note 24, at 36.

28. Despite repeated warnings against further interference with the royal prerogative, Coke persisted in his belief that the King's authority was subject to the common law. The conflict finally came to a head in 1616 following the Case of Commendams, Hobart 140, 73 Eng. Rep. 516 (K.B. 1616). After King's Bench refused a royal request to stay a pending action so that James might consult with his judges, the King summoned all his judges to a meeting of the Council. Addressing the judges personally, James warned:

> That which concerns the mystery of the King's power is not lawful to be disputed; for that is to wade into the weakness of Princes, and to take away the mystical reverence that belongs unto them that sit in the throne of God. . . . As for the absolute prerogative of the Crown, that is no subject for the tongue of a lawyer, nor is it lawful to be disputed.

E. Haynes, The Selection and Tenure of Judges 53 (1944).

Shortly thereafter, Coke was instructed to explain his conduct in encouraging litigants to seek writs of prohibition against actions commenced in the prerogative courts, and to "correct" alleged errors and misconceptions in his report. When Coke's response failed to satisfy James, he was dismissed from office on November 14, 1616. See 5 W. Holdsworth, supra note 13, at 439-40.

29. Prior to the Act of Settlement, 12 & 13 Will. 3, c. 2 (1701), royal judges customarily held their commissions *durante bene placito* (at the pleasure) of the King, rather than *quam diu se bene gesserint* (during good behavior). See text accompanying notes 39 & 40 infra.

30. In speaking of a British "constitution," 17th and 18th century Englishmen did not contemplate a written, deliberately contrived design of government. Rather, they envisioned the country's system of governance as it existed, the peculiarly English arrangement of institutions, laws and customs as they had evolved through history. In a sense, all law was thus "constitutional," since it served to define the public authority as then "consti-

The battle for supremacy centered principally upon the Stuarts' efforts to re-establish the Church of Rome in Britain. In response, Parliament enacted the Test Act, whereby all persons holding offices of public trust were required to receive the sacrament according to the rites of the Church of England. Determined to emasculate the Act, James II seized every opportunity to grant dispensations from its requirements.[31] An action was arranged to challenge a dispensation granted to Sir Edward Hales, a Catholic who had been appointed colonel of a foot regiment. In defense of the suit, Hales pleaded the letters patent issued by the King purporting to discharge him from his statutory duty. When this case of *Godden v. Hales*[32] came before the King's Bench, Chief Justice Herbert stated that he could perceive no defect in Hales's defense,[33] but adjourned the proceeding to consult his colleagues. After exerting what was alleged to have been extreme pressure upon his colleagues to support the Crown,[34] Herbert announced the opinion of his brothers, with only Justice Street dissenting: the King, as absolute sovereign of England, was empowered to dispense with any of the laws of government for which he perceived a necessity. Moreover, the Crown alone was authorized to judge the necessity for such dispensation, and no act of Parliament could strip the King of this power.[35]

Herbert's decision in *Godden v. Hales* sounded the death knell for the common law's claim to supreme authority in England's constitutional structure. Under James II's domination, Coke's successors had proved themselves unable and unwilling to check the King's claims of supra-legal power. Emboldened by his judges' acquiescence, James II both increased the number of Catholic appointments made by dispensation and endeavored to suspend entirely the operation of all penal laws against dissenters by a general Declaration of Indulgence.[36]

This final thrust was too much for the kingdom's Protestants. In 1688, William of Orange was invited to lead an army to England to convene a free parliament to settle the question of succession. Following a brief test of arms, James II to France, and Parliament, declaring the Crown vacant, offered the throne to William and Mary. By asserting the right to make and unmake the monarchy, Parliament had effectively assumed the sovereign power of England. Moreover, to ensure the Crown's subordination to Parliament, the accession of William and Mary was conditioned upon

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tuted." Accordingly, each parliamentary enactment, each novel exercise of the royal prerogative, effectively altered the "constitution"—the system of laws as constituted—if allowed to stand unchallenged. B. Bailyn, The Ideological Origins of the American Revolution 67-68 (1967). See text accompanying notes 41 & 42 infra.

31. See Havighurst, James II and the Twelve Men in Scarlet, 69 Law. Q. Rev. 522, 529-33 (1953).

32. 11 Howell's State Trials 1165, 89 Eng. Rep. 1050 (K.B. 1686).

33. Id. at 1196-97, 89 Eng. Rep. at 1051.

34. See Havighurst, supra note 31, at 532.

35. Godden v. Hales, 11 Howell's State Trials 1165, 1197-99, 89 Eng. Rep. 1050, 1051 (K.B. 1686).

36. Declaration of Indulgence (1687), reprinted in Trial of the Seven Bishops, 12 Howell's State Trials 183, 231-37 (K.B. 1688).

passage of the Bill of Rights,[37] by which the Stuarts' claims to divine right and absolute power were forever renounced.[38]

2. *Legislative Sovereignty and the Courts.* Though Parliament had secured its supremacy over the Crown, the role of the courts in the new order remained uncertain. Throughout the Stuart era, it had become increasingly evident that royal judges were unlikely to countermand the King's desires so long as their tenure in office was dependent on his pleasure. Royal domination of the judges had reached its zenith under James II, but subsided little after William and Mary took the throne. Despite the expectation at their accession that justice would be administered without royal interference, William proved to be a zealous defender of the prerogative.[39] Parliament was, therefore, determined to weaken the Crown's grasp upon the judiciary. By the Act of Settlement,[40] passed in 1701, Parliament required judicial commissions issued by the Crown to be made *quam diu se bene gesserint* (during good behavior). In addition, the Act required judicial salaries to be ascertained and established, and it authorized the removal of judges only upon address of both Houses of Parliament. Though the Act's limitations were not to become effective until Queen Anne's death in 1714, England's constitutional commitment to an impartial judiciary was at last firmly secured. The Crown no longer enjoyed unbridled power to punish judges who refused to accede to its wishes or approve the legality of its every action.

In wresting control of the judiciary from the Crown, however, Parliament by no means intended to insulate the judges from its own control. Parliament's purpose was simply to limit royal prerogative; as for its own power, however, it envisioned no limit. In Blackstone's words, Parliament

> hath sovereign and uncontrolable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.[41]

Thus, even "where the main object of a statute is unreasonable the judges are [not] at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government."[42] The English constitution was therefore what Parliament declared it to be, no more or no less. For the British, Parliament's victory over the King marked the

37. 1 W. & M., sess. 2, c. 2 (1689).

38. In drafting the Bill of Rights, Parliament took special care to outlaw the Crown's "pretended power of suspending laws," and to restrict greatly royal authority to grant special dispensations from legislative enactments. Id. §§ I(1), (2).

39. See 83 Law. Q. Rev. 323, 324 (1967).

40. 12 & 13 Will. 3, c. 2 (1701).

41. 1 W. Blackstone, Commentaries on the Laws of England * 156.

42. Id. at *91.

dawn of political liberty. For the American colonists, however, who enjoyed no right of representation in Parliament, it presaged an era of legislative tyranny.

B. *The American Redefinition*

While the English tended to view with suspicion any interference by the King or his judges with Parliament's will, American colonists were more accustomed to such restraints upon their provincial legislatures. Both Parliament and the Crown insisted that the colonies be governed in conformity with English law. Moreover, those territories that had been colonized pursuant to royal charter were closely supervised to ensure that the powers delegated in their charters were not exceeded by local authorities.[43]

Under the Privy Council's direction, a system of legislative review was instituted by the Home Government to screen colonial enactments for conformity to English law. In 1696, the initial stage of review was delegated by the Council to the Board of Trade.[44] If, upon review, the Board found a colonial enactment to be in conflict with the royal prerogative, the colony's charter, the fundamental rights of Englishmen, a parliamentary enactment, or simply "sound reason," it would recommend disallowance of the measure by the King in Council.[45] If the Council adopted the Board's recommendation, the colonial measure would be disallowed, thus rendering any action taken pursuant to it null and void.[46] Accordingly, it is not surprising that eighteenth century Americans were more receptive to developing notions of constitutionalism and limited government than their British counterparts.[47]

In some cases, in which colonial laws were struck down, the grounds of disallowance resembled what might be termed constitutional review. For example, in 1759 the Georgia Assembly passed an act to settle title to certain disputed lands near Savannah in favor of those claimants who had long occupied and cultivated the land. The Privy Council disallowed the act on the ground

> that the determining upon a question of this nature by a partial Act of Legislature without any hearing of Partys . . . is arbitrary, irregular and unjust, and Subversive of those established Principles of the Constitution by which disputes and questions in all matters of Private property and private claims are referred to the decision of the Courts of Law.[48]

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43. See E. Russell, The Review of American Colonial Legislation by the King in Council 16-18, 139 (1915).

44. See id. at 44.

45. See id. at 48-58.

46. See id. at 19-43.

47. See generally C. Haines, The American Doctrine of Judicial Supremacy 24-96 (1932).

48. 4 Acts of the Privy Council, Colonial Series: 1745-1766, at 490-92 (J. Munro ed. 1911). In 1764 the Privy Council repealed four New Hampshire enactments purporting to settle title to land in various claimants on the ground that such measures "relate to matter properly cognizable in a Court of justice." Id. at 674-76.

In another instance, the Privy Council disallowed a 1758 New Hampshire enactment limiting deer hunting to prescribed seasons. The Council concluded that the act was "unconstitutional," because it authorized the imposition of criminal penalties without providing a right to trial by jury.[49]

At first, the power to overrule or disallow colonial legislation was exercised only by the King in Council, or the Crown's local governor.[50] In time, however, colonial courts began to exercise a similar function and, as the power of the judiciary increased, the colonists came to demand impartial judges, beholden neither to the King, to his governors, nor to Parliament.

1. *The Colonial Judiciary.* Throughout the early eighteenth century, the Board of Trade, which was designated by the Privy Council to supervise the Colonies, consistently expressed dissatisfaction with the quality of men attracted to the colonial judiciary. In 1699, the Board reported to the Privy Council that the unwillingness of the New York General Assembly to establish an adequate salary for the colony's judges posed a serious threat to the administration of justice.[51] Though its recommendation for royal subsidy of the judges' salaries was temporarily adopted, the Crown was reluctant to bear the cost of colonial administration from its own treasury. Accordingly, the power to fix salaries soon reverted to the colonial assemblies, where it was often effectively employed to elicit judicial loyalty.[52]

Because the power of the judicial purse was held by the colonial legislatures, the Home Government refused to permit appointment of judges for a fixed tenure. Otherwise, it was feared, not only would the governors be unable to replace inept judges with more skilled candidates, but, once appointed, the judges would be utterly dependent upon the colonial assemblies.[53]

Despite the Board's consistent policy against good behavior tenure, its instructions to royal governors were often ambiguous. Consequently, in New York, Governor Clinton was persuaded to grant commissions to several justices during good behavior.[54] In Pennsylvania, the Assembly challenged royal control of judicial tenure by enacting a bill in 1759 permitting removal of judges only upon address of the Assembly.[55] The measure was earnestly

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49. See id. at 675, 677. Fifty years earlier, the Council had disallowed a Pennsylvania enactment designed to secure the right of jury trial on the ground that it interfered with an act authorizing prosecutions for trade violations in the courts of admiralty. See Foundations of Colonial America: A Documentary History 1170-71 (W. Kavenaugh ed. 1973) [hereinafter cited as Foundations].

50. The gubernatorial veto was a second check upon legislative abuse. See E. Russell, supra note 43, at 89-90.

51. See O. Dickerson, American Colonial Government: 1696-1765, at 197 (1912).

52. In New York, the assembly cut Chief Justice Morris's salary by 17% in 1726 to express its displeasure with his administration of the courts. See 2 G. Chalmers, An Introduction to the History of the Revolt of the American Colonies 54-55 (1845); O. Dickerson, supra note 51, at 199.

53. O. Dickerson, supra note 51, at 198.

54. See Smith, An Independent Judiciary: The Colonial Background, 124 U. Pa. L. Rev. 1104, 1130-31 (1976).

55. See id. at 1120.

defended in a pamphlet written by the bill's principal author, Joseph Galloway, as nothing more than a codification of the immemorial birthright of Englishmen.[56] "[T]hough the wisest and best laws were enacted to fix the bounds of power and liberty,"[57] Galloway warned that neither the citizens' possessions nor their persons would long remain safe "if an impartial and independent administration of justice is once wrested from [their] hands." [58] Nonetheless, both the Pennsylvania act and a North Carolina provision requiring judicial appointments during good behavior were disallowed by the Privy Council in 1761. Far from securing an independent judiciary, the Privy Council viewed both acts as serving only to heighten the judges' dependence upon the colonial assemblies.[59]

Shortly after the Pennsylvania act was disallowed, the death of George II terminated all commissions in the colonies.[60] When Governor Colden of New York offered to reappoint his judges during pleasure, the judges balked, insisting that their commissions be renewed during good behavior. On November 11, 1761, the Board advised the Privy Council of the situation and recommended issuance of a general instruction to all colonial governors forbidding grant of judicial commissions except during pleasure.[61] On December 2, 1761, the Privy Council adopted the Board's recommendation and instructed its governors that, henceforth,

> [I]t is . . . our express will and pleasure that you do not, upon any pretense whatever, upon pain of being removed from your government, give your assent to any act by which the tenure of the commissions to be granted to the chief judges or other justices of the several courts of judicature shall be regulated or ascertained in any manner whatsoever.[62]

Although purportedly designed to secure the independence and uprightness of the colonial judiciary, the Council's instructions were widely perceived in America as an affront to the colonists' fundamental rights as Englishmen. Eight months before the Council action, George III had personally advised Parliament that he looked "upon the independency and uprightness of the judges . . . as essential to the impartial administration of justice, as one of the best securities to the rights and liberties of my loving subjects, and as most conducive to the honour of the crown." [63] The Home Government appeared determined, however, to deny the colonists the same protections.

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56. J. Galloway, A Letter to the People of Pennsylvania, reprinted in 1 Pamphlets of the American Revolution: 1750-1776, at 248 (B. Bailyn ed. 1965) [hereinafter cited as Pamphlets].

57. Id. at 257.

58. Id. at 272.

59. See O. Dickerson, supra note 51, at 201, 207 n.497.

60. It was not until enactment of 1 Geo. 3, c. 23 (1760) that royal judges' commissions did not expire upon the death of the monarch.

61. See O. Dickerson, supra note 51, at 203-04.

62. Foundations, supra note 49, at 1381.

63. 15 Parl. Hist. Eng. 1007 (1761), reprinted in Smith, supra note 54, at 1110 n.34.

More fundamentally, there was reason to suspect that the Council's decision had been motivated by more than simply fear of political corruption and inept judges. Courts in the colonies had recently demonstrated an increasing willingness to entertain challenges to the enforceability and legality of the Home Government's orders. In *Frost v. Leighton*,[64] the Massachusetts Superior Court of Judicature ruled that it lacked authority under the Bay Colony's charter to enforce a Privy Council order exempting royal license holders from trespass actions by property owners. When the Privy Council reversed the decision and ordered recoupment of the judgment awarded by the court, the Massachusetts judges refused to enforce the Council's order.[65]

The same court shortly thereafter entertained argument directed to the constitutionality of parliamentary enactments, in the *Writs of Assistance Case*.[66] Although the court ultimately rejected the contention that Parliament could not constitutionally authorize the issuance of the writ requested, the case marked the beginning of the colonists' legal assault upon the Home Government's claim to unchecked authority over the colonies. The assault intensified when the Home Government adopted a scheme to reduce its debts from the Seven Years' War by taxing the colonies.[67] American colonists responded with a broadside of protest, much of which was directed to an alleged conflict between the proposed taxes and the fundamental rights of Englishmen.[68]

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64. An account of the case is found in Davis, The Case of Frost vs. Leighton, 2 Am. Hist. Rev. 229 (1897).

65. Id. at 233-39.

66. Quincy 471 (Mass. 1761). In an effort to enforce various trade acts, the Massachusetts colonial government petitioned the Superior Court of Judicature for a writ of assistance authorizing unprecedented searches of homes and shops for contraband. On behalf of Boston's merchants, James Otis argued that the writ, if issued, would violate "fundamental principles." Indeed, Otis argued, such a writ could not even be authorized by an express act of Parliament. Citing Lord Coke's decision in *Dr. Bonham's Case*, see notes 21 & 22 and accompanying text supra, Otis asserted that "an Act against the Constitution is void: an Act against natural Equity is void: and if an Act of Parliament should be made, in the very Words of this Petition, it would be void." Id. at 474.

67. The Revenue Act of 1764, 4 Geo. 3, c. 15 (1764), was the first such enactment and served as a model for the Stamp Act, 5 Geo. 3, c. 12 (1765), and the Townshend Revenue Act, 7 Geo. 3, c. 46 (1766).

68. See J. Otis, The Rights of the British Colonies Asserted and Proved, reprinted in 1 Pamphlets, supra note 56, at 409. To James Otis, for example, Parliament had clearly surpassed its constitutional authority, and he set out to prove his case in this widely circulated pamphlet. The primary grounds of challenge were the fact that the taxes were imposed by Parliament, a body in which the colonies enjoyed no right of representation, and that violations of the act were to be prosecuted in admiralty courts, where defendants were not guaranteed a right to trial by jury. Otis relied on *Dr. Bonham's Case*, as well as the writings of Emmerich Vattel. E. Vattel, The Law of Nations or the Principles of Natural Law (Fenwick trans. 1916). Vattel advanced the notion that in all well-governed states, the public authority was exercised in accordance with a fundamental law embodied in a constitution. Moreover, because the constitution was the source of all authority in the state, it could not be revised by the legislature. Since "it is from the constitution that the legislators derive their power; how, then, could they change it without destroying the source of their authority?" Id. at 19. Citing these principles from Vattel, Otis contended that Parliament's authority to affect fundamental rights was circumscribed by certain bounds which, if exceded, rendered its acts "mere power without right, and consequently void." 1 Pamphlets, supra note 56, at 476. Like Bracton and Coke before him, however, Otis was at a loss to explain what force could counteract the sovereign power when it insisted upon an "unconstitutional" measure. Since "the power of Parliament is uncontrollable but by

Some patriots turned to the colonial courts in an effort to void the enactments directly, or at least to obstruct their enforcement. Few courts, however, proved willing to address squarely the question of the acts' constitutionality.[69] The more popular course was simply for the judges to lend the minimum possible aid to those charged with enforcing the acts.[70]

It is, in part, a measure of the success of the colonists' strategy to seek redress from their courts that the Home Government felt constrained to exert greater control over colonial judges. In June 1771, Governor Hutchinson was instructed to commence paying the salaries of Massachusetts judges from revenues generated by one of the taxation provisions, the Townshend Revenue Act of 1767.[71] This instruction produced a public outcry, which only hardened the Crown's position. In 1774, Parliament passed the Massachusetts Government Act,[72] requiring all judicial appointments in the Bay Colony to be made at the pleasure of the King. With the colony's judges rendered utterly dependent upon the Crown, both in their salary and tenure, it was difficult indeed to "avoid looking with horror on the danger to which" colonists were exposed.[73] In short order, the public outcry turned to public violence, and ultimately revolution.[74]

2. *The American Judiciary and the Supremacy of the Law.* After 1776, the states adopted constitutions replete with checks against executive control of the judiciary. Remarkably, however, the state constitutions contained little or no regulation of the legislative power. Under most state constitutions, the legislature was established as the dominant force in government and played a central role in the appointment and removal of judges. Indeed, in Maryland,[75] Delaware,[76] and South Carolina[77] the legislatures

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themselves," Otis was forced to conclude that no matter what burdens Parliament imposed upon the colonists, "we must, it is our duty to submit and patiently bear them till [Parliament] be pleased to relieve us." Id. at 448.

69. The Court of Hustings for Northampton County, Virginia, was apparently the only colonial court actually to declare the Stamp Act "unconstitutional." See 5 J. McMaster, A History of the People of the United States 394-95 (1916).

70. In New York, the Attorney General attempted to secure a specific form of writ from the colony's Supreme Court of Judicature for five years without success. After repeated delays and adjournments, the court finally ruled in May 1772 that it lacked authority to grant the specific writ requested. When the New York Attorney General returned in June 1773 armed with an opinion by His Majesty's Attorney General that the New York court did indeed possess the requisite statutory authority to issue the writ, the court simply reaffirmed its prior decision, on the ground that there were "no new arguments offered in support of the motion." Dickerson, Writs of Assistance as a Cause of the Revolution, in The Era of the American Revolution 54-58 (R. Morris ed. 1939). Similar obstacles were encountered by customs officials in Pennsylvania, Maryland, and Virginia. Id. at 58-63, 67-75.

71. See Smith, supra note 54, at 1143 n.200.

72. 14 Geo. 3, c. 29, 45 (1774).

73. Town of Boston, List of the Infringements and Violations of the Rights of Colonists, reprinted in Smith, supra note 54, at 1145-46.

74. It is worth noting that among the grievances enumerated in the Declaration of Independence was that the King "had made judges dependent on his will alone, for the tenure of their offices, and the amount of their salaries."

75. Md. Const. of 1776, art. LXIX, reprinted in 3 F. Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1701 (1909).

76. Del. Const. of 1776, art. XXX, reprinted in 1 F. Thorpe, supra note 75, at 568.

77. S.C. Const. of 1778, art. LXIV, reprinted in 6 F. Thorpe, supra note 75, at 3257.

were expressly authorized to amend the constitutions under which they had been constituted. Other states, however, perceived a need to check potential legislative abuse, because "the uncontrolled power of legislation will always enable the body possessing it, to usurp both the judicial and the executive authority." [78] Some of these states established councils of censors, or revision, to monitor the legislature's enactments.[79]

In those states where no express mechanism of constitutional review was established, the law courts provided an obvious forum for constitutional argument. Not only could a litigant lay claim to "fundamental rights" or "natural equity," but there was now the added element of a written constitution. The significance of this new element was by no means lost upon the judiciary. In *Bayard v. Singleton*,[80] a North Carolina plaintiff brought suit in ejectment to recover a house and lot that had apparently been confiscated by the state. The defendant presented a deed to the property running from the State Commissioner of Confiscated Lands, and moved to dismiss the action pursuant to a recently enacted statute. Since dismissal would have denied the plaintiff's constitutional right to trial by jury, the court "reluctantly" but unanimously refused to give effect to the statute. "[I]t was clear," the court concluded, "that no act [that the Legislature] could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established." [81]

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78. Proceedings Relative to the Constitutions of 1776 and 1790, and the Council of Censors 70 (Harrisburg 1825).

79. See, e.g., N.Y. Const. of 1777, art. III, reprinted in 5 F. Thorpe, supra note 75, at 2628-29 (governor, chancellor, and judges of supreme court constitute "council to revise all bills about to be passed into laws by the legislature," subject to two-thirds vote of both houses); Vt. Const. of 1777, art. XLIV, reprinted in 6 F. Thorpe, supra note 75, at 3748-49 (council of censors to be elected every seven years "whose duty it shall be to enquire whether the constitution has been preserved inviolate, in every part").

A notable attempt to confine the British doctrine of legislative sovereignty within constitutional constraints can be found in the Pennsylvania Constitution of 1776. Pa. Const. of 1776, reprinted in 5 F. Thorpe, supra note 75, at 3081-92. Section 47 required a Council of Censors, to be chosen every seven years, to inquire whether the constitutional provisions had been held inviolate during the preceding period. Although the Council was authorized to investigate deficiencies in the present constitutional structure, and to censure legislative or executive acts deemed in excess of their respective powers, it possessed no power to enforce its decisions. Id. at 3091-92.

When the Council first met in 1783, a majority of its members concluded that the delegation of supreme legislative power to the House of Representatives was a "material defect" in the present structure. To correct this crucial infirmity, the Council at first proposed a constitutional convention, but then withdrew its recommendation after 18,000 citizens signed petitions against a convention, and only 800 expressed support. Lacking power to correct either the constitutional defects or the legislative abuses it discovered, the Council simply dissolved itself. Proceedings Relative to the Constitutions of 1776 and 1790, and the Council of Censors 122-26 (Harrisburg 1825).

80. 1 N.C. (Mart.) 48 (1787), reprinted in Martin & Haywood (W. Battle 2d ed. Raleigh 1843).

81. Id. at 51. See Commonwealth v. Caton, 8 Va. (4 Call) 634, 635 (1782):

> [I]f the whole legislature . . . should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.

In *Trevett v. Weeden,*[82] an action was brought against a butcher for refusal to accept Rhode Island's paper currency in payment for meat. To ensure acceptance of the currency, the Rhode Island General Assembly had enacted a bill empowering judges of the state's courts to try summarily without benefit of a jury anyone who refused to accept paper money as lawful tender.[83] When the case came before the Superior Court of Judicature in 1786, Weeden's counsel, James Varnum, argued that because the act abrogated the right to trial by jury, it contravened Magna Carta and violated the defendant's fundamental rights. Therefore, Varnum insisted, the act was unconstitutional and void, because the judiciary "cannot admit any act of the legislature as law which is against the constitution." [84] Although the Court dismissed the prosecution for want of jurisdiction,[85] a majority of the judges apparently expressed the view that the act violated Weeden's fundamental rights.

These assertions of judicial authority to review legislative enactments for conformity to constitutional, or fundamental, principles were not warmly received by state assemblies. For example, immediately following the opinion in *Trevett,* the Rhode Island General Assembly summoned the Court to explain the grounds upon which it had adjudged a legislative act unconstitutional, and therefore void.[86] When three of the court's five judges protested that they were not obligated to explain the basis for their decisions to the legislature, a resolution was introduced to remove them from office. Dismissal of the judges was averted only after the Assembly was persuaded that it could not remove them except upon trial for criminal misconduct.[87]

3. *The Federal Judiciary: A Separate and Co-Equal Branch.* Word of the Rhode Island Assembly's threat against the judges quickly reached the delegates attending the Constitutional Convention in Philadelphia. During debate on the creation of a council of revision to exercise a veto against legislative enactments, James Madison noted that "in R[hode] Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature who would be willing instruments of the wicked [and] arbitrary plans of their masters." [88] When his proposal

82. A contemporaneous account of the case as well as the political controversy it subsequently produced in the Rhode Island General Assembly can be found in J. Varnum, The Case of Trevett against Weeden (Providence 1787). See also F. Bates, Rhode Island and the Formation of the Union 128-39 (1898), reprinted in 10 [no. 2] Studies in History, Economics and Public Law 119 (Columbia Univ. ed. 1967).

83. J. Varnum, supra note 82, at 1-2.

84. Id. at 11, 14, 27.

85. Id. at 1.

86. See id. at 37-38, 43, 45; F. Bates, supra note 82, at 135.

87. J. Varnum, supra note 82, at 47.

88. 2 Records of the Federal Convention of 1787, at 28 (M. Farrand ed. 1911) [hereinafter cited as Records].

for a council of revision was defeated, Madison insisted that the legislative, executive, and judicial powers be kept separate and independent,[89] since

> [e]xperience had proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability [and] encroachments of the latter, a revolution of some kind or other would be inevitable.[90]

To secure an independent and impartial national judiciary, the delegates initially drew upon the lessons of British history. John Randolph proposed that judges be chosen by the national legislature to hold their offices during good behavior.[91] Alexander Hamilton suggested a separate article governing the judiciary providing for a Supreme Court with justices serving during good behavior.[92] When the question reached the floor of the Convention for debate, John Dickinson of Delaware moved to strike the requirement of impeachment so that judges could be removed by the Executive upon application of the Congress. The motion was thoroughly criticized as tending to weaken "too much the independence of the Judges," and was defeated by a vote of seven states to one.[93] As a further safeguard of judicial independence, the delegates then agreed that judges' salaries should not be diminished during their tenure.[94]

The Framers thus adopted the basic outline of the British Act of Settlement [95] as the minimum guaranty of an independent and impartial judiciary. Their efforts did not stop there, however. When the Committee of Detail reported its draft article for the judiciary, federal jurisdiction was limited "to all cases, arising under laws passed by the general [Legislature]," impeachments, and such other cases as the national legislature might assign.[96] Such a limitation would have prevented the judiciary from effectively checking legislative violations of the constitutional framework. Consequently, Dr. William Johnson of Connecticut moved to amend the third article by extending federal jurisdiction to cases arising under "this Constitution," and the motion was passed.[97]

Having scarcely emerged from the shadow of a tyrannical Parliament, and with ever increasing examples of legislative excess throughout the states, the Framers understood that the security of individual rights could be preserved only if the legislative and executive powers were kept within the

89. See id. at 34.
90. Id. at 35.
91. See 1 Records, supra note 88, at 226, 230.
92. See id. at 292.
93. See 2 Records, supra note 88, at 428-29.
94. See id. at 429-30.
95. See text accompanying note 40 supra.
96. See 2 Records, supra note 88, at 146-47.
97. Id. at 430.

limits prescribed by a higher, fundamental law. Recognizing the dangers inherent in unbounded power, the Founders went beyond the legacy of British and colonial history and adopted a written constitution with an independent judiciary for its guardian. The Framers realized, moreover, that their bold experiment could succeed only if the judicial power were kept absolutely separate and distinct from the executive and legislative branches. If it were not, the Constitution's promise of a government of limited powers could be broken with utter impunity. The solution was thus to elevate the judiciary to a third, co-equal branch of government, whose authority flowed directly from the same constitutional wellspring as its sister branches. The Founders thus rendered federal judges independent of the political departments not only with respect to their tenure and salary, but more importantly, in their source of judicial authority. It is this additional step, inconceivable in England, that made the American Constitution truly revolutionary.[98]

II. JUDICIAL INDEPENDENCE AND THE SEPARATION OF POWERS

The historical genesis of article III confirms the Framers' resolve to vest "the judicial power of the United States" in an *independent* department of government. The Framers conceived the grant of power to hear all cases "arising under the Constitution and laws of the United States," as a mandate to the judiciary to check abuses of constitutional limitations by the other two branches. More than an affirmative grant of authority to the judiciary, however, article III is a positive prohibition of interference with the exercise of the judicial power by the legislative and executive branches. To the extent that "the power of judging" is exposed to the will of another branch, "the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." [99]

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98. As Patrick Henry declared in the Virginia Convention to ratify the Constitution, "I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary." 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 325 (2d ed. 1866). Though Henry was speaking in reference to the Virginia Constitution, his colleague, John Marshall, underscored the Virginians' expectation that the federal judiciary would serve a like role in the newly created national government. "If a law be exercised tyrannically in Virginia," Marshall asked, "to what can you trust? To your judiciary. What security have you for justice? Their independence. Will it not be so in the federal court?" Id. at 559. Marshall's thoughts were echoed by Oliver Randolph in the Connecticut Convention. "If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void." 2 id. at 196.

99. The Federalist No. 47 at 299 (J. Madison) (G.P. Putnam's Sons ed. 1908). The separation of powers is grounded in a need to protect the citizenry rather than the occupants of official positions within each branch. Compare Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 449 (1977) (executive privilege, rooted in separation of powers, "not for the benefit of the President as an individual, but for the benefit of the Republic") with United States v. Brewster, 408 U.S. 501, 507 (1972) (speech or debate clause, based on separation of powers, "not written into the Constitution . . . for the personal or private benefit of Members of Congress"), and Pierson v. Ray, 386 U.S. 547, 554 (1967) (judicial

The essence of judicial independence, therefore, is the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality. This principle is embodied in the doctrine of separation of powers, which elevates the judiciary to the status of a co-equal branch. Cases defining the separation of powers suggest that article III's protection of judicial independence extends beyond the specific prohibitions of the salary and tenure provisions to embrace all significant intrusions upon the exercise of the judicial power.

A. *Separation of Powers Analysis*

The majority of cases explicating the significance of the placement of the legislative, executive, and judicial powers in separate departments addresses the scope of the power granted to each branch,[100] without considering the related but somewhat different problem of acts by one branch that interfere with the exercise of acknowledged power by another.[101] Although it is beyond dispute that one branch cannot exercise the "whole" power vested in another department,[102] the Constitution does not mandate complete and absolute separation among the three branches.[103] The separation-of-powers

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immunity, and corresponding judicial independence, are "for the benefit of the public"). See generally Kaufman, supra note 1, at 690; Kurland, The Constitution and Tenure of Federal Judges: Some Notes from History, 36 U. Chi. L. Rev. 665, 698 (1969) (life tenure of federal judges "not created for benefit of judges but for the benefit of the judged").

100. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936); Myers v. United States, 272 U.S. 52, 122 (1926) (cases discussing scope of presidential power); Kauper, The Steel Seizure Case: Congress, the President, and the Supreme Court, 51 Mich. L. Rev. 141, 144-45 (1952).

101. A few cases have considered this issue. See, e.g., United States v. Nixon, 418 U.S. 683 (1974) (claim that judicially compelled disclosure of presidential conversations would interfere with functioning of executive branch); Myers v. United States, 272 U.S. 52, 127 (1926) (congressional exercise of removal power would "leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch and thus most seriously to weaken it").

Myers demonstrates that the scope of one branch's power is often closely related to potential interference with another branch's authority. An exercise of perceived power by one branch (e.g., exercise of the removal power by Congress) may interfere with the effective operation of another (e.g., the president's ability to control the conduct of his subordinates). Nevertheless, cases dealing with whether one branch has "inherent" or "implied" power to act are analytically distinguishable from cases alleging that one branch has unduly influenced the exercise of power by a sister branch. The latter issue, though rarely addressed in the case law, has traditionally been considered a question of separation of powers. See, e.g., E. Corwin, The President, Office and Powers 1781-1957 (4th ed. 1957) (basic component of separation-of-powers doctrine is that each branch must be able to defend its "characteristic functions" from "intrusion" by other branches); The Federalist No. 48, supra note 99, at 308 (J. Madison) (no branch should exercise "an overruling influence over the others in the administration of their respective powers").

102. See The Federalist No. 47, supra note 99, at 302 ("where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free Constitution are subverted").

103. Most of the early cases invoking the separation of powers were content to assert the existence of a complete separation among the branches. See, e.g., Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935); Kilbourn v. Thompson, 103 U.S. 168, 191 (1881). Beginning with Mr. Justice Jackson's concurring opinion in the Steel Seizure Case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952), however, the Court slowly retreated from this view, in favor of what Professor Bruff has termed a "more

concept is necessarily ambiguous and will tolerate some overlap of functions among the branches so that the entire government can operate effectively.[104] Thus, the executive can engage in some conduct that might be reasonably described as "legislative," [105] while the Congress may undertake some arguably "executive" functions.[106] Moreover, one branch may even utilize its power in a manner that hampers, to some degree, the exercise of authority by a sister branch.[107]

The cases do, however, make plain that the separation-of-powers principle will not tolerate undue or injurious intrusion by one branch into the sphere of another. Indeed, they recognize the practical need to define each branch's power to include not only its constitutionally assigned duties, but also those functions that enable it to operate effectively. Thus, to appreciate fully the contours of judicial independence, it is necessary to identify the attributes of effective judicial power.

B. *The Attributes of Judicial Power*

Although no cases expressly define the scope of the judicial power created in article III, cases examining the "legislative" and "executive" powers provide a useful analogy. These cases reveal that there are certain core functions essential to the effective exercise of each branch's powers.[108] Under the separation-of-powers doctrine, the legislature and executive enjoy a constitutionally based independence from interference with these core functions.

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flexible, case-by-case" approach. Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 479 (1979). Justice Jackson advocated a view of the Constitution that "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." 343 U.S. at 635 (Jackson, J., concurring). This approach has been adopted by the courts. See Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977); note 104 infra. Some Justices apparently still cling to the older view. See 433 U.S. at 507 (Burger, C.J., dissenting); id. at 547 (Rehnquist, J., dissenting).

104. The Supreme Court's two most recent decisions discussing the separation of powers have emphasized the ambiguous and flexible nature of the concept. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 442 (1977) (adopting "pragmatic, flexible approach"); Buckley v. Valeo, 424 U.S. 1, 121 (1976) ("[A] hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."). See generally Bruff, supra note 103, at 483 (discussing recent cases); Fleishman & Aufses, Law and Order: The Problem of Presidential Legislation, 40 Law & Contemp. Prob., Summer 1976, at 1, 4 (same).

105. See, e.g., Zemel v. Rusk, 381 U.S. 1 (1965) (delegation to executive branch of arguably legislative power to promulgate rules governing issuance of passports constitutional).

106. See, e.g., Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (Congress may, in some instances, remove some officials of regulatory agencies).

107. See, e.g., United States v. Nixon, 418 U.S. 683 (1974) (judiciary can compel President to disclose confidential conversations in some cases, arguably preventing candid exchange of ideas necessary to effective functioning of executive branch).

108. For purposes of this discussion, "power" refers to the broad legislative, executive, and judicial authority vested in each branch by the Constitution. "Function," by contrast, refers to the particular activities through which each branch exercises its respective power, including those activities not expressly set out in the Constitution. For example, the legislative "power" encompasses the "functions" of voting on legislation (expressly stated in article I) and conducting committee investigations (not expressly stated).

For example, in *Myers v. United States*,[109] the Court held that the President's power to remove subordinate officials is essential to the effective exercise of his constitutional duty to make certain that laws are faithfully executed.[110] Consequently, Congress could not interfere with this core function by attempting to oversee the removal of executive officers.[111]

Another function essential to the execution of the law is the President's ability to discuss and formulate policy. He must be generally free to solicit advice, discuss policy options, and debate methods of executing his constitutional powers. Such a process facilitates selection of the best course of action and increases the probability that an ill-advised alternative will be identified and discarded. Thus, in *United States v. Nixon*,[112] the Court held that to avoid unnecessarily impeding the President in determining how best to execute the laws, conversations between him and his advisors are presumptively privileged from compelled disclosure at the insistence of another branch. Executive privilege "flow[s] from the nature of enumerated powers" because it "is fundamental to the operation [of the executive branch] and inextricably rooted in the separation of powers."[113]

For similar reasons, the powers of the legislative branch have been held to encompass those core functions that collectively constitute the legislative process. The speech or debate clause[114] has been broadly construed to prohibit an "unfriendly executive" or "hostile judiciary"[115] from compromising the "integrity of the legislature."[116] Although article I refers only to "Speech or Debate," the Court has employed the clause to prevent interference by either of the other branches with the "deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[117] This all-

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109. 272 U.S. 52 (1926).

110. Id. at 117; see Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) ("it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will").

111. 272 U.S. at 117.

112. 418 U.S. 683 (1974).

113. Id. at 705, 708; see also id. at 711 ("to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based").

The functional need for confidential deliberations, recognized in *Nixon*, applies to the judicial branch as well. See Kaufman, supra note 1, at 715 (noting need to protect "working processes" of judges). Indeed, it is perhaps more vital to ensure against public disclosure of judicial deliberations than to secure confidentiality of executive or legislative conversations. The two political branches are designed to be, to a significant extent, accountable to public opinion in all phases of their exercise of constitutional power. The judicial branch, by contrast, must be immune from popular passions in the exercise of its decision-making power. See text accompanying notes 140 & 141 infra.

114. U.S. Const. art. I, § 6 ("for any Speech or Debate in either House, they shall not be questioned in any other Place").

115. United States v. Johnson, 383 U.S. 169, 179 (1966).

116. Id. at 178.

117. Gravel v. United States, 408 U.S. 606, 625 (1972); see Kilbourn v. Thompson, 103 U.S. 168, 204 (1881) (speech or debate clause extends "to things generally done in a session of the House by one of its members in relation to the business before it").

embracing interpretation is explicitly premised on the clause's "function of reinforcing the separation of powers." [118] Thus, the Court has relied on the principle of "legislative independence" [119] emanating from the speech or debate clause to protect legislative aides from judicial scrutiny,[120] to limit the introduction of evidence in criminal prosecutions,[121] and to prohibit any interference with ongoing congressional investigations.[122] In this manner, the separation-of-powers doctrine ensures the effective exercise of the legislative power and prevents its usurpation by another department.

These cases demonstrate that the core functions of the judiciary must be protected as well. The constitutional power to decide cases fairly in accordance with law can be exercised effectively only if the deliberative process of the courts is free from undue interference by the President or Congress. The Supreme Court seems to have had only one opportunity to consider a legislative enactment that allegedly invaded the province of judicial decisionmaking, in *Chandler v. Judicial Council*.[123] This case challenged a statute vesting Circuit Councils composed of appellate judges with supervisory authority over individual judges as an impermissible interference with the judicial process. Finding that it lacked jurisdiction, the Court did not reach the merits.[124]

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118. United States v. Johnson, 383 U.S. 169, 178 (1966); accord, Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975); Levi, Some Aspects of Separation of Powers, 76 Colum. L. Rev. 371, 383 (1976). In its most recent discussion of the speech or debate clause, the Supreme Court made clear that its function was "to preserve the constitutional structure of separate, coequal, and independent branches of government." United States v. Helstoski, 99 S.Ct. 2432, 2441 (1979).

119. Gravel v. United States, 408 U.S. 606, 621 (1972); see Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975).

120. See Gravel v. United States, 408 U.S. 606 (1972).

121. See United States v. Helstoski, 99 S. Ct. 2432 (1979); United States v. Johnson, 383 U.S. 169 (1966).

122. See Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501 (1975). *Eastland* makes clear that the congressional "power of inquiry is . . . an integral part of the legislative process." Id. at 505. The Court has not, however, protected the process by which congressmen "inform" their constituents, holding it is not "an integral part" of the legislative power. See Hutchinson v. Proxmire, 99 S. Ct. 2675 (1979).

123. 398 U.S. 74 (1970). The courts have, however, had occasion to pass on legislative enactments allegedly violating the specific requirement of undiminished compensation contained in article III. See O'Malley v. Woodrough, 307 U.S. 277 (1939); O'Donoghue v. United States, 289 U.S. 516 (1933); Williams v. United States, 289 U.S. 553 (1933); Evans v. Gore, 253 U.S. 245 (1920); Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978). The Fifth Circuit has recently suggested the applicability of separation-of-powers analysis to the judiciary, although it rejected a claim by federal judges that financial disclosure requirements, when applied to the judiciary, violate the judicial independence derived from article III. See Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979), cert. granted, 48 U.S.L.W. 2375 (Jan. 31, 1980) (No. 79-1180).

124. The several opinions, however, questioned the validity of the statute. Writing for the Court, the Chief Justice emphasized the "imperative need for total and absolute independence of judges . . . in any phase of the decisional function." 398 U.S. at 84. He appeared to except administrative matters, such as the location and duration of sittings and timing of decisions, from this command. Id.

In a concurring opinion, Mr. Justice Harlan acknowledged that these matters of "judicial administration" constitute an element of the "judicial power." Id. at 103. He concluded, therefore, that Congress could make clear, by statute, that "responsibility . . . of such a nature . . . *may* be placed in the hands of Article III judges to be exercised as a judicial function." Id. at 105.

The protection afforded the core functions of the other two branches, however, indicates that the judicial department must be similarly insulated. Unfortunately, unlike articles I and II, the third article speaks only briefly and cryptically about the elements of the judicial power,[125] from which the judiciary's core functions must be derived.[126]

Although article III does not elaborate the elements of the judicial function, the attributes of the effective exercise of judicial power are not difficult to define. Of primary importance is the grant of judicial power in article III itself. Dating at least to the time of Lord Coke, the hallmark of every true judicial tribunal has been impartial adjudication.[127] The long struggle to separate courts and judges from other institutions and functionaries of government was designed to place judges above the self-interest that motivates the disputing parties.[128] The success of this struggle, at least in the American experience, is clear. Our judicial system is guided by the principle that a "judicial officer, in exercising the authority vested in him, [must] be free to act upon his own convictions, without apprehension of personal consequences to himself."[129] Under the Constitution, judicial impartiality constitutes an essential element of due process.[130] Indeed, because "the judicial power . . . is responsible directly to the fundamental law and no other authority,"[131] article III has been said to require "the *independent* determination of all questions" before the court.[132]

In dissent, Justices Black and Douglas rejected the notion that Congress could empower one group of judges to prevent the assignment of cases to another. See id. at 137 (Douglas, J., dissenting); id. at 141-42 (Black, J., dissenting). In their view, impeachment was the only method by which a judge could be prevented from hearing and deciding cases. Id. at 136 (Douglas, J., dissenting); Chandler v. Judicial Council, 382 U.S. 1003, 1006 (1966) (Black, J., dissenting from denial of application for stay).

125. U.S. Const. art. III, § 2 simply describes the matters to which the judicial power may extend.

126. See note 108 supra.

127. See Dr. Bonham's Case, 8 Co. Rep. 107, 118, 77 Eng. Rep. 638, 652 (C.P. 1610) ("No man ought to be a judge in his own case."); notes 21 & 22 and accompanying text supra.

128. See Shapiro, Judicial Independence: The English Experience, 55 N.C. L. Rev. 577, 623 (1977).

129. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871). Cases, like *Bradley*, discussing the doctrine of judicial immunity set forth explicitly the principle of judicial impartiality. Although recent judicial immunity cases rely on the legislative history of 42 U.S.C. § 1983 (1976), earlier cases indicate that it is an essential element of judicial power. See 80 U.S. (13 Wall.) at 347. The principle was reaffirmed in Pierson v. Ray, 386 U.S. 547, 554 (1967), in which the Court stated that "judges should be at liberty to exercise their functions with independence and without fear of consequences." Accord, Stump v. Sparkman, 435 U.S. 349, 355 (1978).

130. See, e.g., Gibson v. Berryhill, 411 U.S. 564, 577 (1973); In re Murchison, 349 U.S. 133, 136 (1955).

131. Yakus v. United States, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting); see United States v. Nixon, 418 U.S. 683, 704 (1974) ("Notwithstanding the deference each branch must accord the others, the 'judicial Power of the United States' vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive . . . can share with the Judiciary the veto power . . . .").

132. Crowell v. Benson, 285 U.S. 22, 60 (1932) (emphasis added). The central role of judicial impartiality is also manifested in the "symbols of our law." Hoeflich & Deutsch, Judicial Legitimacy and the Disinterested Judge, 6 Hofstra L. Rev. 749, 749 (1978) ("Seated behind bench and bar, the judge is set physically apart from the other actors in the . . . courtroom"); Leff, Law and, 87 Yale L.J. 989, 995-98 (1978).

Judicial impartiality is most seriously compromised when another branch of government appears at the bar. It is precisely because the Framers feared the political branches may attempt to exceed their authorized powers that article III vests the authority to interpret the Constitution in a separate and co-equal branch.[133] The role of the third branch in measuring the actions of the other two against the Constitution, according to Chief Justice Marshall, constitutes "the very essence of judicial duty." [134]

Because the political departments may attempt to enlist the judiciary in a campaign to subvert the Constitution,[135] the third branch must be insulated from congressional or executive attempts to distort the independent exercise of judicial judgment.[136] The legislature's powers extend no further than the creation of substantive rights and the establishment of lower federal courts and rules of procedure for their adjudication; [137] it cannot act to compromise the impartiality of the judge. Thus, a statute that gives the judge, even unintentionally, a personal stake in the controversy before him [138] would not only implicate the personal rights of the disadvantaged party, but would also run afoul of the constitutional command that the ultimate power of decision, the judicial power of the United States, remain in the third branch.[139]

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133. See text accompanying notes 88-98 supra. The need for independent determination is especially important in light of the power of the judiciary to review acts of Congress and the President. In scrutinizing these acts, the judiciary may become immersed in questions concerning the internal operations of another branch. See, e.g., United States v. Nixon, 418 U.S. 683 (1974); Powell v. McCormack, 395 U.S. 486 (1969). To the extent that a co-equal branch has violated the Constitution in managing its internal affairs, however, "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, 177 (1803). The other branches do not have a similar mandate (and burden) to review the judicial decision-making process.

134. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-80 (1803). See United States v. Nixon, 418 U.S. 683, 704 (1974); White, The Path of American Jurisprudence, 124 U. Pa. L. Rev. 1212, 1223 (1976) ("Once Americans had decided to have a constitution with a tripartite governmental structure, . . . they had necessarily decided to have an independent judiciary . . . .").

135. To ensure the superiority of the Constitution, the Court has found that "extra-judicial revisory authority [is] incompatible with the limitations upon judicial power . . . drawn from Article III." Glidden Co. v. Zdanok, 370 U.S. 530, 582 (1962) (plurality opinion of Harlan, J.).

136. See Chandler v. Judicial Council, 398 U.S. 74, 103 (1970) ("the power to direct trial judges in the execution of their decision-making duties . . . [is] a judicial power, one to be entrusted only to a judicial body").

137. See Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825); note 124 supra.

138. Indeed, it was to make certain that the judge remains separate from the contesting parties that the Constitutional Convention rejected a proposal to include judges as members of a Council of Revision with power to disapprove pending legislation. "The judges," Samuel King explained, "ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation." See 1 Records, supra note 88, at 109.

An identical rationale undergirds the compensation clause expressly included in article III. See U.S. Const. art. III, § 1. According to Hamilton, the clause reflects an awareness that "a power over a man's subsistence amounts to a power over his will." The Federalist No. 79, supra note 99, at 491 (A. Hamilton). To avoid the possibility that a judge's self-interest will motivate his decision, he must "be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation." Id. at 492.

139. See Crowell v. Benson, 285 U.S. 22, 57 (1932) (Congress cannot "oust the courts of all determinations of fact by vesting the authority to make them with finality in

To the extent that the action of another branch exposes a judge to the threat of reprisal if he decides against a particular litigant, usurpation of the judicial power is particularly acute.[140] When majoritarian sentiment is injected as a factor in the resolution of an individual dispute, the political branches, ultimately responsible to popular pressures, have succeeded in transforming the court into a political branch as well. This, in turn, engenders a risk that constitutional interpretation will succumb to popular pressures, a blow to the very substance and existence of the judicial power.[141]

As the preceding discussion demonstrates, impartiality and insulation from pressures by the political branches are essential attributes of judicial power. The crucial role of judicial impartiality in the effective exercise of the article III case-deciding function therefore serves as a useful guidepost in identifying congressional and presidential initiatives that threaten judicial independence. Simply put, there is cause for legitimate concern whenever policies implemented by another branch potentially compromise the impartiality of a federal judge in any phase of his decisionmaking process.

C. *Protecting Judicial Independence*

Recognition of this central element of the judicial power is the beginning rather than the end of the analysis. The separation-of-powers case law teaches that potential interference with impartial judicial decisionmaking "triggers" serious scrutiny.[142] Once the impartiality of judicial decisionmaking is threatened by another department of government, the separation-

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its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution"); Kilbourn v. Thompson, 103 U.S. 168, 192 (1881) (Congress can neither "exceed[ ] the limit of its own authority" nor "assume[ ] a power which could only be properly exercised by [courts] because it [is] in its nature clearly judicial").

Cases limiting the authority of federal magistrates have done so to preserve this concept of "judicial power." See, e.g., Wingo v. Wedding, 418 U.S. 461, 485-86 (1974) (Burger, C.J., dissenting) (ultimate decisionmaking power is judicial function that cannot be delegated); Horton v. State Bank & Trust Co., 590 F.2d 403, 404 (1st Cir. 1979) (authority to enter final judgment is an exclusive power of article III court); Sick v. City of Buffalo, 574 F.2d 689, 692-93 (2d Cir. 1978).

140. See Palmore v. United States, 411 U.S. 389, 419 (1973) (Douglas, J., dissenting) ("No federal court exercising Art. III judicial power should be made a minion of any cabal that from accidents of politics comes into the ascendancy . . . ."); Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 Sup. Ct. Rev. 135, 154 (Framers "hoped to make judges free from popular pressure and from legislative control").

141. See Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring) ("Courts are not representative bodies. They are not designed to be a good reflex of a democratic society.").

142. The most recent cases, adopting the "flexible" approach to the separation of powers, see notes 104 & 105 and accompanying text supra, hold that potential interference with the power of another branch is not dispositive, but merely triggers analysis of whether the conduct "impermissibly interferes" with that power. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 498 (1977); accord, United States v. Nixon, 418 U.S. 683, 706 (1974). The few cases applying separation-of-powers analysis to the judicial branch also indicate that potential interference triggers concern. See Chandler v. Judicial Council, 398 U.S. 74, 84 (1970); Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979), cert. granted, 48 U.S.L.W. 2375 (Jan. 31, 1980) (No. 79-1180).

of-powers principle requires a weighing of all relevant factors to identify violations of the judicial independence derived from article III.

The least difficult, though often vexing, scenarios are those in which the Constitution itself speaks to the legitimacy of congressional or presidential involvement in the judicial process. When the Constitution specifically authorizes the exercise of arguably "judicial power" by another branch, there is a strong presumption that judicial independence is not compromised.[143] For example, article III specifically recognizes congressional authority to create or abolish lower federal courts[144] and to regulate the appellate jurisdiction of the Supreme Court.[145] Although it is possible to imagine unreasonable congressional invocation of these powers with an eye toward precluding judicial resolution of a particular case or class of cases,[146] the "textually demonstrable constitutional commitment"[147] to the Congress adds considerable weight to the legitimacy of their exercise.[148] Conversely, the Constitution indicates that some actions by the other branches would always contravene the separation of powers, because they would violate the specific protections of judicial independence. Most significantly, the salary and tenure provisions in article III stand as powerful obstacles to congressional attempts to reduce judicial compensation or remove judges from office by mechanisms other than impeachment.[149]

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143. There are numerous instances in which the Constitution specifically provides that one branch should exercise a power that would otherwise fall within the domain of another. For example, the veto power, vested in the President by article II, is of a decidedly legislative cast. Similarly, the Senate's power to "consent" to executive appointments is, arguably, an essentially executive power. See Myers v. United States, 272 U.S. 52 (1926).

144. See U.S. Const. art. III, § 1.

145. Id. § 2.

146. Compare Crowell v. Benson, 285 U.S. 22 (1932) (Congress cannot preclude court from addressing questions of "jurisdictional fact") and United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) (Congress cannot deprive court of jurisdiction "to give the effect to evidence which, in its own judgment, such evidence should have") with Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) (suggesting that Congress can use its power over remedies to alter jurisdiction in manner that would otherwise violate due process). See generally, P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 313-75 (2d ed. 1973) [hereinafter cited as Hart & Wechsler].

147. Baker v. Carr, 369 U.S. 186, 217 (1962). To the extent that it limits the judicial branch from interfering in the resolution of questions "committed" to another branch, the "political question" doctrine is obviously an aspect of the separation of powers.

148. See, e.g., Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1868); Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850). But see Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (Story, J.) (asserting that Congress must grant each federal court the full "judicial power"). The question of how far Congress can intrude into the judicial process by regulating the jurisdiction of federal courts, of course, has been the subject of great dispute. See Hart & Wechsler, supra note 146, at 313-75.

149. See U.S. Const. art. III, § 1. The principle that the compensation clause forbids all direct attempts to diminish judicial salaries is articulated in Booth v. United States, 291 U.S. 339 (1934). For the argument that the tenure provision precludes removal of a federal judge by a method other than impeachment, see Kaufman, supra note 1.

In addition, the bill of attainder clause, U.S. Const. art. I, § 9, stands as a bar to legislative action that usurps the judicial power by predetermining the result of a particular case. See United States v. Brown, 381 U.S. 437, 445 (1965) (bill of attainder clause "reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons").

Between these relatively precise expressions of the bounds of permissible interference with judicial power lies, to paraphrase Mr. Justice Jackson, a "twilight zone." [150] Within this zone are a variety of situations in which the impartial adjudication of cases is to some extent compromised by legislative or executive action. In these situations, determining whether a particular encroachment on judicial independence is permissible requires a sensitive weighing of often conflicting factors.[151]

The most salient factor emerging from recent cases is the extent to which the challenged congressional or executive action implicates the judiciary's core function [152] of impartial judicial decisionmaking. At the extreme, a statute that promises a judge personal reward for reaching a specific result would be of doubtful validity, as would a law that empowers the President to "punish" a judge when he disagrees with judicial decisions. Under such statutes, impartial decisionmaking would be all but impossible, because a judge's self-interest would taint the deliberative process. Less onerous, but still questionable, are statutes that vest independent entities,[153] groups of judges,[154] or private individuals [155] with authority to reward or punish judges based on their performance.[156]

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150. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

151. Perhaps the most difficult class of cases inhabiting this twilight zone involves conflicting claims of potential interference by two different branches. The conflict over President Nixon's tapes provides a graphic illustration. See United States v. Nixon, 418 U.S. 683 (1974). The President asserted a claim of executive privilege based on the separation of powers; i.e., compelled disclosure would interfere with the effective operation of the executive branch. An absolute privilege, however, would compromise the ability of the judicial department "to do justice in criminal prosecutions" and would "plainly conflict with the function of the courts under Art. III." Id. at 707. The Court resolved this clash of separation-of-powers claims by concluding that the President had failed to specify the potential harm that merited invocation of executive privilege. Id. at 706. The Chief Justice, who wrote the *Nixon* opinion, has since commented that the case was "essentially a conflict between the Judicial Branch and the President, where the effective functioning of both branches demanded an accommodation." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 515 (1977) (Burger, C.J., dissenting).

152. Cf. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) ("the proper inquiry focuses on the extent to which [the action] prevents the Executive Branch from accomplishing its constitutionally assigned functions").

153. Cf. Nash v. Califano, 613 F.2d 10 (2d Cir. 1980) (administrative law judge has standing to contest alleged injury to statutory "independence" caused by agency personnel who allegedly harassed judges when they reversed agency decisions).

154. Compare Chandler v. Judicial Council, 398 U.S. 74, 105 (1970) (Harlan, J., concurring) (administrative control of district judges "*may* be placed in the hands of Article III judges") with id. at 137 (Douglas, J., dissenting) ("there is no power under our Constitution for one group of federal judges to censor or discipline any federal judge"). The significance of vesting disciplinary power over federal judges in a group of their peers is at the center of the current controversy over proposed judicial discipline legislation. See text accompanying notes 161-84 infra.

155. See text accompanying notes 161-84 infra (proposed discipline bill vests, to some extent, power to influence judges in individual citizens).

156. Another factor of considerable significance is the "novelty" of the legislative or executive action in question. A longstanding policy, though it potentially compromises impartial adjudication, may be regarded by judges as inconsequential. Nevertheless, the introduction of the same policy as an original matter may cause considerable concern within the judiciary that the policy is likely to interfere with independent exercise of the judicial power. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("inertia, indifference or quiescence" by one branch in face of action by another

The extent of the intrusion should be measured, however roughly, against the weight of the interest justifying congressional or executive action.[157] Even relatively minor and remote threats to impartial decisionmaking should not survive constitutional objection if they do not enhance substantial government interests.[158] Moreover, if alternative means of achieving the same ends without compromising the judiciary are available, the "necessity" of the challenged policy is open to serious question.[159] Conversely, legislation designed to correct conceivable but unrealized evils should not be tolerated if it also compromises the judicial function.

D. *Judicial Discipline Legislation and the Separation of Powers*

The dearth of cases adjudicating threats to judicial independence is a testament to the admirable self-restraint hitherto exercised by the legislature and the executive. But in the post-Watergate era's atmosphere of governmental accountability, new legislative proposals in the sensitive area of judicial discipline have appeared with some frequency.[160] Since these congressional initiatives do not affect judicial tenure or salary, they must be evaluated within the separation-of-powers framework. This analysis, therefore, constitutes a necessary complement to the safeguards embodied in the salary and tenure provisions.[161]

Because article III prohibits removal of judges by any means other than

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"may sometimes, at least as a practical matter, enable" that action).

It has been suggested that a legislative enactment applicable to all three branches is of less concern than a statute aimed squarely and solely at the judiciary. See, e.g., Duplantier v. United States, 606 F.2d 654, 668 (5th Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3607 (U.S. Jan. 31, 1980) (No. 79-1180); Atkins v. United States, 556 F.2d 1028, 1055 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978). To the extent this factor reflects a congressional intent not to misuse potentially intrusive legislation, the point has substance. Nevertheless, it should never be dispositive. The three branches may be co-equal, but they are surely not identical. Thus, a statute that applies to all three branches may be constitutional with respect to all but one. This is especially likely in the case of the judiciary which, unlike the political departments, must be insulated from popular pressures. Accordingly, a statute designed to bolster the political accountability of government officials may offend article III by exposing a judge to undue public pressure, though it is entirely consistent with articles I and II.

157. Cf. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) ("where the potential for disruption is present," reviewing court must "then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress"); id. at 507 (Burger, C.J., dissenting) (intrusion must be "necessary to secure some overriding governmental objective"); United States v. Nixon, 418 U.S. 683, 707 (1974) (executive privilege can be overcome by compelling need).

158. See, e.g., United States v. Nixon, 418 U.S. 683 (1974).

159. See Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 507 (1977) (Burger C.J., dissenting).

160. See, e.g., S. Rep. No. 362, 96th Cong., 1st Sess. 5 (1979).

161. See, e.g., R. Berger, Impeachment: The Constitutional Problems (1973); Berger, "Chilling Judicial Independence": A Scarecrow, 64 Cornell L. Rev. 822 (1979); Ervin, Separation of Powers: Judicial Independence, 35 Law & Contemp. Prob. 108 (1970); Kaufman, supra note 1; Kramer & Barron, The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behaviour," 35 Geo. Wash. L. Rev. 455 (1967); Kurland, supra note 99; Shartel, Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution, 28 Mich. L. Rev. 485 (1930); Stolz, Disciplining Federal Judges: Is Impeachment Hopeless?, 57 Calif. L. Rev. 659 (1969).

impeachment,[162] advocates of judicial discipline legislation have stopped short of drafting procedures for complete removal. Instead, the Senate has passed the Judicial Conduct and Disability Act of 1979.[163] Addressed to largely imagined fears of mental or physical incapacity,[164] and grossly improper or unethical conduct,[165] this Act confers upon the judicial councils of the eleven circuits [166] responsibility for investigating allegations of judicial misconduct "inconsistent with the effective and expeditious administration of the business of the courts." [167] Any person, including a disgruntled litigant, may file a complaint, although allegations related to the merits of a judicial ruling must be dismissed by the councils.[168] Sanctions available to the councils would include public and private censure, orders prohibiting further assignment of cases to the judge in question for a time certain, and formal pressure to retire "voluntarily." [169] Either the complainant or the judge may seek discretionary review in a new article III court to be known as the Court on Judicial Conduct and Disability.[170] This court is authorized to submit a record of its proceedings to the House Judiciary Committee whenever it determines that a judge has committed an impeachable offense.[171]

The separation-of-powers doctrine requires careful constitutional scrutiny of the degree to which this legislation interferes with the core judicial function of independent and impartial decisionmaking. If the Act gives the judge an irrelevant personal stake in the outcome of the case before him,

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162. It has been gospel during most of our history that "[i]mpeachment is the only means by which a Federal judge can be got rid of." 1 J. Bryce, The American Commonwealth 111 (3d ed. 1914); see id. at 230-31; accord, Shurtleff v. United States, 189 U.S. 311, 316 (1903) (referring in dictum to "life tenure" of federal judges); J. Story, Commentaries on the Constitution § 1635, at 470 (3d ed. 1859); 11 Annals of Cong. 738 (1802) ("The judges are to be removed only on impeachment, and conviction before Congress.") (Rep. Rutledge quoting unattributed statement by Madison).

Nevertheless, during the 1930s, it was argued in some quarters that the good behavior tenure of federal judges could be forfeited upon the commission of lesser offenses than high crimes and misdemeanors, as determined by bodies other than the Congress. Shartel, supra note 161, at 909. This proposition has been tested and found without substance from the perspectives of American constitutional history, Kurland, supra note 99, at 418, British common law and colonial precedents, Ziskind, supra note 140, at 137-38, 151-53, and modern policy analysis, Kaufman, supra note 1, at 684-90. Indeed, these barriers have contributed to the defeat of so-called removal legislation introduced in recent years. See 125 Cong. Rec. S15,422-24 (daily ed. Oct. 30, 1979) (remarks of Sen. Mathias). Senator Tydings sponsored the prototype of modern judicial discipline bills. See, e.g., S. 1506, 91st Cong., 1st Sess. (1969). For criticism of a more recent version of this scheme, S. 1423, 95th Cong., 2d Sess., S. Rep. No. 1035, 95th Cong., 2d Sess. 47-61 (1978), see Kaufman, supra note 1.

163. S. 1873, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. S15,435 (daily ed. Oct. 30, 1979).

164. See notes 175 & 176 and accompanying text infra.

165. S. Rep. No. 362, supra note 160, at 1.

166. Each Judicial Council, established by 28 U.S.C. § 332 (1976), is composed of the circuit judges in regular active service, and is empowered to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." Id. § 332(d).

167. S. 1873 § 2(c)(1)(B).

168. Id.

169. Id. § 2(d)(2).

170. Id. § 2(k). This court will be staffed by existing article III judges, who will serve three-year terms.

171. Id.

this intrusion may be counterbalanced only by the most weighty governmental interests.

While the constitutional text gives Congress the power to discipline its own members,[172] the judiciary is not similarly vested with disciplinary authority. The separation-of-powers framework contemplates that the judiciary will hold its members accountable to the law and litigants through appellate review, rather than inquisitorial proceedings.[173] In essence, the Act forces judges to adopt a procedure for reviewing their colleagues' actions other than that established in the Constitution. Thus, the Act transgresses the separation of powers unless it is narrowly drawn to further weighty and legitimate countervailing interests.[174]

But the proponents of judicial discipline legislation have never documented a need for this unprecedented intrusion into our federal judges' traditionally inviolate sphere. Indeed, the high quality of the federal judiciary is conceded by even the staunchest advocates of this legislation, who are forced to admit that "the problem addressed in the Act is more one of perception than actuality."[175] Not only are documented instances of judicial disability rare,[176] but the judicial selection process—which today includes the intense scrutiny of presidential and state bar commissions, as well as that of the Senate—ensures that the high standards of the past will be equalled or exceeded in the future.[177] The circuit judicial councils have already demonstrated their effectiveness in controlling through informal means the very inefficiencies and delicts to which the Act is apparently addressed.[178]

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172. U.S. Const. art. I, § 5.

173. S. Rep. No. 362, supra note 160, at 21.

174. See text accompanying note 157 supra.

175. S. Rep. No. 362, supra note 160, at 5. See, e.g., 125 Cong. Rec. S15,379 (daily ed. Oct. 30, 1979) ("Although, on the whole, the general calibre of the Federal judiciary has been extremely high, the problem of the unfit judge is a serious challenge to our judicial system.") (remarks of Sen. DeConcini); Judicial Discipline and Tenure: Hearings Before the Subcomms. on Improvements in Judicial Machinery & Constitution of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess., on S. 295, S. 522, S. 687, at 3 (1979). ("The first thing to say about the Federal Bench is that there is no reason to doubt the ability or integrity of the vast majority of our nearly 700 Federal judges.") (statement of Clark Mollenhoff, journalism professor, and Gregory Rushford, investigative journalist).

176. S. Rep. No. 362, supra note 160, at 3, 5.

177. Berkson, Carbon & Neff, A Study of the U.S. Circuit Judge Nominating Commission: Findings, Conclusions & Recommendations, 63 Jud. 105 (1979).

178. After intensive study, investigators for the Federal Judicial Center concluded: "As a result of our visits with circuit and district judges, supporting personnel, and a few lawyers, we have concluded that it is in the area of handling complaints about judges that the council has been most effective." S. Flanders & J. McDermott, Operation of the Federal Judicial Councils 28 (1979). The report further notes that, "[d]espite considerable probing, we uncovered *no* clear instances in which councils had failed to act effectively." Id. at 25 (emphasis in original). It concludes: "On the basis of our visits to the circuits, we have concluded that the councils have done an effective job, as far as we can determine. We searched for complaints that had been 'swept under the rug,' and found none." Id. at 30. See also Wallace, Must We Have the Nunn Bill? The Alternative of Judicial Councils of the Circuits, 51 Ind. L.J. 297, 324-25 (1976).

Weighing against the flimsy justification for this legislation is the extraordinary danger of erosion of the impartiality that is the essence of the judicial role. Despite disclaimers by the Act's sponsors,[179] it invites dissatisfied litigants to harass judges who rule against them. Although the councils must dismiss complaints based on the merits of a decision, they are nonetheless obliged to review the charges before dismissal.[180] The litigant may then seek review of the dismissal, and may be able to force the Court on Judicial Conduct to review the record.[181] During the time required for these procedures to run their course, the judge under investigation would no doubt feel a chill. Indeed, since councils may conduct investigations on their own initiative,[182] the judge would be likely to avoid rendering any potentially controversial decisions while the complaint was pending. Under such a regime, there would inevitably arise cases in which even the most dispassionate judge, knowing that litigants or his colleagues could "punish" him, would be unable to preserve an unwavering focus on the applicable facts and legal principles. Fear of the personal consequences of an "unpopular" decision could take the upper hand, irreparably chilling fearless and impartial adjudication. Any disciplinary system that allows interested parties to strike out at judges is too great an interference with judicial impartiality to be tolerable under the doctrine of separation of powers.

Just as legislators must be free to consider and enact legislation[183] and the executive branch to execute the laws,[184] so must each judge be free to adjudicate fairly and without fear of reprisal. The provisions of article III establishing the tenure and salary of federal judges state but one essential part of this fundamental tenet of due process.[185] Accordingly, statutes like the Judicial Conduct and Disability Act that disturb a judge's impartiality must, absent a demonstrated necessity, be deemed unconstitutional infringements upon judicial independence.

CONCLUSION

Because of the unique position of the federal judiciary as the principal guardian of the rights conferred by the Constitution, encroachments upon its protected sphere must be weighed with acute sensitivity. The Framers of the Constitution went far beyond the British experience in its elevation of the judiciary to a co-equal branch of government. If we are to remain true to the Framers' plan for a government bound at all levels by the rule

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179. See, e.g., 125 Cong. Rec. S15,380 (daily ed. Oct. 30, 1979) (remarks of Sen. DeConcini).
180. S. Rep. No. 362, supra note 160, at 28.
181. Id.
182. S. 1873 § (2)(c)(4).
183. See text accompanying notes 114-22 supra.
184. See text accompanying notes 109-13 supra.
185. See In re Muchison, 349 U.S. 133, 136 (1955).

of law, we must resist even well-intentioned legislation that would chill the capacity of the judge to render impartial justice. Judicial independence is not a cliché conjured up by those who seek to prevent encroachments by the other branches of government. The term is one of art, defined to achieve the essential objective of the separation of powers that justice be rendered without fear or bias, and free of prejudice.