
ARTICLE

THE INDEPENDENCE OF THE JUDICIARY: THE CASE OF ENGLAND

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The concept of judicial independence, an integral part of the separation of powers in the constitutional framework of the United States, is inchoate.¹ One might think that in England, where many of the early ideas about the separation of powers developed, the concept of judicial independence might be articulately analyzed—far from it. In modern Britain, the idea of an independent judiciary remains primarily a term of constitutional rhetoric. Its penumbra, and perhaps even its core, are at best murky. Perhaps the English were so skeptical of theory that they adopted the common law solution—what Tennyson called “[t]hat wilderness of single instances”²—as a substitute for constitutional analysis. In any event, no general theory of judicial independence exists there either.

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1. See Peter Russell, *Towards a Theory of Judicial Independence*, in JUDICIAL INDEPENDENCE: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (David O’Brien & Peter Russell eds., forthcoming 1999).

2. *Aylmer’s Field*, in A COLLECTION OF POEMS BY ALFRED TENNYSON 272 (Christopher Ricks ed., 1972).

Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances,
Thro’ which a few, by wit or fortune led,
May beat a pathway out to wealth and fame.

Id.

Of course, if one looks at the standard textbooks, there are lists of attributes of judicial independence.³ Security of tenure is invariably linked to the Act of Settlement of 1700, which prevents judges from being dismissed other than through addresses to both Houses of Parliament—a modified form of impeachment. Financial independence also looms large for English judges. The conventional view is that salaries are protected in value through the semi-independent Top Salaries Review Body and somewhat distinguished from the common herd of public salaries by being paid out of the Consolidated Fund. Freedom from executive pressure is largely self-evident. Impartiality is rarely unpacked. It presumably means an absence of bias in favor of one party or the other in litigation. Yet, even the English judges have abandoned the view they expressed forty years ago that they were both apolitical and value free. Although judges may approach decisionmaking with an open mind with respect to factual situations and specific parties, judicial values and predispositions (the uncharitable might say their prejudices) inevitably shape their approach to decisionmaking.

In England, judicial independence has been most important as a piece of political rhetoric.⁴ It is banded about in political disputes about legislation, such as those involving sentencing or judicial salaries.⁵ It is a term likely to be trotted out, both by government and opposition, when a new approach is offered for some criminal or civil remedy. Although it is never defined, it is always asserted.⁶ Lord Chancellors, who embody the judicial, executive, and legislative, often claim Britain does or does not have separation of powers depending on the context.⁷ They never deny

3. See, e.g., S.H. BAILEY & M.J. GUNN, SMITH AND BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM (3d ed. 1996).

4. There are innumerable examples of this. For instance, Lord Ackner, a former law lord argues that judicial independence “is fast disappearing.” He attributes this to the Green Papers, pension changes, and the mandatory retiring age. See Lord Ackner, *The Erosion of Judicial Independence*, 146 NEW L.J. 1789 (1996). For a response, see Tony Holland & Robert Stevens, *Lord Ackner and Judicial Independence*, 147 NEW L.J. 699 (1997).

5. See generally ROBERT STEVENS, THE INDEPENDENCE OF THE JUDICIARY: THE VIEW FROM THE LORD CHANCELLOR’S OFFICE, chs. 2, 3, 7 (1993) [hereinafter STEVENS, INDEPENDENCE] (discussing judicial salaries in this century).

6. When Lord Chancellor Mackay visited the European Court of Human Rights in Strasbourg, some thought that the trip was made in an attempt to make the court more sensitive to the United Kingdom political traditions. Lord Lester QC described it as “[a] mission without precedent in modern times. . . . No British minister would dare to exert pressure on *British* judges about the way in which they decide cases. Such an attempt would be a clear contempt of court, in breach of the vital constitutional principle of judicial independence.” Such a visit would create “justifiable public outrage.” *Top Law Officers Should Be Out of Political Arena*, 146 NEW L.J. 1771, 1771 (1996).

7. Cf. Lord Mackay of Clashfern, *The Lord Chancellor in the 1990s*, 44 CURRENT LEGAL PROBS. 241, 258 (1991) (“Our constitution, unlike that, for example, of the United States, is not built

that the judges are independent, as it is assumed that Locke, Hale, Montesquieu, and Blackstone settled this.⁸ Locke and Hale, however, had but rudimentary ideas about the subject, and Montesquieu, writing of England, seemed to confuse the judges and the jury.⁹ It was Blackstone who gave a modern focus to the separation of powers, although his impact was far greater in North America than in Britain.¹⁰

I argue that there is a more or less accepted, although not always observed, theory of the independence of individual judges. Second, I argue that there is, at best, a confused notion of the independence of the judiciary as a branch of government, but not one that will withstand rational analysis. Third, I argue that the time may have arrived when there should be a clearer separation of powers, with something approaching an “independent” judiciary. Such a change, however, cannot happen without cost.

I. THE INDEPENDENCE OF INDIVIDUAL JUDGES ON THE BENCH

It is appropriate, if not entirely accurate, to say that England has independence of the judiciary in the sense of the independence of each individual judge. Taking what are conventionally seen as the hallmarks of such independence—security of tenure, fiscal independence, impartiality, and freedom from executive pressure—there is little doubt that England qualifies under any reasonable standard with respect to individual judges. One has to look at the English scene historically and sociologically, however, to

on the principle that the legislative, the executive and the judicial powers should be separate and equal.”); *Interview: Lord Irvine of Lairg*, *NEW STATESMAN*, Dec. 6, 1996, at 18 (“It is time to return to first principles. The British constitution, largely unwritten, is firmly based on the separation of powers.”). For more on this dichotomy, see KATE MALLISON, *THE NEW JUDICIARY: THE EFFECTS OF EXPANSION AND ACTIVISM* 47 (forthcoming 1999).

8. The literature on the theoretical underpinnings is remarkably sparse. *But see* M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967).

9. *See* STEVENS, *INDEPENDENCE*, *supra* note 5, at 1-5 (reviewing authorities).

10. Sir William Blackstone stated:

In this distinct and separate existence of the judicial functions in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown, consists our main preservation of the public’s liberty which cannot subsist long in any state, unless the administration of common justice be in some degree separated as well from the legislative as from the executive power.

Were such functions joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their own opinion and not by any fundamental principles of law: which though legislators may depart from, yet judges are bound to observe.

Were it joined with the executive, this union might soon be an overbalance for the legislative. Nothing is more to be avoided in a free constitution than unifying the province of a judge with that of a minister of State.

WILLIAM BLACKSTONE, *COMMENTARIES* 322 (Herbert Sloan & Edward Hadley eds., 1869).

comprehend fully the extent of judicial independence experienced by individual judges.

Traditionally, we look to the Act of Settlement as the basis of judicial independence. The protection provided by the Act—that judges were not to be dismissed without addresses to both Houses of Parliament—must be seen, however, in the context of eighteenth-century society—a period of rationality and “right order.”¹¹ Judges were still best understood as part of the medieval King’s Council. Many officers of State had lifetime appointments, including bishops and those whom we would now call civil servants. Like the parson and the squire, the judge was thought to hold the freehold of his office. The problem was that James II had attempted to replace judges and intimidate bishops. Because good governance would not tolerate such behavior, a modified form of impeachment was introduced to protect judges.

A. SECURITY OF TENURE

Certainly the tenure of English judges since then has been relatively peaceful. The closest a judge has come to being dismissed after addresses by both Houses was Justice Barrington, an Irish judge, for alleged bribery. Justice Grantham,¹² one of the undistinguished political appointments to the High Court Bench by Lord Halsbury, the Conservative Lord Chancellor at the turn of the century, was nearly dismissed after a particularly partisan decision in the Yarmouth By-Election case in the first decade of this century. The most noted recent near example was that of Sir John Donaldson, a High Court Judge sitting as President of the Industrial Relations Court. In December 1973, 187 Labour MPs called for his removal for “political prejudice and partiality.”¹³ The move failed and, as we shall see, Donaldson ended as Master of The Rolls (President of the Court of Appeal).¹⁴ In the end, Barrington, Grantham and Donaldson all survived.

One ought also to insert a few further caveats in the litany of assumed praise for judicial protection and integrity. Politics become a factor. For example, Lord Trevethin (Lawrence L.J.), appointed Lord Chief Justice in

11. See, e.g., J.S. WATSON, *THE REIGN OF GEORGE III*, at 45-47 (1960).

12. For a rather generous description of Grantham and his problems, see R.F.V. HEUSTON, *LIVES OF THE LORD CHANCELLORS* 41-42 (1964).

13. SHIMON SHETREET, *JUDGES ON TRIAL: A STUDY OF THE APPOINTMENT AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY* 150 (1976).

14. See Robert Stevens, *Judges, Politics, Politicians and the Confusing Role of the Judiciary*, in *THE HUMAN FACE OF LAW: ESSAYS IN HONOUR OF DONALD HARRIS* 245, 257 (Keith Hawkins ed., 1997) [hereinafter Stevens, *Judges, Politics, Politicians*]. See also STEVENS, *INDEPENDENCE*, *supra* note 5, at 171-72; JOHN GRIFFITH, *JUDICIAL POLITICS SINCE 1920: A CHRONICLE* 129-46 (1993).

1921 to keep the seat warm for Sir Gordon Hewart, was required to sign an undated letter of resignation by that devious Prime Minister, Lloyd George. When the Coalition Government broke up in 1922, Trevelin read of his resignation in *The Times*.¹⁵ Justice was done, however. Hewart was not an admired Chief Justice, and ultimately he too was dismissed by a telephone call from 10 Downing Street in 1940 when Churchill, in the darkest days of the Second World War, needed to find a berth for Caldecote, his less than effective Dominions Secretary.¹⁶ In 1928, the first Lord Hailsham asked for Lord Atkinson's resignation as a Law Lord because the Canadian press said there were too many "old fogies" in the Privy Council and, as Atkinson reported, "I was the oldest of the old fogies."¹⁷ Certainly the introduction of a mandatory retirement age in 1959 helped, but the second Lord Hailsham, Lord Chancellor for Edward Heath and Margaret Thatcher, had to urge Lord Chief Justice Widgery¹⁸ and Lord Denning¹⁹ on their way. Judges also police their own. Early in 1998, Justice Harman of the Chancery Division, much criticized by the legal press for arrogance, felt obliged to resign after particularly damning condemnation of his casualness and tardiness by the Court of Appeal.

One must remember that the vast bulk of the full-time judiciary in England (now some 1300) have no protection under the Act of Settlement, although in fairness to the Lord Chancellor's Department, dismissals are handled with considerable natural justice.²⁰ When thinking about security of tenure, we also must remember that the English increasingly use a probationary period before substantive appointment. The Recorder and Assistant Recorder, both part-time appointments, are used as a training grade. Appreciably more obvious is the old system of commissioners and the more recent system of Deputy High Court judges.²¹ These are patently probation systems—preparatory to appointment to the High Court—and the purist would argue inconsistent with the Montreal Declaration on the Independence of the Judiciary.²² It is interesting to note, however, that the House of Commons Home Affairs Committee in its recent report on judi-

15. See ROBERT JACKSON, *THE CHIEF: THE BIOGRAPHY OF GORDON HEWART, LORD CHIEF JUSTICE OF ENGLAND 1922-40*, at 126-44 (1959).

16. See HEUSTON, *supra* note 12, at 604.

17. *Id.* at 303-04.

18. In fact, Denning delivered the message. See GEOFFREY LEWIS, *LORD HAILSHAM: A LIFE* 273 (1997).

19. See LORD DENNING, *THE CLOSING CHAPTER* 10 (1983); LEWIS, *supra* note 18, at 279-80.

20. See STEVENS, *INDEPENDENCE*, *supra* note 5, at 165-66.

21. See *id.* at 169.

22. See MALLISON, *supra* note 7, at 83.

cial appointments does not think a five-year probationary period unreasonable and is willing to consider term appointments on the bench.²³

B. FISCAL INDEPENDENCE

Fiscal independence is closely associated with judicial independence in the judges' minds in England. There is no doubt an important element of truth to this and much has also been written about the absence of promotion on the English bench. In the 1870s, for instance, the Court of Appeal was paid at the same rate as the High Court, lest promotion to it be thought of as "a promotion." All this has since changed. The Court of Appeal and House of Lords are paid at levels thought appropriate for their seniority. Circuit judges are occasionally appointed to the High Court, and those who are not may be designated Senior Circuit Judges with a higher salary. Much of the work of the Crown Court is done by part-time Recorders and Assistant Recorders; practicing members of the bar and, as we have seen, candidates for judgeships are expected to have served as Recorders and may well have acted as a deputy High Court Judge.

Such a complex system inevitably means that the classical view of the independence of individual judges today is seen in the much broader framework of the courts as a provider of a social service—namely a dispute settlement process provided by the State. In the past, many claims that passed under the rubric of judicial independence had about them the whiff of trade unionism if examined from the constitutional viewpoint rather than that of the Welfare State. Any interest of litigants was assumed to be inferior to the demands of State and constitution and, one might add, profession.

Nor should we be taken in by all the claims of integrity and excellence. If we look back to the seventeenth and eighteenth centuries, the great offices of State, including the judiciary, were an opportunity to accumulate wealth. Judges, often from modest circumstances, not infrequently became significant landowners and members of the aristocracy. While judicial salaries were low, judges received a multitude of fees from all stages of litigation and were free to sell the right to become "court officials." For instance, until well into the nineteenth century, masterships, themselves lucrative, attracted very significant sums.

The system was put on a more rational basis under the influence of the utilitarians. High Court judges' salaries were set at £5500 in 1825—an

23. See HOME AFFAIRS COMM., HOUSE OF COMMONS, 1 JUDICIAL APPOINTMENTS PROCEDURES ¶¶ 153-59, at 176-81 (June 5, 1996) [hereinafter JUDICIAL APPOINTMENTS PROCEDURES].

immense sum for those days—but were reduced to £5000 in 1832, the year of the Great Reform Act. Such salaries still enabled judges to compete in wealth with the great landowners. Indeed, economic historians tell us that during the nineteenth century, Britain's economic fortunes meant that £5000 became worth more not less. Yet, in the 1870s when Gladstone talked of cutting salaries, the judges greeted him with cries of horror as they refused to discuss his reforming Judicature Bill. To Gladstone's suggestion that "not only their salaries but also their pensions were extravagantly high," Chief Justice Bovill of Common Pleas argued that, "since the judges' salaries were fixed, everything, especially house rents, servants and horses have become very much more expensive."²⁴ Yet, judges made compromising deals. For example, while the salary of the Chief Justice of Queen's Bench was set at £10,000 in the 1820s, Campbell in 1850 agreed with the Prime Minister to take only £8,000 for the job.²⁵ In the twentieth century, judges may have had more cause for complaint about salaries, but that topic is probably best looked at under the collective aspect of judicial independence.

C. IMPARTIALITY

Returning to the traditional ingredients of individual judicial independence, one can argue comfortably that English judges are impartial—at least vis-à-vis litigants. At the same time, we should remember that Winston Churchill, as a minister in a liberal government at the turn of the century, warned against allowing judges to decide cases where "different classes" were concerned,²⁶ while in the 1940s Aneurin Bevan refused to allow appeals to judges in National Health Service matters for fear of "judicial sabotage."²⁷ Even that most conventional of commercial judges, Scrutton L.J., conceded in the 1930s that "it is very difficult sometimes to be sure that you have put yourself in a thoroughly impartial position between two disputants, one of our own class and one not of your class."²⁸ Indeed, when one thinks of impartiality in a broader sense of values or prejudices other constraints are at work. English judges operate in a highly formalized system with a strong sense of law as a series of objective rules

24. Letter from Bovill to Selborne (January 27, 1873), *quoted in* STEVENS, INDEPENDENCE, *supra* note 5, at 50.

25. *See* Lord Chancellor's Office, 2/1667, *cited in* STEVENS, INDEPENDENCE, *supra* note 5, at 50.

26. Otto Kahn-Freund, *Labour Law*, in LAW AND OPINION IN ENGLAND IN THE 20TH CENTURY 232 (Ed Morris Ginsberg ed., 1959).

27. 425 PARL. DEB., H.C. (5th ser.) 1983 H.C. (1946).

28. Sir T.E. Scrutton, *The Work of the Commercial Courts*, 1 CAMBRIDGE L.J. 8 (1923).

impartially enforced. Artificial as these claims may be, intellectually, judges are both pushed toward objectivity and kept up to the mark by the bar, which itself has a reputation for independence and impartiality. At least this is the official position, and it contains an important core of truth. The formality of English law, a relatively small bar, a divided profession, and the orality of English courtroom procedure all do work together to keep a judge's prejudices and predispositions to a minimum.²⁹ Where the judge has discretion, however, whether it be over sentencing, the interpretation of statutes, or developments in the common law, the judges have more opportunity to allow their personal views full rein. As Lord Hailsham, a true Conservative Lord Chancellor, observed of the judges, "[u]nlike the keepers of the seraglio, they (the judges) do not have their political or social opinions carefully removed."³⁰

In recent years, there has been increasing skepticism about judicial impartiality: The bar is predominantly white, male, middle-aged, Oxbridge and public school educated; thus, how can they possibly be impartial? There is undoubtedly considerable confusion in the minds of judges, as well as the public and politicians, about what is meant by impartiality. The bulk of the public and politicians, however, are happy to accept the myth. It was clearly one of the reasons why judges have been so attractive as chairs of commissions or committees of inquiry and, more dubiously, commissions or committees to rethink some delicate political issue.³¹ Such judicial work is frowned upon in the United States—the Warren Commission's investigation into the assassination of President Kennedy being the exception and, in the view of most observers, no desirable precedent.

The English, however, have carried these judicial inquiries to remarkable lengths. In the fifties, sixties, and seventies not only were inquiries into accidents, areas of probable law reform, or criminal allegations of wrongdoing in public life subjected to some form of judicial investigation, but all manner of disputes, including union wage claims, disturbances in Northern Ireland, and colonial misadventures were treated in this manner. In this period, when there was a vast array of government commissions and committees, half of them were chaired by either judges or lawyers. The process was described by A.P. Herbert as "Government by Radclif-

29. See BRIAN ABEL-SMITH & ROBERT STEVENS, *IN SEARCH OF JUSTICE: SOCIETY AND THE LEGAL SYSTEM* 166-96 (1968).

30. LEWIS, *supra* note 18, at 270 n.*.

31. In the post-1945 period, almost half of all government committees or commissions were chaired by judges or lawyers. See STEVENS, *INDEPENDENCE*, *supra* note 5, at 97-101.

fery," named after the law lord who chaired so many of these inquiries. Yet, while the judges stumbled into these roles by chance, in the name of impartiality, they sometimes left with reputations sullied because their prejudices or political views were thought to be too clearly stated.

When Lord Devlin produced a report on riots in Nyasaland (Malawi), then Prime Minister Macmillan who disliked the conclusions commented: "I have since discovered that he is (a) *Irish*—no doubt with that Fenian blood that makes Irishmen anti-government on principle, (b) a *lapsed* Roman Catholic. His brother is a priest; his sister a nun . . . he was bitterly *disappointed* at my not having made him Lord Chief Justice."³² Also, when in 1972, the Lord Chief Justice Widgery was appointed to investigate "Bloody Sunday" in Londonderry, it was dismissed at the time by critics as a "whitewash."³³ It now looks as if that view has been embraced by the new Blair government, which has appointed yet another Committee of Enquiry, chaired by Lord Saville, a distinguished commercial judge, with two Commonwealth judges, to write a new report on what "really" happened that day.

During the eleven Thatcher years, little use was made of judges for inquiries. With the Major years, however, there is again spasmodic use of them. Although Lord Nolan, with his report on Standards in Public Life, failed to get the full support of the Conservative government and was attacked by some Tory MPs, his treatment was generous when contrasted with that accorded Vice-Chancellor Scott who reported on the Arms to Iraq affair.³⁴ Scott's conclusions, although not always politically wise,³⁵ were actively destabilized by the government. Such activities cannot possibly strengthen the judicial reputation for impartiality. Through such political attacks, the State endangers the very reputation for impartiality that judges need in order to perform both their judicial functions and the broader responsibilities they have acquired under the British Constitution.

Finally, the elements of individual judicial independence are normally thought to include freedom from executive interference. This undoubtedly exists in England on a daily basis. However, England is a complex society. The Lord Chancellor is not only the senior judge (the head of the judiciary), but also a politician who serves in the Cabinet and has responsi-

32. ALISTAIR HORNE, *HAROLD MACMILLAN: VOLUME II 1957-1968*, at 180-81 (1989).

33. KEVIN BOYLE, TOM HADDEN & PADDY HILLYARD, *LAW AND THE STATE: THE CASE OF NORTHERN IRELAND* 127 (1975).

34. See Stevens, *Judges, Politics, Politicians*, *supra* note 14, at 277-78.

35. There is much to be said for the U.S. system of investigation of alleged political malpractice by the legislature itself as was the norm in Britain until the 1920s.

bility for a major executive department. It is hardly surprising that, by the standards of other countries, pressures that do not exist in other societies are somehow exerted.

Foreign observers are somewhat surprised that the Lord Chancellor (a politician) chooses the hearing panels in both the House of Lords and Judicial Committee of the Privy Council (the final courts of appeal for the United Kingdom and parts of the Commonwealth).³⁶ The different branches of government, moreover, interact constantly. For instance, during the Labour Government of 1945-51, Lord Chancellor Jowitt wrote Lord Goddard, the Lord Chief Justice whom he had appointed, that he sincerely hoped “the judges will not be lenient to these bandits [who] carry arms [to] shoot at the police.”³⁷ Meanwhile, Attorney-General Shawcross wrote to the Chief Justice complaining that the Court of Criminal Appeal had gone too far in restricting questions about the manner by which the police had obtained confessions. The Chief Justice agreed and said he would raise the complaint with his fellow judges.³⁸

The most egregious example of executive interference, however, is the most recent. In the early 1970s, while the Industrial Relations Court under Sir John Donaldson was resorting to imprisonment to break the strike mentality in England, the Court of Appeal under Lord Denning thought that imprisonment was not an appropriate way to settle industrial disputes. Lord Chancellor Hailsham, direct as ever, was furious. He sent for Denning while he was presiding over the Court of Appeal. Denning refused to adjourn court to wait upon the Head of the Judiciary. When they did meet, Hailsham accused Denning of deliberately directing certain cases to his court—after all, he assigned cases in the Court of Appeal. Denning insisted he merely applied the law to the facts.

There was, however, something rather unsatisfactory about the encounter, at least as far as the absence of executive influence over the judiciary was concerned.³⁹ Lord Donaldson and Lord Hailsham continued to have meetings that questioned the separation of powers. It emerged in 1983 that Lord Donaldson, then Master of the Rolls, had been consulted by civil servants on “how the judiciary could play a more constructive role in industrial relations.”⁴⁰ Lord Hailsham defended these consultations as “normal.” Two years later, however, when two judges commented ad-

36. The 12 law lords never sit en banc.

37. STEVENS, INDEPENDENCE, *supra* note 5, at 95.

38. *See id.*

39. *See* LEWIS, *supra* note 18, at 277 & app. 1.

40. DAVID PANNICK, THE JUDGES 184-86 (1988).

versely in an appeal on plans to abolish some forms of judicial review, Lord Hailsham proudly announced in a legislative debate that he had received letters of apology from the two judges: "It is utterly improper in my judgment for a Court of Appeal judge or any other judge speaking on the Bench, to criticize matters passing through Parliament."⁴¹

Lord Hailsham extracted the proverbial pound of flesh from those who benefited from judicial independence. In 1970 when Sir Harry Fisher wished to retire from the High Court bench after only two years and go to the city, Hailsham was outraged. When Fisher suggested that the judicial office was not like marriage, Hailsham responded, "it is more like ordination to a priesthood." Hailsham was particularly concerned that, if Fisher did not like the city, he might go back to the bar. He thus made it clear that such a return was not permitted and that he would do his best to prevent other judges from giving him a right of audience.⁴² Poor Fisher did not enjoy the city and had to end his days as head of an Oxford college.⁴³ In the future things may be different, since the Home Affairs Committee's Report on Judicial Appointments calls for the right to return to the bar after service on the bench.⁴⁴

How absolute, however, is judicial independence? Like academic freedom, it has to defer to judicial accountability. The most extreme example of Lord Eldon's delays in the Chancery Court, estimated in 1820 to be close to twenty years, would not be acceptable under judicial accountability today. No matter how strong judicial independence may be, the situation is obviously a delicate one. When Lord Mackay, Lord Chancellor from 1987 to 1997, required the High Court judge then serving as President of the Employment Appeals Tribunal to follow certain administrative procedures to clear up the backlog of cases, the judge resigned from the bench rather than accept the directive. A debate in the House of Lords alleged a serious breach of judicial independence, but the matter died without any discussion of where independence ended and accountability began.⁴⁵

The conflict between independence and accountability will no doubt produce more disputes as the courts are expected to offer an improved social service to their clients or customers. Indeed, the so-called Woolf re-

41. *Id.*

42. The professional ethics of the bar now formally prevent leaving the bench to return to the bar.

43. See LEWIS, *supra* note 18, at 275-76.

44. See JUDICIAL APPOINTMENTS PROCEDURES, *supra* note 23, ¶ 181.

45. See MALLISON, *supra* note 7, at 50.

forms that are currently being implemented,⁴⁶ will call on judges not only to control and monitor their cases more closely but also to be business managers of litigation. As a result of these changes, there will have to be more effective administrative controls to ensure judicial accountability. A cry of judicial independence may well be used to attempt to undermine a reasonable level of administrative competence.

Although the line between individual and collective independence of the judiciary is artificial, it does help focus arguments. As the discussion above illustrates, with regard to individual independence, although not surprisingly there are issues at the penumbra, England can claim a respectable basis for the independence of individual judges. What then of the collective situation?

II. JUDICIAL INDEPENDENCE: THE JUDGES AS A SEPARATE BRANCH OF GOVERNMENT

In England, judges are not a separate or co-equal branch of government. While the assertion is frequently made that judicial independence in the corporate sense exists, it exists primarily in the minds of judges to be produced at convenient moments in political and constitutional debate. Separate branches of government, as in the United States, do not exist. Exactly what was the founding fathers' historical bases at the Constitutional Convention which led to the separate branches of government, is difficult to say. No doubt it was based partly on the writings of Montesquieu and Blackstone, but probably most significantly on the hostility to the royal judges—a sentiment most obvious in New England.

Justice Scalia, dissenting in *Morrison v. Olson*,⁴⁷ looked to Article XXX of the 1780 Massachusetts Constitution:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: To the end it may be a government of laws and not of men.⁴⁸

It was an extreme position that did not prevail when the federal Constitution was drafted in Philadelphia; checks and balances were the order of the day—as indeed they must be in any political system. If, as

46. See *Bringing the Court Up to Speed*, 146 NEW L.J. 1769 (1996).

47. 487 U.S. 654 (1988).

48. *Id.* at 697.

some have argued, the U.S. Supreme Court's concept of judicial review was inherited from the power of the Privy Council to strike down colonial acts, this too could be seen as a mixture of the executive and judicial.⁴⁹ Yet, the three branches of government were set out clearly in the Constitution.

The genesis was, however, a catholic one. Jefferson had rejected the "honeyed" words of Blackstone. Moreover, other colonies took a very different approach from Massachusetts. In New York, the Constitution of 1777 provided for a final appeal court along the lines of the Judicial Committee of the Privy Council—composed of senators and the professional judges of the Supreme Court. A Council of Revision also had, like the Privy Council, power to disallow legislation for "unconstitutionality and impracticality."⁵⁰ The New York Constitutional Convention of 1821 abolished the property qualification for the Senate and ended the Council of Revision. Nevertheless, the final appeal went to the Court of Errors which, in the future, was to consist of all thirty-two Senators and three professional judges. There was some concern at the time about the separation of powers, and some members of the Convention referred to the legislative and judicial role of the House of Lords. The deciding factor, however, seems to have been the antielitism of the period which out-ranked any concern about the separation of powers. It was not until the 1846 Constitutional Convention that the separation of powers was more clearly defined, while the dangers of elitism were dealt with by having the courts, including the final court (the Court of Appeals), elected.⁵¹

In England, as we have already seen, the Lord Chancellor is the senior judge, a cabinet member, and frequently an active politician, as well as head of a significant executive department. The current Lord Chancellor, Lord Irvine, is active as chair of many constitutional committees emerging from the Cabinet. These committees range from political programs for devolution to a proposal for a bill of rights. He also joins actively in political debates. For instance in October 1998, *The Independent* reported that Lord Richard was dismissed as Leader of the Lords by the Prime Minister partly because he could not get on with Lord Irvine.⁵² Addition-

49. See generally J. H. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN COLONIES* (1950).

50. Greg Sergienko, "A Body of Sound Practical Common Sense": Law Reform Through Lay Judges, Public Choice Theory, and the Transformation of American Law, 41 AM. J. LEGAL HIST. 183-85 (1997).

51. See *id.*

52. See Ian Hargreaves, *The Godfather*, *THE INDEPENDENT* (London), Oct. 11, 1998, at 6.

ally, Lord Jenkins, one of the Liberal Democratic leaders, has complained that Lord Irvine orders the Prime Minister around.⁵³

Gilbert and Sullivan pilloried the Office of Lord Chancellor as the “embodiment of all that’s excellent.”⁵⁴ On the other hand, that powerful mandarin and Permanent Secretary to the Lord Chancellor, Lord Schuster, justified the system in 1943 as follows:

The advantages which accrue to the Cabinet from the presence of a colleague who is not only of a high judicial reputation, but who can represent to them the view of the judiciary; to the legislature from the presence in it of one who is both a judge and a minister; and to the judiciary from the fact that its President is in close touch with current political affairs, is enormous. In a democracy, whose legislature may be advancing, or at least moving rapidly, and where the judiciary remains static, there is also a risk of collision between the two elements. Where the Constitution is written and the static condition of the judiciary is absolute, as in the United States, the danger of such a collision is very great. Even in England, with an unwritten constitution and an unwritten common law unless there is some link or buffer (whichever term may be preferred) between the two elements the situation would be perilous.⁵⁵

The Schuster statement is remarkably revealing both about the concept of the judicial role and independence in England. In 1998, these sentiments were reinterpreted and refined by the current Master of the Rolls, Lord Woolf:

As a member of the Cabinet, he [the Lord Chancellor] can act as an advocate on behalf of the courts and the justice system. He can explain to his colleagues in the Cabinet the proper significance of a decision which they regard as being distasteful in consequence of an application for judicial review. He can, as a member of the Government, ensure that the courts are properly resourced. On the other hand, on behalf of the Government he can explain to the judiciary the realities of the political situation and the constraints on the resources which they must inevitably accept.

As long as the Lord Chancellor is punctilious in keeping his separate roles distinct, the separation of powers is not undermined and the justice system benefits immeasurably. The justice system is better served by

53. See Tim Rayment, *Master of the Rolls*, THE SUNDAY TIMES MAGAZINE, Oct. 18, 1998, at 20.

54. W.S. Gilbert & Arthur Sullivan, *Jolanthe*, in THE PEER AND THE PERI 9 (1882) (“The law is the embodiment of everything that’s excellent. It has the kind of fault or flaw . . . And I, my lords, embody the Law.”).

55. Memorandum, Lord Chancellor’s Office, 2/3630 (Jan. 31, 1943), quoted in STEVENS, INDEPENDENCE, *supra* note 5, at 3.

having the head of the judiciary at the centre of government than it would be by having its interests represented by a Minister of Justice who would lack these other roles.⁵⁶

Such enthusiasm for the status quo—a fudged notion of judicial independence—has not been shared by reformers. In the 1870s, as part of the great utilitarian movement within the courts, judges opposed the idea of a Ministry of Justice to handle the administrative powers being taken from the old court structure, and insisted that power be exercised by the Lord Chancellor—hence the establishment of the Lord Chancellor’s Office (now Department) in 1880. The hope reformers had held in the 1870s for a Ministry of Justice did not die. Lord Haldane, in his committee report made on the Machinery of Government in 1918, called for a Ministry of Justice, although he still saw the need for a Lord Chancellor. Chief Justice Lord Hewart of the 1920s and 1930s was paranoid that a plan to establish such a ministry was under way.⁵⁷ There was talk of splitting the post of Lord Chancellor in the Labour Government of 1964-70, but Harold Wilson’s Lord Chancellor, Lord Gardiner, was a conservative in professional matters and nothing happened.

In the early 1990s, Liberal and Labour reformers argued that the Office should be split, but there has been no evidence that this movement has had any support from Lord Irvine since his appointment in 1997. This sentiment has not prevented a segment of Labour back-benchers from suggesting that reform—that is, some separation of powers at the top—is necessary. Perhaps most surprising of all, Lord Steyn, one of the law lords, has opined that “[t]he proposition that a Cabinet Minister must be head of our judiciary in England is no longer sustainable on either constitutional or pragmatic grounds.”⁵⁸ Steyn also argued that, “[w]hile the Lord Chancellor appeared to speak neutrally as head of the judiciary, ‘the truth is different.’”⁵⁹

In turn, the position of the Lords of Appeal in Ordinary, the professional judges of the House of Lords that also serves as the Final Court of Appeal, is a violation of any basic concept of separation of powers. In the

56. The Rt. Hon. Lord Woolf, *Judicial Review—The Tensions Between the Executive and the Judiciary*, 114 L.Q. REV. 579, 582 (1998).

57. See STEVENS, INDEPENDENCE, *supra* note 5, at 37.

58. *Top Law Officers Should Be Out of Political Arena*, 146 NEW L.J. 1771 (1996).

59. *Id.* The reformers were Lords Carins and Selborne.

1870s, the intention of the reformers had been to end the House of Lords as a judicial body, as well as the Judicial Committee of the Privy Council.⁶⁰ In their place would be an aggrandized Court of Appeal, known as the Imperial Court of Appeal, sitting in the new Law Courts to be built in the Strand.

A group of Tory right wingers led by Sir William Charley harassed Disraeli's new administration after 1874 to restore the appeal to the Lords to protect the dignity of the House.⁶¹ By the enactment of the 1876 Appellate Jurisdiction Act, the House of Lords had its appellate power restored.⁶² Two judicial peers were created, rising to four as the salaried judges of the Privy Council retired. In the 1880s, rather than being peers only during their service as law lords, they were made life peers. In theory, the law lords are supposed to speak only on legal matters. That did not deter Lord Sumner in the 1920s from defending General Dyer for his role in the Massacre at Amritsar, nor Lord Carson from opposing the Irish Treaty in 1922.⁶³ Even closer to the legal, however, Lord Goddard and his successor as Chief Justice Lord Parker were strong advocates of hanging and flogging in the 1940s and 1950s. Lord Merriman and other divorce judges delayed the liberalization in divorce law and procedure.⁶⁴

Perhaps the most dramatic political activities by the law lords, however, came in the late 1980s as Lord Mackay introduced Green Papers designed to make the courts and the profession more efficient and, in some cases, to introduce market reforms. The retired law lords behaved in a remarkable manner. No less than three—Lords Elwyn-Jones, Donaldson, and Lane—implied that the Lord Chancellor was guilty of Nazi tendencies (and of course violating the independence of the judiciary).⁶⁵

Former Labour Lord Chancellor Lord Elwyn-Jones announced judges must be “felt to be completely independent of the State” and there was a

60. See ROBERT STEVENS, *LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800-1976* at 262, 266 (1978) [hereinafter STEVENS, *LAW AND POLITICS*].

61. See Robert Stevens, *The Final Appeal: Reform of the House of Lords and Privy Council*, 1867-1876, 80 L. Q. REV. 343 (1964).

62. See STEVENS, *LAW AND POLITICS*, *supra* note 60, at 66-67. There was more responsible support, for example, from the Conservative leader Lord Salisbury. He argued that judges should sit in the House of Lords as a legislative body since “[p]ractically they have often to make law as judges, and they will do it all the better from having also to make it as legislators.” *Id.* at 55. Salisbury also argued that such a legislative experience also saved the judges “from too technical and professional a spirit; and their decisions gain in breadth.” *Id.*

63. See *id.* at 262, 266.

64. See *id.* at 371 n.85.

65. See STEVENS, *INDEPENDENCE*, *supra* note 5, at 174-76.

danger of “going down the American path.”⁶⁶ Lord Hailsham, the recently retired Conservative Lord Chancellor, expanded the notion of judicial independence far and wide. He regarded the Green Papers as “an outrage.”⁶⁷ He defended “the most upright and most independent legal profession known to man The judiciary remains the guardian of the liberties of the people The independence of the judiciary depends more upon the independence and integrity of the legal profession than upon any other single factor.”⁶⁸

The debate scarcely enhanced the reputation of the law lords or helped quiet the feeling that such debates undercut basic concepts of the separation of powers. It also failed to clarify the issue of whether the law lords really belonged in the upper House. Some critics—including the *Economist*⁶⁹ and the Institute of Public Policy Research⁷⁰—thought it an anachronism, although even some liberal judges were apparently supportive of the system. It was not altogether surprising, however, that in the summer of 1998, plans for the reform of the House of Lords were delayed in part because there was no agreement on what to do with the law lords or, for that matter, with the Anglican Bishops.⁷¹ It was all very English.

Another problem undercutting judicial independence in England is that a politician, the Lord Chancellor, chooses the judges (at least in the case of the High Court and the Circuit Court). While the English like to say that judicial appointments in their country are nonpolitical, or even apolitical, foreigners find it difficult to comprehend how a system that leaves the final say with an active politician—the Prime Minister who makes appointments to the Lords and Court of Appeal—can be apolitical. Civil servants in the Lord Chancellor’s Department are influential, there is an increasingly formal process of consultation. Although the Lord Chancellor consults the judicial heads of divisions, each Lord Chancellor boasts

66. *Id.* at 175. “I well remember that in Nazi Europe and the Fascist countries before the War, the authoritarian regimes’ first victims were the independence of the judiciary and the independence of the legal profession.” *Id.* (quoting 505 PARL. DEB., H.L. (5th ser.) 1307 (1989)).

67. See 505 PARL. DEB., H.L. (5th ser.) 1333-34. Ironically, Lord Irvine’s current suggestions for reform go far much farther than Lord Mackay’s. See Michael Zander, *More Louis XIV than Cardinal Wolsey*, 148 NEW L.J. 1084 (1998).

68. *Id.*

69. “If the judiciary is to act as an effective check on overweening Government, it should be untainted by direct involvement either with the legislature or the executive.” *ECONOMIST*, Dec. 16, 1995.

70. See INSTITUTE FOR PUBLIC POLICY RESEARCH, *A WRITTEN CONSTITUTION FOR THE UNITED KINGDOM 27* (Robert Blackburn ed., 1993) [hereinafter *A WRITTEN CONSTITUTION*].

71. See Steve Richards, *At Least Jack Cunningham Will Talk Properly, and Not Go on About “Hard Choices” as Brown and Mendelson Do*, NEW STATESMAN, July 31, 1998, at 8.

that the decisions are his and has rejected the idea of a Judicial Appointments Commission. The current Lord Chancellor, Lord Irvine, at first embraced such an idea, but has now “put it on a back burner.”⁷²

It is true that with a relatively small and cohesive bar, there is an argument that “the judges select themselves” as Sir George Coldstream, a former Permanent Secretary to the Lord Chancellor, put it.⁷³ It is also true that the days when politics played an important role in getting on the bench have largely disappeared. At the turn of the century, Lord Halsbury was the last Lord Chancellor who blatantly appointed political supporters to the High Court Bench; after the 1920s, political service played little role in appointment to the High Court and Court of Appeal.⁷⁴

Despite this trend away from politically motivated appointments, Mrs. Thatcher overruled Lord Hailsham’s advice and appointed Sir John Donaldson to be Master of the Rolls in the 1980s. It is unlikely that she was unaware of Donaldson’s work for the Tory cause in the Industrial Relations Court.⁷⁵ Of course, what is political is always difficult to define. We should not forget that during Britain’s most radical government, the Attlee government of 1945-51, Lord Chancellor Jowett refused to appoint divorced persons to the bench and, for a significant period, members of the Roman Catholic Church. This latter resistance was allegedly due to the fact that they might have had difficulty hearing divorce petitions on circuit, however, the real reason may have been because he and the Home Secretary, Chuter Ede, were vigorously anti-Catholic.⁷⁶

The wide jurisdiction of the Lord Chancellor, together with the political appointment of judges and the dual roles of the law lords, make it impossible to have an institutional concept of judicial independence based on a notion of separate branches of government. That, however, has never discouraged the English judges from believing that there is such a concept as “the Independence of the Judiciary” in some kind of ethereal collective sense. As academics are inclined to see violations of academic freedom whenever they are faced with decisions they do not like, English judges tend to announce violations of judicial independence when events occur that they think undermine their dignity—and until recently, the English

72. See Robert Rice, *Former Star of the Bar Papers Over Last Cracks in His Image*, FINANCIAL TIMES, Dec. 7, 1998.

73. See Interview with Sir George Coldstream, former Permanent Secretary to the Lord Chancellor (Oct. 1963).

74. See BRIAN ABEL-SMITH & ROBERT STEVENS, LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM, 1750-1965, at 118, 125-26 (1967).

75. See STEVENS, INDEPENDENCE, *supra* note 5, at 172.

76. See *id.* at 86-88.

judges were big on dignity. That should not detract from the fact that there are occasions when such claims are legitimate. When, for example, in the War Damage Act of 1965, Parliament reversed the actual decision in *Burmah Oil Co. Ltd. v Lord Advocate*,⁷⁷ thereby saving the government the need to pay damages, the legislation was pronounced to be unconstitutional and a violation of judicial independence.⁷⁸

The grandest cause for allegations of the violation of judicial independence have been those on the trade union front, especially on the issue of judicial salaries. The most spectacular example of this was during the economic crisis in the 1930s.⁷⁹ In 1931, the National Recovery Act cut the salaries of public servants and in implementing it, the Order in Council cut judicial salaries despite the fact that the latter were paid out of the Consolidated Fund. The judges were outraged. While Northern Ireland judges were said to have stood and sung "God Save the King" when they heard about the cuts, as Lord Schuster noted the "English judges are in a mood where they are far more likely to sing 'The Red Flag' than 'God Save the King.'"⁸⁰

By December of that year the judges had delivered a formal memorandum:

We think beyond question that the judges are not in the position occupied by Civil Servants. They are appointed to hold particular offices of dignity and exceptional importance. They occupy a vital place in the constitution of this country. They stand equally between the Crown and the Executive and between the Executive and the subjects. They have to discharge the gravest and most responsible duties. It has for over two centuries been considered essential that their security and independence should be accounted inviolate.

The Act of Settlement made clear provision for this

It was long ago said that there can be no true liberty in a country where the judges are not entirely independent of the Government Article III of the Constitution of the United States.⁸¹

The insurrection was undignified and, in the traditional English way, ended in a fudge. A bill was introduced saying that judges' salaries could not be cut. Schuster's instructions to the statutory draftsmen catch the fla-

77. [1965] App. Cas. 75.

78. See LOUIS BLOM-COOPER, Q.C. & GAVIN DREWRY, *FINAL APPEAL: A STUDY OF THE HOUSE OF LORDS IN ITS JUDICIAL CAPACITY* 366-74 (1972).

79. For an elaboration of this dispute, see STEVENS, *INDEPENDENCE*, *supra* note 5, at 50-63.

80. *Id.*

81. *Id.*

vor of the civil service view of the judges as an independent branch of government:

Begin with a recital, which should be as long and pompous as possible, asserting the independence and all the rest of it and negating any idea that the Economy Act or the Order in Council affected that in any way. I realize that this is extraordinarily difficult to do for I do not see how you can negate that which has never been asserted except by the judges themselves. Then declare that notwithstanding all this, they are affected by the cut.⁸²

For all the rhetoric, judicial independence—at least for the judges as a class—is not a legal concept in England. Politically, however, its rhetoric is important in a body politic without a written constitution that relies on a congeries of statutes, delegated legislation, custom, and conventions for making the system work. The Schuster approach emphasized that in England there is no sense of the judiciary as a separate branch of government. In a decade which also saw the Scott-Donoughmore Committee on Ministers' Powers, the approach was a restatement of the Diceyan concepts of parliamentary sovereignty. Dicey had seen judges as having a narrow delegated role. They were in no way a branch of government as in the American sense. While the reality of the judicial role has changed over the last three decades, the rhetoric has not. That fact makes it impossible to claim a concept of collective judicial independence in England.

III. THE FUTURE

The question is: Should there be a “real” separation of powers and a more meaningful concept of judicial independence? It may be a good moment to ask this question, for the Blair administration has announced its commitment to reform the constitution, and a joint Liberal-Labour Committee has been constituted to address other relevant issues.

It is a good moment too, because, over the last twenty years, the role, power, and self-perception of the judiciary has changed. It may be that nothing evidences this more than the long period of Conservative rule between 1979 and 1997. For the first decade there was effectively no opposition; the Labour Party was split and drifted leftward into the political wilderness. The decline in the concept of an opposition coincided with the realization of the declining importance of the House of Commons. Lord Hailsham caught the atmosphere with his phrase “elected dictatorship,” which he used to describe the relationship between the legislature and the

82. *Id.*

executive.⁸³ The government made laws; back-bench MPs were cannon fodder. The declining independence of MPs, and even the decreasing importance of question time, inevitably left a vacuum.

The conflict between the judges and the Conservative government became most public in the battles between Lord Taylor, the late Lord Chief Justice, and Michael Howard, the last Conservative Home Secretary.⁸⁴ It was not a dignified dispute. Even the move of the Conservatives to the right seemed to leave a larger vacuum into which the judges stepped, were drawn, or were pushed, depending on one's perspective. The interesting question now, raised obliquely by Lord Woolf in a recent lecture at Oxford, is what the impact on all this will be as a result of the 1997 Labour landslide.⁸⁵ With a massive, docile majority of Labour members in the House of Commons, once again the judges may be faced with the task of keeping some sense of balance.

It would be wrong, however, to think of this approach as solely some kind of judicial *putsch*. For twenty or even twenty-five years the atmosphere has made it inevitable that judges would have more influence in the day-to-day running of the constitution. From the 1950s to the 1970s, Parliament, through legislation, instructed judges to return to matters relating to competition and labor relations. From the mid-1960s onward, the appeal judges have been more willing to reclaim their traditional role of pushing forward the boundaries of the common law. In a wide range of cases, they have opened up new areas of negligence, instilled notions of

83. See LEWIS, *supra* note 18, at 264.

84. See STEVENS, INDEPENDENCE, *supra* note 5, at 261-62. The disputes with Mr. Howard were continued by the new Chief Justice (Lord Bingham) and the new Master of the Rolls (Lord Woolf). The Daily Telegraph editorialized about the debates on mandatory sentences:

Yesterday's debates in the House of Lords revealed the growing unwillingness of our judges to confine themselves to an interpretive role. In the United States and most of Europe, judges are overtly political figures whose views are a matter of great public interest. In Italy, they see themselves as champions of the people against political corruption. British judges are moving in the same direction, appearing frequently in the media and speaking on subjects that often have little to do with the law.

Terence Shaw, *The Judgment of Judges*, DAILY TELEGRAPH, Jan. 28, 1997, at 9.

The Press was also agitated when the new Lord Chancellor, Lord Irvine, suggested that it was up to the judges, not Parliament, to develop a right to privacy. "The real question is whether the judges should be left to make their own law or whether Parliament should legislate for where freedom to investigate ends and privacy begins. It should be a matter for Parliament, in part because the judges Lord Irvine favours are almost all Conservatives." *A Law That Is Not for Judges to Make*, THE OBSERVER, July 27, 1997, at 21.

While Lord Irvine has not made himself popular with the press, relations with the judges seem to have improved. See generally Francis Gibb, *Judges Offered Role in Deciding Law Policy*, TIMES (London), July 24, 1997, at 8.

85. See STEVENS, INDEPENDENCE, *supra* note 5, at 253-54.

bona fides and instrumentalism into contract,⁸⁶ and rationalized criminal law. They have been much more activist in their interpretation of statutes as well. For example, in the 1993 case of *Pepper v. Hart*⁸⁷ in 1993, the House of Lords allowed, under certain circumstances, legislative debates to be introduced in interpreting statutes. The opportunities for judicial creativity in this area are only now being fully realized.

Britain's changing relationship with the rest of Europe has also had its impact on English judges. When Edward Heath eventually negotiated Britain's entry into the European Union (the "EU"), the judges found that they were, de facto, making decisions about the constitutionality of British statutes.⁸⁸ Although Lord Mackay explained this away by saying that the judges were merely interpreting one British statute in the light of another, it did not seem an adequate explanation for those watching the events unfold.

When the House of Lords held that British legislation relating to part-time employees violated European directives and therefore was unenforceable—or more accurately, the directive was automatically enforceable⁸⁹—*The Times* concluded that "Britain may now have, for the first time in its history, a constitutional court."⁹⁰ The courts had already suspended a British statute while the European courts tested its validity.⁹¹ It was certainly not business as usual. Sitting as judges in the Judicial Committee of the Privy Council, the appeal judges had impeded the enforcement of the death penalty in West Indian Commonwealth countries on the ground that

86. In 1942, Lord Greene M.R. announced in *Hankey v. Clavering* that "documents are not to be strained and principles of construction are not to be outraged in order to do what may appear to be fair in an individual case." [1942] 2 K.B. 326, 328. In *Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co. Ltd.*, Lord Steyn said that "there has been a shift from strict construction of commercial instruments to what is sometimes called purposive construction . . ." [1997] 3 All E. R. 352, 371. The situation is even more pronounced in the interpretation of tax statutes. Cf. *Commissioners of Inland Revenue v. Duke of Westminster*, [1936] App. Cas. 3, with *Commissioners of Inland Revenue v. McGuckian*, [1997] 3 All E.R. 817.

87. [1993] 1 All E.R. 42.

88. See Stevens, *Judges, Politics, Politicians*, *supra* note 14, at 265.

89. See *Regina v. Secretary of State for Employment ex parte Equal Opportunities Comm'n*, [1995] App. Cas. 1 (1994) (appeal taken from [1993] 1 WLR 872 (C.A.)).

90. *Profound Judgment*, THE TIMES, Mar. 5, 1994, Features.

91. See *Regina v. Secretary of State for Transport ex parte Factortame Ltd. (No. 2)*, [1991] 1 App. Cas. 604 (following a petition to the European Court, see *Factortame Ltd. v. Secretary of State for Transportation*, [1990] 2 App. Cas. 85 and the decision of the European Court, [1991] All E.R. 70 (E.C.J.)). In another case, the Court of Appeal speculated about the legal implication (e.g., effect *ab initio* or from moment of decision) of an unconstitutional statute. "Now that we are members of the European Union and the possibility arises that even provision in Acts of Parliament can be declared illegal because of a conflict with Community Law the question may well grow to be of greater importance in this country." *Percy v. Hall*, [1996] 4 Eng. Rep. 523, 544 (C.A.) (Schieman, L. J.).

delay "would constitute inhuman punishment."⁹² Indeed, such decisions had hastened the end of appeals from such countries to London.⁹³

The judges also took a more aggressive role towards civil rights. Britain had adhered to, but never incorporated, the European Convention on Human Rights. The leading judges, including the two most recent Chief Justices Lords Taylor and Bingham lobbied for its implementation, but in the meantime other judges merely shadowed its provisions. The new Labour government has recently introduced legislation to make the Convention an integral part of English law. Interestingly, this development has been opposed by the Right on the ground that it would politicize the judiciary⁹⁴ and by the Old Left on the ground that judges are not to be trusted because of their conservative instincts.⁹⁵ In the Human Rights Act, violations of the Convention will not entitle judges to strike down statutes, but they will be able to certify the violation, thus leading to fast-track legislative change. Lord Irvine, in his welcome to the new legislation, also admitted that it represents a considerable transfer of power to the judges.⁹⁶

The most dramatic area of increasing judicial power over the last three decades has been in the extension of the so-called judicial review.⁹⁷ Since the 1960s, judges have moved into a wide range of supervisory situations, leading the Civil Service to issue a pamphlet entitled *The Judge Over Your Shoulder*. The Home Secretary has found his discretion on sentencing, immigration, and prison policies curbed, while the Foreign Secretary was brought to book for his policies in foreign assistance. Lord

92. *Pratt v. Attorney Gen. for Jamaica*, [1994] 2 App. Cas. 1, 2. See also *Guerra v Baptiste*, 1996 App. Cas. 397 (appeal taken from the Court of Appeal of Trinidad and Tobago) (stating that although in the Bahamas, which had not signed the United Nations Optional Protocol of the United Nations Covenant on Human Rights, three-and-a-half years is the norm).

93. See Larry Rohter, "Little England" in the Caribbean Weighs Divorce, INT'L HERALD TRIB., July 8, 1997, at 7; *The Caribbean: A Relic of Empire*, THE ECONOMIST, Feb. 8, 1997, at 43.

94. See Lord Mackay, Parliament and the Judges: A Constitutional Challenge?, Speech to the Citizenship Foundation at Saddlers' Hall in London (July 8, 1996).

95. See John Griffith, *Human Rights, Legal Wrongs*, NEW STATESMAN (London), July 31, 1998, at 12; Martin Mears, *Unelected Dictators*, DAILY TELEGRAPH, July 29, 1997, at 18; Sir Brian Cubben, *Don't Put Democracy at Risk*, TIMES (London), Oct. 30, 1997, at 20.

96. See *Interview: Lord Irvine of Lairg*, NEW STATESMAN, Dec. 6, 1996, at 18. See also CENTRE FOR PUBLIC LAW, THE UNIVERSITY OF CAMBRIDGE, CONSTITUTIONAL REFORM IN THE UNITED KINGDOM: PRACTICE AND PRINCIPLES 68-84 (1998).

97. See *Judges, Politics and Politicians*, supra note 14, at 263-65. For recent discussion on sentencing, see *Regina v. Home Sec. ex parte Venables*, 3 All E.R. 97 (H.L. 1997), and on mandatory provisions of public funding, see *Regina v. Gloucestershire County Council ex parte Barry*, 2 All E.R. 1 (H.L. 1997).

Hailsham and Lord Irvine⁹⁸ have both expressed concerns with how far the scope of judicial review has extended.

On the other hand, in the intemperate debates on the Green Papers on the profession, the Lord Chief Justice, Lord Lane, noted, “[A]s Parliament is increasingly liable to do what the government of the day (may) wish it to do . . . it is . . . becoming more and more necessary to preserve intact the courts’ power of judicial review . . . the one thing that will stop a bullying government in its tracks.”⁹⁹ The person in the Clapham omnibus might well conclude that the judges were aggressively moving into the political vacuum. Judges are now more prone to explain that judicial review is designed to help the government, though these statements are reminiscent of the Parliamentarians’ claim in the Civil War, “‘tis for the King that we against him fight.”

Judges are now more circumspect in their political statements than they were even two or three years ago. However, issues have been raised which cannot now be ignored. If judges are to be a “third force” in British politics, there may have to be a clearer demarcation of the judicial role. Over the last few years, judges have been pushing further at the boundaries. Lord Woolf¹⁰⁰ and Justice Laws¹⁰¹ have hinted that parliamentary sovereignty may not be absolute. Lord Brown-Wilkinson has suggested that judges should have power over their budgets and the courts.¹⁰² Assuming judges continue to think in this way, will it be possible to proceed intelligently with such demands and developments when the separation of powers is so murky? The English like to think of their constitution as growing organically. However, the organic may have to give way to the planned.

As already noted, the Lord Chancellor’s role has been ripe for reform for the last 150 years. Lord Steyn, one of the law lords, has suggested that it may be time to phase out the Lord Chancellorship.¹⁰³ The current incumbent, Lord Irvine, has suggested in a slightly Gilbertian way that when he speaks for the government, he no longer wear his wig and judicial robes

98. See Lord Irvine of Lairg, Q.C., *Judges and Decision-Makers: The Theory and Practice of Wednesbury Review*, 1996 PUB. L. 59, 59-78.

99. STEVENS, INDEPENDENCE, *supra* note 5, at 176.

100. See The Rt. Hon. Lord Woolf of Barnes, *Droit Public—English Style*, 1995 PUB. L. 57, 67-69.

101. See Sir John Laws, *Law and Democracy*, 1995 PUB. L. 72.

102. See Lord Nicolas Browne-Wilkinson, *The Independence of the Judiciary in the 1980s*, 1988 PUB. L. 44, 53-57.

103. See The Rt. Hon. Lord Steyn, *The Weakest and Least Dangerous Department of Government*, 1997 PUB. L. 84, 90.

when presiding in the Lords. Reformers, when they get close to the wool-sack, tend to lose their enthusiasm for reform. The current Liberal/Labour Committee on the Constitution may well push for more rigorous thinking.

Two Liberal Democrat peers, Lords Goodhart and Lester, were primarily responsible for the Institute of Public Policy Research's draft written constitution in 1991. Under it, as in America, there would be a much clearer distinction between the branches of government: The Lord Chancellor would serve only in his judicial role, with a Minister of Justice responsible for what was the old Lord Chancellor's department. Additionally, the judges of the final court of appeal would cease to be legislators, and judges would be chosen by a Judicial Appointments' Committee.¹⁰⁴

The latter two suggestions are probably worth considering in greater detail. There certainly are problems with having the law lords, in addition to the Chief Justice and Master of the Rolls, sitting in the Lords. The advantages are always said to be that the House has the benefit of legal expertise, but it may also—as in the Green Papers debate—have the disadvantage of judicial conservatism.¹⁰⁵ Legal advice is available in other ways. There are other lawyers in the Lords, while the Commons survives quite happily without the presence of judges.

The biggest disadvantages, however, are the appearance of judicial partiality and confusion about the role of judges. When the *Fire Brigade* case came on before the Lords in 1995, it was difficult to find five law lords to sit judicially, since so many of them had already spoken out, legislatively, against the Home Secretary Michael Howard's proposals.¹⁰⁶ This cannot be an ideal way for the final court of appeal to conduct itself.

The IPPR recommended a judicial appointments' commission to choose judges. The commission would, as we have seen, be heavily dominated by judges. It is an area in which the English have great difficulty. There is an increasing consensus that allowing one politician in the Cabinet to choose judges is unacceptable—although that opinion received a setback during the chancellorship of James Mackay because he was immensely successful and imaginative in his choice of judges. The problem remains: If the judges are not chosen by the Lord Chancellor, then by whom?

104. See A WRITTEN CONSTITUTION, *supra* note 70, *passim*.

105. See *supra* note 65 and accompanying text.

106. R. v. Secretary of State for the Home Department, *ex parte* Fire Brigades Union, [1995] 2 All E.R. 244 (a decision which eventually struck down Home Secretary Michael Howard's attempt to make cuts in the Criminal Injuries Compensation Scheme).

The idea of judges as a self-selecting oligarchy, inherent in the IPPR's draft constitution, was also unattractive to the Committee on the Judiciary, established in 1991 by Justice, the British Branch of the International Commission of Jurists. In its report, it proposed a committee composed of a balance of lawyers and laymen to advise the Lord Chancellor on appointments.¹⁰⁷ Justice's advice was rejected by Lord Mackay and has been put on the back burner by Lord Irvine.

The English are reluctant to come to grips with the implications of a judiciary increasingly involved with what in other societies would be regarded as political issues. They were also offended with the American system which they associate with the Bork and Thomas hearings. Yet other societies have been forced into similar directions. In 1948, for example, Israel transformed its basically British legal system into an apolitical Judicial Selection Committee to choose judges.¹⁰⁸ As the supreme court has moved more actively into the political arena, the Knesset has demanded representation.¹⁰⁹

The German constitutional court, another aggrandizing judiciary, is now chosen half by the *Bundestag* (the Federal Upper House) and half by the *Landers* (the state governments). Furthermore, Nelson Mandela argued that the President of South Africa should choose the numbers of that country's constitutional court, while the ANC opposed the idea of a constitutional court altogether, preferring a council of State. Eventually, the Constitutional Convention adopted a constitutional court along the lines of the German constitutional court. It was provided that judges are appointed by the President from a panel selected by the Judicial Service Commission. The Commission holds hearings in public but makes its decisions on whether to recommend in private.

England, Scotland, and Northern Ireland are likely to move down one of these routes. The outgoing Permanent Secretary to the Lord Chancellor Sir Thomas Legg recently suggested that if the Lord Chancellor continues to appoint judges, they might be subject to confirmation by a committee of a reformed House of Lords.¹¹⁰ The Conservatives have been more logical in this regard. Lord Mackay opposed the incorporation of the European

107. See COMMITTEE ON THE JUDICIARY, COUNCIL OF JUSTICE, *THE JUDICIARY IN ENGLAND AND WALES* 17-24 (1992).

108. See Shimon Shetreet, *Judicial Independence and Accountability in Israel*, 33 INT'L & COMP. L.Q. 979, 992 (1984).

109. The current composition of the Judicial Selection Committee is three judges, two lawyers, two Cabinet Ministers, and two members of the Knesset.

110. See Terence Shaw, *Judges May Face Scrutiny of Their Political Views*, DAILY TELEGRAPH, Jan. 19, 1998, at 9.

Convention on Human Rights because it would expose the judges to analysis of their political and social views. The new leader of the Conservative Party, William Hague, has taken that concern to its logical conclusion by calling for a House of Commons' veto on senior judicial appointments.¹¹¹ The judges have no doubt taken note of the sudden public concern about the personal and political views of the Bank of England's Monetary Policy Committee to which, in 1997, Gordon Brown, the Chancellor of the Exchequer controlled the bank rate.¹¹² Can judges, with their expansive role, be far behind? In short, the situation is fluid.

IV. CONCLUSION

The British prefer fudge to principle. They frequently call it the genius for compromise. Things may have changed with the New Labour Government. Unlike its predecessor, it is thought to have clear policies and it is clearly activist and image conscious. It is somewhat more humane in penal policy, yet the judges have not thus far shown a willingness to abandon an independent stance. Lord Bingham, the new Lord Chief Justice, is concerned about mandatory life imprisonment for murder, and, at a different level, efforts by government to require disclosure of Masonic links. At the same time the government continues to hand political tasks to the judges—including determining the disputes that will inevitably arise in giving Scotland a devolved parliament—with disputes to be decided by the Judicial Committee of the Privy Council.

Despite new political responsibilities and irrespective of need, one suspects that Britain will not suddenly embrace three clear branches of government. The growth will be organic. The Legg suggestions for review in the Judiciary Committee of a reformed House of Lords may well be a political trial balloon. The Hague suggestion has yet to become official Conservative policy. Both Legg and Hague, however, have conceded that it is a legitimate question as the millennium approaches to ask questions about the politics of the judiciary.

Some form of judicial appointments' committee cannot be far away. Its establishment might help validate the Posner thesis that open political input in appointment protects independence during tenure.¹¹³ In the foreseeable future, no political party will give the judges the right to strike

111. See Andrew Pierce, *Hague Looks to U.S. Judge Systems*, THE TIMES, Feb. 25, 1998, at 10.

112. See *Brown Mischief*, DAILY TELEGRAPH, Aug. 5, 1998, at 19.

113. See William M. Landis & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J. L. & ECON. 875 (1975).

down legislation, but judicial review of administrative action, the right to review United Kingdom legislation in the light of European Union directives and regulations, together with the Bill of Rights, will ensure that the judiciary in the United Kingdom continues its movement to the center of the political stage.¹¹⁴ Only the frustrating belief in muddling through will prevent a formalized separation of powers and an entrenched concept of the independence of the judiciary.

114. See *Pepper v Hart*, [1993] 1 All E.R. 42.