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Foreword: Judicial Discipline and Impeachment

BY JOHN H. GARVEY*

This symposium deals with the discipline and removal of Article III judges. In employing these measures we must heed two principles that are in tension with one another. The first is that judges must be honest. The second is that they must be independent. This second principle actually presupposes a third, about which I will say something before returning to the first two. The independence of federal judges is particularly important because they engage in the practice of judicial review

There is a symbolic as well as a heuristic point to having law students begin their careers with the study of *Marbury v Madison*. The practice of judicial review—courts declaring legislative and executive acts unconstitutional—is perhaps the greatest American contribution to the idea of constitutional government. Judicial review assumes that the courts should correct for imperfections in the political process by looking out for those who are inadequately represented. It also suggests that the courts speak with a voice of reason and moral authority that the political branches of government sometimes fail to hear. This has distinctly antidemocratic implications. It means that the majority of the people cannot always do as they wish. But most of us accept the idea. It was the undoing of Judge Bork, whom the Senate rejected because he thought that the Supreme Court should defer to Congress more often than it does.

Because judicial review has this antidemocratic aspect, it is important that judges be independent. Hamilton speaks of the two principles in the same breath in *Federalist No. 78*:¹

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroach-

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¹ THE FEDERALIST No. 78, at 469 (C. Rossiter ed. 1961).

ments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

The Constitution assures judicial independence in several ways. Article III gives judges life tenure and a promise of undiminished compensation.² Article II allows their removal from office, but only by impeachment for a limited number of reasons.³ And Article I makes impeachment procedurally difficult by requiring a super-majority to convict.⁴

The judges protected by these provisions are men and women of unusual integrity. Until the last Congress, no Article III judge had been impeached in 50 years. Only ten federal judges had ever been impeached, and only four convicted. But judicial misbehavior has recently become an issue of public concern. Chief Judge Harry Claiborne of the District of Nevada was sentenced in 1984 to two years' imprisonment for tax evasion. He was the first sitting federal judge ever to be imprisoned for crimes committed while on the bench. In 1986 the Senate convicted him and removed him from office.⁵ In February of 1986 Chief Judge Walter Nixon of Mississippi was convicted of perjury and sentenced to five years in prison.⁶ Last year the United States Judicial Conference recommended to Congress the im-

² The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

³ [All] civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

U.S. CONST. art. II, § 4.

⁴ The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. And no Person shall be convicted without the Concurrence of two thirds of the Members present.

U.S. CONST. art. I, § 3, cl. 6.

⁵ 132 CONG. REC. S15,759-62 (daily ed. Oct. 9, 1986).

⁶ *United States v. Nixon*, 816 F.2d 1022 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 749 (1988).

peachment of Miami District Judge Alcee Hastings, and a resolution to that effect is now being considered in the House.⁷

I hesitate to say that these events signal a trend. Federal judges, like other people, are no less scrupulous or competent than they used to be. One part of the explanation is simply that there are many more judges (nearly 750 now) than there were a decade or two ago. Another is that we have given them much more power than they had 50 years ago; they pass on everything from cocaine distribution to the national budget. It would be foolish to think that judges are exempt by virtue of their office from Lord Acton's maxim that power corrupts. A third is that the press (and the rest of us) give public figures less deference and more scrutiny since the Watergate affair.

Whatever the causes, we naturally want to prevent and punish unethical behavior by judges. The Constitution explicitly provides several methods for doing this. The first line of defense is the scrutiny judges undergo in the appointments process.⁸ The second is removal by impeachment. The third is criminal prosecution, a remedy that Article I says is not foreclosed by impeachment.⁹

But these are not enough. Even if the appointments process functions perfectly it can only predict, not control, a nominee's behavior on the bench. Impeachment, in Lord Bryce's metaphor, is a hundred-ton gun ill suited to correcting the venial sins of errant judges.¹⁰ Criminal prosecution has its own set of unique difficulties. We assume, though we are not certain, that it can be used in advance of impeachment. When it is, it is attended by procedural difficulties of peculiar delicacy. And in any event it, like impeachment, is not a perfect match for the kinds of impropriety in which a wayward judge can engage.

⁷ *Congress Reluctantly Takes Up Hastings' Ouster*, Legal Times 2 (Mar. 30, 1987); H.R. Res. 128, 100th Cong., 1st Sess. (1987), 133 CONG. REC. H1506, H1514 (daily ed. March 23, 1987).

⁸ U.S. CONST. art. II, § 2.

⁹ Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

U.S. CONST. art. I, § 3, cl. 7.

¹⁰ I J. BRYCE, *THE AMERICAN COMMONWEALTH* 283 (1888).

How can we rectify these shortcomings? Statutory measures directed specifically at judicial misbehavior are one approach. Congress finally tried this in 1980 when it enacted the Judicial Councils Reform and Judicial Conduct and Disability Act.¹¹ A second approach is to streamline the nonconstitutional aspects of the impeachment process. The Constitution outlines that process in general terms, but much of the detail about the gathering of evidence and the process of proof is regulated by legislative rules and precedents that may be more cumbersome than necessary. A third, and more radical approach, is to amend the Constitution.

It is when we consider improvements like these that the tension between judicial ethics and judicial independence becomes most acute. Democratic control of the judiciary is a good thing, up to a point. Decisions about appointments, impeachments, and prosecutions are all made by politicians. But the institution of judicial review is fundamentally undemocratic. If we allow more political supervision than the text mentions we may upset a delicate balance of power and cause more harm than good. Before risking this we should think about the limits of control. I now want to say a few words about this subject.

There are two points I wish to stress in discussing the limits of control. The first is that we should not identify judicial independence with the independence of individual judges. The second is that we should not identify the principle of limited control with any set of historically sanctioned instances.

First, as to the meaning of judicial independence. There is something about the judicial process that leads us to think of judges (especially district judges) as latter-day German princes, relatively free to operate independently within their own territories. Justice Douglas once went so far as to call them "sovereign[s]."¹² This is partly because they are not responsible to the electorate, nor controlled collegially like members of Congress, nor disciplined and rewarded like bureaucrats in the executive branch. It also stems in part from our idea of jurisdiction.

¹¹ The Act's misconduct and disability procedures are found at 28 U.S.C. § 372(c) (1982).

¹² *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 136 (1970) (Douglas, J., dissenting).

A court has sovereign control over the actors and acts involved in its cases; Congress cannot dictate the result¹³ and appellate courts must wait their turn. Some people, beguiled by the analogy, have concluded that judges are immune from discipline from *any* quarter—the judiciary no less than Congress and the President—because judicial independence means the independence of Judges A, B, C, etc. Some add that this is desirable for another reason: judges deciding cases about the rights of unpopular litigants must be free from pressures from any direction to do what they think is right.¹⁴

There is something paradoxical about this way of thinking, though. The Constitution entertains the possibility that state judges would make up all but the last tier of our court system.¹⁵ They are subject to lots of outside pressures, even political ones (elections, limited terms, address, recall, discipline). How important can the independence of Judges A, B, and C be if we can have a system without it?

The answer, of course, is that judicial independence is first and foremost an aspect of the separation of powers. The tenure and compensation provisions of Article III protect federal judges against Congress and the President, because that is where the danger lies. It is they who would otherwise fix the terms of office. Article III does not protect state judges because they are not threatened by Congress and the President. And it allows the federal judiciary to keep its own house, just as Article II allows the President to keep his,¹⁶ and Article I allows Congress to keep its.¹⁷ What we most fear about control of judicial ethics is the possibility that the political branches will use it to weaken the independence of judges and thereby affect the institution of

¹³ *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

¹⁴ Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 714-15 (1979).

¹⁵ The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. CONST. art. III, § 1.

¹⁶ *Myers v. United States*, 272 U.S. 52 (1926). Cf. *Nixon v. Administrator of General Services*, 433 U.S. 425, 444-45 (1977).

¹⁷ U.S. CONST. art. I, § 5 (exclusion; expulsion); *id.* § 6, cl. 1 (“for any Speech or Debate in either House, they shall not be questioned in any *other Place*”) (emphasis added).

judicial review. Judges already review one another's decisions, so reviewing one another's ethics entails no new threat.

This is the assumption underlying the 1980 Act. It provides that anyone with a complaint against a judge can file it with the clerk of the court of appeals. A special committee investigates complaints that the chief judge cannot resolve. And when there is merit to a complaint the circuit council is directed to take appropriate action, which may include censure, reprimand, and taking away cases, but not removal from office.¹⁸ Here we have a method of controlling judicial ethics without curbing judicial independence in a way that threatens judicial review.

My second point about the limits of control is that we should not identify our goal with any set of historical practices. Consider the proposal advanced during the Claiborne impeachment proceedings, that we should give substantial finality to the findings of fact implicit in any guilty verdict against a judge on trial in the Senate (the "preclusion proposal"). This idea has met with two objections. One is a separation of powers claim about improper delegation: Congress gives away part of its constitutional role when it lets the courts play a part in impeachments. This confuses Congress's role with the way we have traditionally done things. (As some people confuse Don Giovanni's role with the way the Metropolitan Opera does it). The important question is not whether Congress plays its role differently, but whether the proposal upsets the overall balance of power between the legislative and judicial branches.¹⁹ I think it does not. The proposal does not diminish Congress's power. In fact it allows Congress to act more often—because it can act more expeditiously—to check improprieties in the judiciary.

The second objection is a claim about fairness to the target judge, who loses the chance to convince the requisite number of Senators that things did not happen as an earlier jury believed. We should not confuse the tradition of a full-blown Senate trial with the demands of fairness any more than with the requirements of separation of powers. The preclusion proposal leaves

¹⁸ 28 U.S.C. § 372(c)(1), (4)-(6) (1982).

¹⁹ Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

in Congress's hands the constitutionally sensitive issue of what behavior warrants impeachment. It relies on the courts (more accurately, juries) for help only with fact-finding. And it does so only in cases where a judge has: (i) already been prosecuted, and (ii) convicted, (iii) according to a standard of proof (beyond a reasonable doubt) more exacting than the one the Senate uses (clear and convincing) in impeachment trials.²⁰

The contributors to this symposium address the limits of control over judicial behavior in ways that respect the principles I have outlined. Professor Burbank argues that we should exercise caution in dealing with constitutional amendments for the removal of federal judges. He suggests a variety of adjustments that we should make in current arrangements before considering more drastic steps. Current controls include the appointments process, retirement and disability statutes, the 1980 Act, the criminal process, and the impeachment process. Each of these is in need of some attention. The impeachment process could be improved, for example, by adopting the preclusion proposal, by a set of procedural rules to govern the House's deliberations, and by giving more consideration to committee proceedings in the Senate.

Professor Rotunda confines his attention strictly to unsettled legal issues attending the impeachment process. One such question, which has arisen in the past and is likely to recur, is the effect of a resignation on impeachment proceedings. Does it short-circuit the process, or may Congress still proceed to impeach and convict? A second, much debated during the proceedings against former President Nixon, is the scope of impeachable offenses. One aspect of this question is the meaning of the phrase "high Crimes and Misdemeanors" in Article II. Does it embrace abuses of power that are not crimes defined by statute? Another is the meaning of the Article III statement that judges "shall hold their Offices during good Behaviour." Is this an extension (limitation?) of impeachable offenses, or simply a roundabout way of saying that judges have no fixed term of office?

²⁰ See Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L.J. 707, 719 (1987-88).

Senator McConnell, too, addresses the impeachment process, and his perspective is a uniquely good one. He was a member of the special Senate Committee created to receive evidence in the proceedings against Judge Harry Claiborne. Senator McConnell believes that the full Senate was able to achieve significant economies with this procedure, without abdicating any of its responsibilities to hear, consider, and judge before convicting. The process might have been shorter still had the Senate accepted the third article of impeachment against Judge Claiborne. That article went a step beyond the preclusion proposal. Rather than simply giving finality to the facts underlying Claiborne's conviction, it would have equated that conviction with guilt of "misbehavior and high crimes."²¹ Senator McConnell argues that there are strong reasons for declining to give automatic deference to judicial decisions in impeachment trials. Not least among them is Hamilton's caution that "those who might happen to be the objects of prosecution" should have "the double security intended them by a double trial."²² Senator McConnell also opposes Senate Joint Resolution 113, which would allow Congress to delegate its removal power to the judiciary, among others. It is significant that he, having experienced first-hand the drain that impeachment imposes on legislative resources, still views the current process as desirable for what it contributes to judicial independence.

Mr. Kastenmeier offers a close critical look at one existing alternative to impeachment—the 1980 Act. It assumes, as I said, that judicial self-discipline is the best way to cope with separation of powers concerns. Mr. Kastenmeier maintains that the Act has worked fairly well. He suggests, however, that it could be improved in a number of ways. For example, the Act does not give the council power to act when no complaint is filed. (There was no complaint against Judge Claiborne even after he was sent to prison.) Turnover in the membership of special investigative committees has also caused problems. When a complaint presents serious allegations an investigation can take months,

²¹ See McConnell, *Reflections on the Senate's Role in the Judicial Impeachment Process and Proposals for Change*, 76 Ky. L.J. 739, 741 (1987-88).

²² THE FEDERALIST No. 65, at 399 (C. Rossiter ed. 1961).

and during that time committee members may die or retire. Mr. Kastenmeier offers legislation to cure these and other difficulties with the Act. His proposals should get serious attention in the next Congress.

Mr. Weingarten provides an insider's look at the other current alternative to impeachment—criminal prosecution. There has been some debate about whether the Constitution permits this approach in advance of impeachment, though the practice is now fairly well entrenched, and the arguments in favor of allowing it are strong.²³ Even if the Constitution permits prosecution, however, the government must cope with a host of serious prudential concerns. These include the target judge's privilege for confidential communications with his staff; the effect of undercover operations on the fifth and sixth amendment rights of litigants before the target judge; the difficulty of finding judges, marshals, clerks, and reporters to serve at judges' trials; and so on. Mr. Weingarten makes a number of observations about how these can be addressed.

Professor Shaman provides a useful counterpoint to the discussion by outlining state procedures for disciplining judges through the mechanism of judicial conduct organizations. This mechanism accepts, at least in broad outline, the same principle that informs the 1980 Act: that judicial self-regulation poses less of a threat to judicial independence than other alternatives. Professor Shaman explains in some detail how this principle is implemented in commission systems in the various states.

²³ The chief difficulty arises from the statement in Article I that "the Party convicted [in an impeachment proceeding] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. CONST. art. I, § 3, cl. 7. Use of the past participle ("convicted") has suggested to some that impeachment must precede criminal prosecution. A second problem arises when a judge convicted in a criminal prosecution is sentenced to jail. If that disposition is equivalent to removal from office, the executive will have usurped Congress's sole prerogative of impeachment. Professor Burbank deals ably with both of these issues, concluding that neither precludes trial in advance of impeachment.

