
BIBLIOGRAPHY

JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY: A SELECTED BIBLIOGRAPHY

COMPILED BY

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PREFACE

This bibliography was prepared in conjunction with the Judicial Independence and Accountability Symposium held at the University of South-

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The bibliographers wish to express their gratitude to the staff of the University of Southern California Law Library, whose assistance and support greatly contributed to the completion of this work. The bibliographers would like to give special thanks to Mable Lee, Hazel Lord, and Charles Miller, who tirelessly and ably met our document retrieval and interlibrary loan requests. The bibliographers wish to express their particular gratitude to Palma Denham, whose expert assistance in input, formatting, and proofing (as well as her patience, care, and dedication) were invaluable to the completion of this bibliography.

ern California on November 20-21, 1998. This bibliography provides citations and abstracts for selected books, papers, reports, and articles relating to the topics of judicial independence and judicial accountability. With respect to the period of time covered, the bibliographers chose to look back forty years; thus, the works included are those published as of 1958 and up through November 30, 1998 (the day on which searching ceased). With respect to geographic coverage, this bibliography covers United States as well as foreign, comparative, and international law materials. Non-English language materials, however, were not reviewed or included.

The topics of judicial independence and judicial accountability have been written about extensively, and the number of possibly relevant writings from the past forty years is staggering. These topics carry with them a potentially very broad range of subtopics, and the danger exists of creating a bibliography whose focus is obscured by what might be extraneous sources for many researchers. Accordingly, to make the bibliography useful as well as practical to create, the bibliographers chose to follow a relatively traditional and narrow subject approach in their review and selection decisions. The focus of this bibliography thus is on works which are “self-consciously” about judicial independence and judicial accountability—that is, those that deal directly and substantially with these topics. To some extent, the substance of the bibliography initially was shaped by the topics to be addressed at the related Symposium, but the bibliography is not limited solely to those topics (particularly in the areas of foreign, comparative, and international law).

Another limitation concerns the types of materials reviewed and included. The bibliographers principally sought to locate and include works of a scholarly nature. As a general rule, the following types of publications have been excluded: writings geared towards the general public (including newspaper articles, both legal and non legal, and popular magazines); book reviews; articles from journals or other periodicals published by bar associations or other professional associations;¹ writings which did not include commentary, perspective or analysis; very short writings (i.e., eight pages or less); scholarly works which only addressed judicial independence or judicial accountability in a brief or passing manner; lectures and panel discussions (unless adapted to law review format); and doctoral dissertations

1. The bibliographers note that the topic of judicial independence particularly has generated a wealth of commentary, editorials, articles, and other writings in bar association journals, both U.S. and foreign. For the most part, however, those writings tend to be shorter and less scholarly than those included within this bibliography. The bibliographers have included a very few selected articles from associational journals when their substance appeared to fill a gap in the literature and when their focus appeared to be sufficiently scholarly.

or master's theses. Notwithstanding these limitations, there are several instances in the bibliography when writings of the types to be excluded are, in fact, included because the bibliographers believed that the contents of such works warranted their inclusion.

To ensure comprehensive coverage of this subject matter, a broad range of on-line and print indexes were consulted, as well as Internet resources. Because most on-line sources only index articles back to the early 1980s, print equivalents also were consulted to ensure inclusion of pre-1980 publications.

The following indexes and databases were consulted for this bibliography:

- Amazon.com (Internet)
- America, History and Life on Disc (CD-ROM)
- American Bar Association web site (www.aba.org)
- American Judicature Society web site (www.ajs.org)
- ArticleFirst (FirstSearch)
- Arts & Humanities (Dialog through Westlaw and FirstSearch)
- Books in Print (Dialog through Westlaw)
- British Books in Print (Dialog through Westlaw)
- Bus-Arts (Dialog through Westlaw)
- C.R.I.S.: The Combined Retrospective Index Set to Journals in Political Science, 1886-1974 (print)
- Current Index to Legal Periodicals (e-mail results generated by pre-determined searches)
- EconLit (Dialog through Westlaw and FirstSearch)
- Historical Abstracts on Disc, 1972-1997 (CD-ROM)
- Humanities Abstracts (Dialog through Westlaw and FirstSearch)
- Index to Foreign Legal Periodicals (print)
- Index to Legal Periodicals (Westlaw, LEXIS, print)
- JSTOR Electronic Journal Archives (selected political-science journals)
- Lawrev Library, Allrev File (LEXIS)

Legal Resource Index (Westlaw and LEXIS)
 Magazine (Dialog through Westlaw)
 Melvyl Catalog (web version for all University of California holdings,
 www.melvyl.ucop.edu)
 PAIS International (FirstSearch and print)
 PapersFirst (FirstSearch)
 Periodical Contents Index (FirstSearch)
 Philosopher's Index (Dialog through Westlaw)
 Social Science Abstracts (Dialog through Westlaw and FirstSearch)
 SocSciSrch (Dialog through Westlaw)
 TP-ALL Database (Westlaw)
 Uncover (Dialog through Westlaw) WorldCat (FirstSearch)

The bibliography is divided into three parts: 1) General works on or related to judicial independence and judicial accountability; 2) Subject-specific works on or related to judicial independence and judicial accountability; and 3) Foreign, comparative, and international law works on or related to judicial independence and judicial accountability. Within the second and third parts, entries are broken down into more specific subtopics and categories. A number of the works contain discussions falling into more than one of the categories. In those instances, the works have been listed under their dominant topics.

Finally, the citation format for this bibliography deviates from *The Bluebook: A Uniform System of Citation*, and follows that used in prior bibliographies published in the *Southern California Law Review*.

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I. GENERAL WORKS ON OR RELATED TO JUDICIAL
INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

Books, Papers, and Reports

- ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE. AN INDEPENDENT JUDICIARY. Washington, D.C.: American Bar Association, 1997. This report asserts that the United States is in the middle of a cycle of intense judicial scrutiny and criticism and that a number of threats to judicial independence exist. The Commission reviews historical and recent judicial independence issues and arguments as well as threats to decisional and institutional independence, both federal and state, and provides recommendations.
- BICKEL, ALEXANDER M. THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS. 2d ed. New Haven: Yale University Press, 1986. Professor Bickel explores the establishment and justification of the U.S. Supreme Court's review power, emphasizing the operation of the Supreme Court in the political arena. Bickel discusses the countermajoritarian aspect of judicial review and its implications for a democracy.
- BOOT, MAX. OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH. New York: Basic Books, 1998. The author, a writer for the *Wall Street Journal*, delivers a scathing attack on the judiciary, using real-life examples which he believes demonstrate that judges often are too activist, soft on crime, and sometimes corrupt. This is a highly partisan work, presented with a foreword by Robert H. Bork.
- FREYER, TONY A. & DIXON, TIMOTHY J. DEMOCRACY AND JUDICIAL INDEPENDENCE: A HISTORY OF THE FEDERAL COURTS OF ALABAMA, 1820-1994. Brooklyn: Carlson Publishing, 1995. The authors provide a historical overview of federal court appointments and decisionmaking in Alabama. They assert that Alabama federal courts historically have tested the relationship between judicial independence and democracy by deciding numerous important constitutional issues relating to the rights of freed slaves during the Reconstruction, railroad regulations and New Deal agencies, and civil-rights and voting-rights matters.
- KATZMANN, ROBERT A. COURTS AND CONGRESS. Washington, D.C.: Brookings Institution/Governance Institute, 1997. Professor Katzmann focuses on three aspects of the relationship between the federal

judiciary and Congress: the appointment process for U.S. Supreme Court Justices; judicial review of legislation; and interbranch communications. He identifies problems in each area and makes recommendations. He asserts that Congressional inquiry into court funding and activities should not be perceived as a threat to judicial independence in most instances.

LONG RANGE PLAN FOR THE FEDERAL COURTS: AS APPROVED BY THE JUDICIAL CONFERENCE. Washington, D.C.: Judicial Conference of the United States, 1995. This Judicial Conference framework for policymaking and administrative decisions identifies judicial independence and accountability as core values, and focuses on the necessity for judicial independence within the Judicial Conference's mission statement. The Governance proposals are directed to independence and accountability issues, including recommending that impeachment remain the sole removal mechanism for Article III judges.

SPILLER, PABLO T. & GELY, RAFAEL. CONGRESSIONAL CONTROL OR JUDICIAL INDEPENDENCE: THE DETERMINANTS OF U.S. SUPREME COURT LABOR RELATIONS DECISIONS, 1949-1988. Chicago: University of Chicago, Center for the Study of the Economy and the State, 1990. The authors use an empirical "rational choice" framework to determine the U.S. Supreme Court's independence from political and economic interests. The analysis is applied to the outcomes of all decisions involving the NLRB from 1949 to 1988. [Note that this paper later was published at 4 RAND JOURNAL OF ECONOMICS 463 (Winter 1992).]

STERLING, HARWOOD. JUDICIAL ACTIVISM: A RESTRAINED DEFENSE. Revised edition. San Francisco: Austin & Winfield, 1996. The author, a philosophy professor, summarizes the principal arguments against "judicial activism" and offers a defense on behalf of activism.

STOLZ, PREBLE. JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT. New York: The Free Press, 1981. Professor Stolz examines the events surrounding a November 1978 eve of election *Los Angeles Times* story stating that the California Supreme Court was delaying announcement of a decision overturning a politically popular gun law, and the subsequent California Commission on Judicial Performance investigation of these allegations. He discusses the threat these events posed to the confidentiality of the Court's deliberative process and other matters affecting judicial independence and accountability issues. The author lays blame on the

personalities of various Justices and is particularly critical of Chief Justice Rose Bird. The Foreword by Anthony Lewis provides a useful contrasting view.

Articles

- Abrahamson, Shirley S. *Remarks of the Hon. S. Abrahamson Before the American Bar Association Commission on Separation of Powers and Judicial Independence, Washington, D.C., December 13, 1996*. 12 SAINT JOHN'S JOURNAL OF LEGAL COMMENTARY 69 (Fall 1996) (Part of Symposium). The Chief Justice of the Wisconsin Supreme Court discusses how the State of Wisconsin treats judicial independence. Her discussion covers the public's concern for accountability and the tension between the doctrine of the separation of powers and the interdependence of the three branches of government.
- Bermant, Gordon & Wheeler, Russell R. *Federal Judges and the Judicial Branch: Their Independence and Accountability*. 46 MERCER LAW REVIEW 835 (Winter 1995) (Part of Symposium). The authors contend that judicial independence is an umbrella term that covers decisional, personal, procedural, and administrative activity. They find that federal judges generally do not believe that their decisional independence is threatened either from within or without the judicial branch but are concerned that their procedural and administrative independence is threatened by legislative and executive intervention.
- Black, Barbara Aronstein. *Massachusetts and the Judges: Judicial Independence in Perspective*. 3 LAW AND HISTORY REVIEW 101 (Spring 1985). Professor Black examines an incident during 1772-74 when the Crown attempted to take over payment of judicial salaries. Up until then, judicial salaries had been paid out of levied taxes pursuant to colonial assemblies. She argues that while judicial independence-related conflicts in other colonies at that time were political in nature, those in Massachusetts had a constitutional focus.
- Boudreaux, Donald J. & Pritchard, A.C. *Reassessing the Role of the Independent Judiciary in Enforcing Interest-Group Bargains*. 5 CONSTITUTIONAL POLITICAL ECONOMY 1 (Winter 1994). The authors reject William Landes and Richard Posner's theory that judicial independence maximizes the value of legislative deals with interest groups by enhancing the durability of those deals. Through reinterpreting empirical findings that previously were thought to support the Landes-Posner theory, the authors conclude that the federal judiciary is independent from both Congress and the President and

that the Constitution's framers intended this independence to further a sound government.

Burbank, Stephen B. *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*. 97 COLUMBIA LAW REVIEW 1971 (November 1997). The author compares academic freedom and accountability with judicial freedom and accountability. He relies on the decisions and writings of Judge Jack Weinstein to illustrate his argument. The author argues that Judge Weinstein's vision of judicial independence was significantly shaped by his experience as an academic and that he necessarily surrendered a portion of his intellectual autonomy when rising to the bench.

Burger, Warren E. *The Interdependence of Judicial and Journalistic Independence*. 63 GEORGETOWN LAW JOURNAL 1195 (1975). In an address to the American Society of Newspaper Editors, Chief Justice Burger suggests that the independence of the judiciary and journalists are interdependent. Journalists depend upon the courts to protect and enforce their press freedoms; conversely, the courts depend on the actions of a free press in exposing and combating assaults on the judiciary that would limit its independence.

Chemerinsky, Erwin & Friedman, Barry. *The Fragmentation of Federal Rules*. 46 MERCER LAW REVIEW 757 (Winter 1995) (Part of Symposium). The authors examine the recent trend towards "localism" in federal rulemaking, which is counter to the intent behind the adoption of the Federal Rules of Civil Procedure in 1938. They make a case for uniformity and propose a model for central rulemaking authority.

Cole, Charles D. *Judicial Independence in the United States Federal Courts*. 13 JOURNAL OF THE LEGAL PROFESSION 183 (1988). The author examines the nature of judicial independence under the United States Constitution and suggests that governments that seek to avoid tyranny and promote human rights consider the basic characteristics of judicial independence provided in the Constitution.

Coleman, John M. *Thomas McKean and the Origin of an Independent Judiciary*. 34 PENNSYLVANIA HISTORY 111 (1967). The author examines the origins of Pennsylvania's independent judiciary by tracing the career of Chief Justice Thomas McKean and the evolution of the Supreme Court of Pennsylvania.

Cox, Archibald. *The Independence of the Judiciary: History and Purposes*. 21 UNIVERSITY OF DAYTON LAW REVIEW 565 (Spring 1996) (Part of Symposium). The author maintains that judicial independ-

ence implies that judges have a reciprocal obligation to decide cases "according to law," i.e., they must follow the principles found in statutory and case law. He states that this obligation creates a dilemma because the law also must coincide with the dominant aspirations and needs of its time. In discussing this dilemma, he cites rationales for maintaining judicial independence, including protection against executive oppression and legislative violations of human rights and assurance of upright and impartial justice. He also discusses threats to judicial independence, including historical attacks and charges of judicial lawmaking.

Currie, David P. *The Constitution in Congress: The Most Endangered Branch, 1801-1805*. 33 WAKE FOREST LAW REVIEW 219 (Summer 1998). Professor Currie examines three battles over judicial independence in the four years following Jefferson's inauguration: the repeal of the Judiciary Act of 1801 and related partisan debate and events; the removal of Judge Pickering; and the attempted impeachment of Justice Chase.

Dix, George E. *Judicial Independence in Defining Criminal Defendants' Texas Constitutional Rights*. 68 TEXAS LAW REVIEW 1369 (June 1990) (Part of Symposium). The author examines the 1989 attempt by Texas prosecutors to amend the Texas Constitution. The proposed amendment sought to bar state courts from independently construing the major constitutional provisions affecting criminal litigation. The author analyzes the proposal, its merits, and the factual foundation of those merits.

Ervin, Sam J., Jr. *Separation of Powers: Judicial Independence*. 35 LAW & CONTEMPORARY PROBLEMS 108 (1970). Senator Ervin discusses the historical foundation of the American system of separation of powers. He cautions against Congressional attempts to simplify the process of removing federal judges.

Epstein, Richard A. *The Independence of Judges: The Uses and Limitations of Public Choice Theory*. 1990 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 827. Professor Epstein applies public choice theory in an effort to explain how judges behave when deciding cases. He concludes that this analysis does not meet with much success when attempting to predict the behavior of judges. Judges are limited in their ability to act in their self-interest, and thus their independence is constrained, by matters of background and temperament.

- Friedman, Barry. *Dialogue and Judicial Review*. 91 MICHIGAN LAW REVIEW 577 (February 1993). The author addresses the debate concerning the legitimacy of judicial review and the countermajoritarian arguments raised by many commentators. He defends the judiciary and argues that a dialog occurs between the courts and public opinion when issues of constitutional interpretation arise.
- Friedman, Barry. "Things Forgotten" in the Debate Over Judicial Independence. 14 GEORGIA STATE UNIVERSITY LAW REVIEW 737 (July 1998) (Part of Symposium). The author provides a historical perspective on the relationship of popular democracy to the judicial branch. He observes that throughout history, both liberals and conservatives have attacked the judiciary and that these attacks are motivated by disagreement with the substance of judicial decisions. He also notes that all attempts to limit judicial independence have failed.
- Geyh, Charles Gardner. *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*. 71 NEW YORK UNIVERSITY LAW REVIEW 1165 (November 1996). Professor Geyh observes that the judiciary and legislative branches have become increasingly intertwined. The judiciary is involved in the formulation and implementation of legislation, and Congress has moved into the area of procedural rulemaking. He proposes creating an Interbranch Commission to facilitate this increasing interaction.
- Hartnett, Edward A. *Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*. 75 TEXAS LAW REVIEW 907 (April 1997). The author examines the 1914 Act which expanded the Supreme Court's jurisdiction to hear appeals from state court judgments and discusses its impact on the independence of state courts. He argues that the current Court should refrain from hearing appeals by state officers of judgments from their own courts.
- Hatch, Orrin G. *Congress and the Courts: Establishing a Constructive Dialogue*. 46 MERCER LAW REVIEW 661 (Winter 1995). Senator Hatch comments upon recent actions of Congress that "federalized" traditional state-law matters. He also addresses the issue of increasing the size of the judiciary.
- Hawkins, Michael Daly. *Dining with the Dogs: Reflections on the Criticism of Judges*. 57 OHIO STATE LAW JOURNAL 1353 (October 1996). Judge Hawkins reflects on episodes in American history that produced particularly bitter critical reaction to the federal judiciary, in-

cluding the decisions in *Dred Scott* and *Brown v. Board of Education* and the careers of Justices Marshall and Holmes.

- Kaplan, Matthew N. *Who Will Guard the Guardians? Independent Counsel, State Secrets, and Judicial Review*. 18 NOVA LAW REVIEW 1787 (Spring 1994). The author addresses whether Congress may empower Independent Counsel to challenge presidential invocations of state secret privilege and whether the federal judiciary may review such challenges.
- Kaufman, Irving R. *Chilling Judicial Independence*. 88 YALE LAW JOURNAL 681 (1979). Judge Kaufman discusses the traditional mechanisms meant to secure judicial independence and warns against proposals that would jeopardize these protections. He specifically condemns the proposals embodied in the Judicial Tenure Act of 1978.
- Kaufman, Irving R. *The Essence of Judicial Independence*. 80 COLUMBIA LAW REVIEW 671. Judge Kaufman traces the development of judicial independence in English history and Colonial America. He then looks at contemporary challenges to judicial independence, including attempts in Congress to pass laws relating to the conduct and discipline of judges.
- Kozinski, Alex. *The Many Faces of Judicial Independence*. 14 GEORGIA STATE UNIVERSITY LAW REVIEW 861 (July 1998) (Part of Symposium). In this speech, Judge Kozinski discusses the nature of judicial independence, where it stops and lawlessness begins and how actions of other branches of government impact it.
- Landes, William M. & Posner, Richard A. *The Independent Judiciary in an Interest-Group Perspective*. 18 JOURNAL OF LAW & ECONOMICS 875 (1975). The authors apply economic analysis to the decision-making of the Supreme Court. They conclude that the Court is not political but simply enforces the "deals" which effective interest groups make with legislatures.
- Mullenix, Linda S. *Judicial Power and the Rules Enabling Act*. 46 MERCER LAW REVIEW 733 (1995) (Part of Symposium). Professor Mullenix regards Congressional activity in the federal procedural rulemaking arena as the most significant current issue in judicial independence. She discusses the Rules Enabling Act and the 1990 Civil Justice Reform Act. This article is largely a response to Professor Martin Redish's article, *Federal Judicial Independence: Constitutional and Political Perspectives* (See *infra* this Section).

- Murchison, Brian C. *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GEORGIA LAW REVIEW 85 (Fall 1995). In a portion of this article, the author examines Justice Brandeis' concurrence in the *Ashwander* case and the view of judicial independence that it reflects. Justice Brandeis' invocation of the "avoidance canon" as a means of preserving the court's independence in our system of law also is explored.
- Peterson, Todd. D. *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*. 29 U.C. DAVIS LAW REVIEW 41 (Fall 1995). The author asserts that the federal judiciary's increased role in pre-trial management and settlement negotiations between parties has led to an unwarranted expansion of power. After reviewing the Constitutional system of checks and balances, he offers alternatives that would reduce judges' use of their "managerial" power.
- Poulin, Anne Bowen. *Double Jeopardy and Judicial Accountability: When is an Acquittal not an Acquittal?* 27 ARIZONA STATE LAW JOURNAL 953 (Fall 1995). Professor Poulin discusses how double-jeopardy protection may impair judicial accountability (e.g., insulating judges from accountability for improper rulings). She suggests employing a relaxed double-jeopardy standard in bench trials and when the prosecution can prove beyond a reasonable doubt that judicial corruption occurred. She resists, however, reductions in constitutional protection.
- Pratt, Jr., Walter F. *The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges*. 4 LAW AND HISTORY REVIEW 129 (Spring 1986). The author discusses the Supreme Court of North Carolina's success in maintaining and increasing its independence during the antebellum years. He attributes this success to the political acumen and personal reputations of two of the then Supreme Court justices, Thomas Ruffin and William Gaston.
- Rasmusen, Eric. *Judicial Legitimacy as a Repeated Game*. 10 JOURNAL OF LAW, ECONOMICS & ORGANIZATION 63 (April 1994). The author claims that integrity and good faith on the part of judges are not prerequisites to maintaining a judiciary that is both independent and responsible. He maintains that self interest causes irresponsible judges to follow precedent because they either do not want to undermine the legitimacy of the judiciary as a whole or they want to preserve the individual legitimacy of their own precedents.

- Redish, Martin H. *Federal Judicial Independence: Constitutional and Political Perspectives*. 46 MERCER LAW REVIEW 697 (Winter 1995) (Part of Symposium). Professor Redish examines judicial independence in the context of the following categories: "institutional independence," "decisional/lawmaking independence," and "countermajoritarian independence." He defines "institutional independence" as the textual guarantees of salary and tenure protection; "decisional independence" as the ability of the judge to ascertain and apply governing legal principles to the case at hand, free from external influences; "lawmaking independence" is defined as the judge's ability to fashion general substantive rules of decision or procedure to both present and future cases; and, finally, "countermajoritarian independence" as the ability of the federal courts to interpret provisions of the Constitution in the course of individual adjudications.
- Rehnquist, William H. *Political Battles for Judicial Independence*. 50 WASHINGTON LAW REVIEW 835 (1975). Justice Rehnquist discusses the impeachment of Justice Samuel Chase and President Roosevelt's "court-packing" scheme as examples of the struggle for judicial independence that have taken place among the branches of government.
- Richardson, William S. *Judicial Independence: The Hawaii Experience*. 2 UNIVERSITY OF HAWAII LAW REVIEW 1 (Winter 1979). The author discusses the significance of judicial independence and the growth of this principle in Hawaii. In so doing, he reviews the structural and administrative changes that have taken place within Hawaii's courts.
- Riggs, Burkeley N. & Westerberg, Tamera D. *Judicial Independence: An Historical Perspective*, 74 DENVER UNIVERSITY LAW REVIEW 337 (1997). The authors discuss the protections for judicial independence found in the U.S. Constitution. This article provides a useful overview, but not an in-depth treatment of the subject.
- Rishikof, Harvey & Perry, Barbara A. "Separateness but Interdependence, Autonomy but Reciprocity": A First Look at Federal Judges' Appearances Before Legislative Committees. 46 MERCER LAW REVIEW 667 (Winter 1995) (Part of Symposium). The authors focus on the nature and frequency of testimony by all levels of federal judges before Congressional committees. The authors note that such testimony represents an interaction between the judicial and legislative branches not contemplated by the founders of the Constitution.

- Rosen, Gerald E. *Judicial Independence in an Age of Political and Media Scrutiny*. 14 THOMAS M. COOLEY LAW REVIEW 685 (1997). In this speech, Judge Rosen discusses several recent episodes that reveal the political pressure on the judiciary, and how it threatens judicial independence.
- Seidman, Louis Michael. *Ambivalence and Accountability*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1571 (September 1988) (Part of Symposium). The author argues that ambivalence is the only possible response to the contradictory desire of wanting an independent judiciary that is politically accountable. He also argues that it is misguided to resolve this tension through normative justification of judicial non-accountability.
- Selya, Bruce M. *The Confidence Game: Public Perceptions of the Judiciary*. 30 NEW ENGLAND LAW REVIEW 909 (Summer 1996). In this brief essay, Judge Selya explores whether there is a crisis of public confidence in the American judicial system, and the potential judicial responses thereto. He advises that judicial candor is a critical component of judicial accountability.
- Sirvet, Ene & Bernstein, R.B. *John Jay, Judicial Independence, and Advising Coordinate Branches*. 2 JOURNAL OF SUPREME COURT HISTORY 22 (1996). The authors examine John Jay's conception of the Supreme Court's function and purpose. They discuss specific episodes when Jay had to delineate what the Court's role was in relation to the other branches of government.
- Smith, Joseph H. *An Independent Judiciary: The Colonial Background*. 124 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1104 (1976). The author examines the struggle for judicial independence in the colonies during English rule in America and discusses the experience of every colony.
- Strossen, Nadine. *The Current Assault on Constitutional Rights and Civil Liberties: Origins and Approaches*. 99 WEST VIRGINIA LAW REVIEW 769 (Summer 1997). In the context of current political battles over civil liberties, Professor Strossen argues that an independent judiciary should be the main line of defense for individual rights. She believes, however, that the federal judiciary is being hampered in its ability to intervene by forces in Congress that have sponsored legislation such as the Prison Reform Litigation Act and the Antiterrorism and Effective Death Penalty Act.

- Symposium. *A Discussion of Judicial Independence with Judges of the United States Court of Appeals for the Tenth Circuit*. 74 DENVER UNIVERSITY LAW REVIEW 355 (1997). A presentation of a panel discussion between seven sitting justices of the Tenth Circuit and members of the Denver University Law Review. Each judge voices opinions about the role of the federal judiciary, growing concerns about the need for judicial restraint, pressures associated with the appointment process, and other issues relevant to a discussion of judicial independence.
- Symposium. *Politicization of the Courts: Balancing the Need for Judicial Independence Against the Need for Judicial Accountability*. 6 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 295 (Summer 1983). This is a reprint of a late 1982 panel discussion held at Southwestern University of Law, sponsored by The Federalist Society for Law and Public Policy Studies. It includes audience questions and responses. Panelists include California Justices Macklin Fleming, Bernard A. Jefferson, L. Thaxton Hanson, and James A. Cobey. Much of the panelists' discussion involves differing views of the merits of judicial activism.
- Tacha, Deanell Reece. *Independence of the Judiciary for the Third Century*. 46 MERCER LAW REVIEW 645 (Winter 1995) (Part of Symposium). Judge Tacha gives her perspective on judicial independence in light of current congressional activity. She discusses sentencing guidelines, case management requirements, and the budget for the courts.
- Vitiello, Michael & Glendon, Andrew J. *Article III Judges and the Initiative Process: Are Article III Judges Hopelessly Elitist?*. 31 LOYOLA OF LOS ANGELES LAW REVIEW 1275 (June 1998). The author examines the initiative process in California and the rise in hostility towards judges who have impeded immediate implementation of controversial propositions. He discusses attacks against the judiciary, particularly the demand by some politicians to repeal the lifetime tenure provisions of Article III. He argues that independent judges may do a better job than the initiative process in reflecting a broad consensus view on controversial social issues.
- Walker, John M. *Current Threats to Judicial Independence and Appropriate Responses: A Presentation to the American Bar Association*. 12 SAINT JOHN'S JOURNAL OF LEGAL COMMENTARY 45 (Fall 1996) (Part of Symposium). In this brief address, the author discusses current threats to judicial independence, including criticism of judges by

members of the other branches during campaign season and Congressional control over the judiciary's budget and salaries.

Wallace, J. Clifford. *Judicial Administration in a System of Independents: A Tribe with Only Chiefs*. 1978 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 39. Judge Wallace attempts to reconcile the tension between judicial independence and judicial administration. He maintains that judicial administration decisions are compromises between conflicting needs for judicial independence and systems control.

White, Penny J. *It's a Wonderful Life, or Is It? America without Judicial Independence*. 27 UNIVERSITY OF MEMPHIS LAW REVIEW 1 (Fall 1996). In this inspirational essay based on an address, former Judge White envisions how America would have developed absent judicial independence. She asserts that most if not all of the significant Supreme Court decisions (e.g., *Mapp v. Ohio*, *Miranda*, *Gideon v. Wainwright*, *Dartmouth College v. Woodward*, etc.) would not have happened, indeed, that economic development in the U.S. would have been markedly different. She emphasizes the need to remind the public why judicial independence is so important.

Ziskind, Martha Andes. *Judicial Tenure in the American Constitution: English and American Precedents*. 1969 SUPREME COURT REVIEW 135. The author reviews the early American experience with judicial control and discipline. She also examines the debates of the Constitutional Convention and early state constitutions.

II. SUBJECT-SPECIFIC WORKS ON JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

A. AGENCIES AND ADMINISTRATIVE LAW JUDGES: INDEPENDENCE AND ACCOUNTABILITY

Books, Papers, and Reports

COFER, DONNA PRICE. *JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING PROCESS*. Westport: Greenwood Press, 1985. This study of the independence of Social Security Administration (SSA) Administrative Law Judges (ALJs) concludes that the organizational structure of the SSA allows for political pressure to be exerted on these judges and for interference in their work. The author examines SSA practices during the 1970s and the effect of a lawsuit

brought by the ALJs against the SSA premised on SSA practices which violated their independence, as well as the results of a Fall 1982 questionnaire submitted to the ALJs.

Articles

- Baxendale, Scott E. Note, *Growing Pains for the Board of Patent Appeals and Interferences: A Plan for Restoring Judicial Independence*. 29 JOHN MARSHALL LAW REVIEW 171 (Fall 1995). The author of this Note examines the power of the Commissioner of the Patent and Trade Office (PTO) to interfere with decisions of the Board of Patent Appeals. The author proposes legislation that would clarify the roles of the PTO and Board of Patent Appeals.
- Endris, Lori Kyle & Penrod, Wayne E. *Judicial Independence in Administrative Adjudication: Indiana's Environmental Solution*. 12 SAINT JOHN'S JOURNAL OF LEGAL COMMENTARY 125 (Fall 1996) (Part of Symposium). The authors examine current trends in Indiana's administrative adjudicative process, particularly its attempts to assure fairness and impartiality in the environmental arena. The authors maintain that an independent forum for environmental adjudication enhances the perception that dispute resolution is fair and efficient.
- Harves, Duane R. *The 1981 Model State Administrative Procedure Act: The Impact on Central Panel States*. 6 WESTERN NEW ENGLAND LAW REVIEW 661 (1984) (Part of Symposium). The author discusses the 1981 Model State Administrative Procedure Act and certain failings in its language which detract from the goal of ensuring independence in administrative adjudicatory hearings. He suggests alternative language be adopted by those states using a central-panel system.
- Hoffman, Richard B. & Cihlar, Frank P. *Judicial Independence: Can It be Without Article III?* 46 MERCER LAW REVIEW 863 (Winter 1995) (Part of Symposium). The authors discuss past problems with the Social Security Administration's adjudicative procedures and its lack of judicial independence. They argue for expanding the selection process and increasing the independence of administrative law and Article I judges so that these judges will more closely resemble Article III judges in terms of their judicial independence.
- Kauper, Karen Y. Note, *Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute*. 18 UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM 537 (Winter 1985). The author argues that under the present system, federal ad-

ministrative agencies can influence administrative law judges, which leads to bias and a lack of quality decisionmaking and deprives the parties of a fair hearing. She proposes a model statute establishing a corps of administrative law judges who operate independently of federal administrative agencies and to whom all agency administrative proceedings should be referred.

- Liman, Lewis J. Note, *The Constitutional Infirmities of the United States Sentencing Commission*. 96 YALE LAW JOURNAL 1363 (May 1987). The author critiques the United States Sentencing Commission and concludes that the Commission is constitutionally invalid. He argues that the Sentencing Reform Act of 1984 violates principles of separation of powers by: (1) permitting Congress to unlawfully delegate power to the Commission, and (2) providing that Article III judges sit on the Commission, which poses a threat to judicial independence because the President has the power to appoint and remove Commission members.
- Lussier, Edward. *The Role of the Article I "Trial Judge."* 6 WESTERN NEW ENGLAND LAW REVIEW 775 (1984) (Part of Symposium). The author compares the hearing procedures of various federal agencies in the context of examining the question of the appropriate degree of independence when there is a federal right to a hearing before an administrative law judge. He expresses concern over the tension which may exist between agency pressure to reduce caseloads and the judge's duty to thoroughly investigate and review each case.
- O'Keefe, L. Hope. *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence versus Employee Accountability*. 54 GEORGE WASHINGTON LAW REVIEW 591 (May 1986). The author examines judicial independence issues for federal administrative law judges. Her discussion focuses on agency control and oversight, including performance evaluations and production standards.
- Palmer, Victor W. & Bernstein, Edwin S. *Establishing Federal Administrative Law Judges as an Independent Corps: The Heflin Bill*. 6 WESTERN NEW ENGLAND LAW REVIEW 673 (1984) (Part of Symposium). The authors examine a pending bill which seeks to create an independent, unified corps of federal administrative law judges. They conclude that the Due Process Clause is violated by having a system in which federal administrative law judges are subordinate employees of agencies motivated to interfere with their decisionmaking, and argue in favor of the corps concept. [Related articles in same Sympos-

sium issue: Levant, Michel. *A Unified Corps of Administrative Law Judges—The Transition from a Concept to an Eventual Reality*. 6 WESTERN NEW ENGLAND LAW REVIEW 705 (1984); and Zankel, Norman. *A Unified Corps of Federal Administrative Law Judges is Not Needed*. 6 WESTERN NEW ENGLAND LAW REVIEW 723 (1984).]

Parmelee, Paul W. Note, *Preserving the Judicial Independence of Federal Administrative Law Judges: Are Existing Protections Sufficient?* 4 THE JOURNAL OF LAW & POLITICS 207 (Summer 1987). The author examines whether federal administrative-law judges (ALJs) are sufficiently independent from their parent agencies so that agency influence will not color their decisions. The author discusses the role and status of ALJs, the adequacy of existing protections under the Administrative Procedure Act and proposals for ALJ reorganization.

Rich, Malcolm C. *The Central Panel System and the Decisionmaking Independence of Administrative Law Judges: Lessons for a Proposed Federal Program*. 6 WESTERN NEW ENGLAND LAW REVIEW 643 (1984) (Part of Symposium). The author discusses the advantages and disadvantages of the central-panel system used by some states and how it might be implemented at the federal level as a means of accommodating the tension between decisional independence and accountability.

Rosenblum, Victor. *Contexts and Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors*. 6 WESTERN NEW ENGLAND LAW REVIEW 593 (1984) (Part of Symposium). Professor Rosenblum examines the Administrative Procedure Act's provision regarding removal of administrative law judges "for good cause," along with related case law, Attorney General opinions, and administrative decisions. He concludes that "for good cause" is not contingent on judicial behavior and may be based on outside factors, and offers examples to serve as a guideline.

B. BANKRUPTCY JUDGES AND JUDICIAL INDEPENDENCE

Articles

Currie, David P. *Bankruptcy Judges and the Independent Judiciary*. 16 CREIGHTON LAW REVIEW 441 (1982-83). Professor Currie examines the creation of bankruptcy courts by a 1978 act of Congress. He ar-

gues that these courts are unconstitutional because their judges are not afforded the Article III protections of life tenure and irreducible salary.

Chemerinsky, Erwin. *Decision-Makers: In Defense of Courts*. 71 AMERICAN BANKRUPTCY LAW JOURNAL 109 (Spring 1997). Professor Chemerinsky explores the nature of judicial decisionmaking by the bankruptcy courts, and its relation to Article III courts. The theme of judicial independence runs throughout the article: why it does and doesn't matter for purposes of assessing the validity and power of Bankruptcy Courts.

Krattenmaker, Thomas G. *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*. 70 GEORGETOWN LAW JOURNAL 297 (October 1981). Professor Krattenmaker argues that the bankruptcy courts established by the Bankruptcy Reform Act of 1978 are unconstitutional because they lack the protections afforded to the federal courts created under Article III of the Constitution.

C. CONGRESS AND THE JUDICIARY: LEGISLATIVE ACTIONS AFFECTING JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Books, Papers, and Reports

PRITCHETT, C. HERMAN. CONGRESS VERSUS THE SUPREME COURT, 1957-1960. Minneapolis: University of Minnesota, 1961. Professor Pritchett examines the efforts of the 85th and 86th Congresses to curb the Supreme Court—both in terms of reversing the effect of certain Warren Court decisions and in terms of limiting the Court's power of judicial review. His analysis concentrates on national security cases as well as segregationist responses to *Brown*. He concludes that this Congressional effort failed principally for three reasons: the Court was protected by the respect felt for the judiciary; the character and nature of some of the attackers and their exaggeration of charges; and the Court took a more moderate position in several subsequent decisions.

WHEELER, RUSSELL R. & BERMANT, GORDON. FEDERAL COURT GOVERNANCE: WHY CONGRESS SHOULD—AND WHY CONGRESS SHOULD NOT—CREATE A FULL-TIME EXECUTIVE JUDGE, ABOLISH THE JUDICIAL CONFERENCE, AND REMOVE CIRCUIT JUDGES FROM DISTRICT COURT GOVERNANCE. Washington, D.C.: Federal Judicial

Center (1994) (Long Range Planning Series, Paper No. 3). The authors analyze the structure and practice of federal court governance and its impact on judicial independence. They describe the current governance arrangement and offer arguments for and against a detailed set of alternatives to the current arrangement.

Articles

- Chase, Harold W. *The Warren Court and Congress*. 44 MINNESOTA LAW REVIEW 595 (1959-60). The author, a political-science professor, asserts that contrary to popular opinion, the Warren Court has been exceptionally deferential to Congress. He contends that for those with libertarian values, the Court has failed to defend constitutional liberties from Congressional invasion. He concludes that criticisms of the Court have stemmed principally from unhappiness over a limited portion of its decisions, namely, those relating to segregation and national security issues.
- Elliott, Sheldon D. *Court-Curbing Proposals in Congress*. 33 NOTRE DAME LAWYER 597 (1957-58). Professor Elliott looks at a flurry of Congressional actions directed at the Warren Court and compares them to legislative responses in another era, 1935-37. He analyzes the various different types of legislative activity aimed at somehow limiting the Supreme Court's (and other federal courts') powers, including proposed jurisdiction limits.
- Handberg, Roger & Hill, Harold F., Jr. *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court Versus Congress*. 14 L. & Soc'y Rev. 309 (1980). The authors examine the degree of relationship between court activities and congressional behavior. They review the arguments in the debate on whether the Court serves as a "legitimater" of the will of the majority in Congress or whether the Court acts as a disturber of the status quo.
- Jackson, Vicki C. *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*. 86 GEORGETOWN LAW JOURNAL 2445 (July 1998) (Part of Symposium). In this introduction to a symposium, the author presents an overview of questions relating to the integrity of the federal courts and the constitutionality of recent legislation that restricts the courts' jurisdiction. She briefly examines some of the unresolved questions concerning the Suspension Clause and Article III judicial power that have been raised this legislature. She also briefly summarizes the arguments presented by each contributor to the symposium.

- Lawrie, Timothy A. *Interpretation and Authority: Separation of Powers and the Judiciary's Battle for Independence in New Hampshire, 1786-1818*. 39 AMERICAN JOURNAL OF LEGAL HISTORY 310 (July 1995). The author describes the New Hampshire judiciary's struggle to restrain the legislature from exercising both legislative and judicial power. The author includes several examples of when the legislature granted new trials through legislation.
- Menez, Joseph F. *A Brief in Support of the Supreme Court*. 54 NORTHWESTERN UNIVERSITY LAW REVIEW 30 (1959). The author, a political-science professor, discusses the history of attacks on and criticism of the Supreme Court and refutes current criticisms and suggested "reforms." He notes that there is much talk of separation of powers and judicial independence until the Court "brings Congress up to date on the Bill of Rights."
- Note, *Congressional Reversal of Supreme Court Decisions: 1945-1957*. 71 HARVARD LAW REVIEW 1324 (1957-58). The author examines instances of Congress-Supreme Court "disagreement" (passage of a bill which modifies the legal result of a Supreme Court decision) during this 12-year period and concludes that these actions were the result of a host of causes rather than any single factor. The author also concludes that these situations almost always involve a return to a "common understanding" disrupted by the Supreme Court decision as well as near unanimous disapproval of the decision by affected groups.
- Redish, Martin H. *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*. 77 NORTHWESTERN UNIVERSITY LAW REVIEW 143 (1982). The author responds to Professor Sager's 1981 article (*See infra* this Section). He sets forth his views on the ability of Congress to control the jurisdiction of the federal courts.
- Resnik, Judith. *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*. 86 GEORGETOWN LAW JOURNAL 2589 (July 1998) (Part of Symposium). Professor Resnik analyzes the trend in authorizing non-Article III judges to perform federal judicial tasks and argues that non-Article III judges must be protected from political pressure. She also argues that the most vulnerable litigants must have access to Article III judges because they

are the most politically protected judges. She maintains that this trend in using non-Article III judges threatens the independence of the judiciary and that Article III judges must resist congressional encroachments on their judicial functions.

Rosenberg, Gerald N. *Judicial Independence and the Reality of Political Power*. 54 THE REVIEW OF POLITICS 369 (Summer 1992). Using five indicators of political preference, Professor Rosenberg tests his judicial independence hypothesis (i.e., that these factors are irrelevant to judicial decisions). He does so by selecting nine periods of high frequency Congressional attacks on the courts (e.g., bills in response to unpopular decisions, bills limiting jurisdiction, etc.), and examining U.S. Supreme Court decisions during those periods. He concludes that in six of these periods, the Court succumbed to Congressional pressure, rejects the hypothesis, and concludes that judicial independence is least likely to be found when it is most needed.

Sager, Lawrence Gene. *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*. 95 HARVARD LAW REVIEW 17 (1981). Professor Sager discusses the authority of Congress to limit the jurisdiction of the Supreme Court and lower federal courts. Current proposals to limit federal court jurisdiction in specific subject areas are reviewed. He regards such bills as presenting a serious threat to the independent authority of the federal courts.

Sager, Lawrence G. *Klein's First Principle: A Proposed Solution*. 86 GEORGETOWN LAW JOURNAL 2525 (July 1998) (Part of Symposium). The author analyzes the ramifications of the 1871 holding in *United States v. Klein*, a decision which invalidated a legislative restriction on federal court authority. He asserts that the first principle of the case is that the judiciary will not be forced to speak or act against its own best judgment on matters within its competence that will have great impact on the political community. He also asserts that the decision forbids Congress from requiring the judiciary to act in accordance with Congress's view of an issue that is before the judiciary. He applies this analysis to Congress's enactment of the Religious Freedom Restoration Act.

Stumpf, Harry P. *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*. 14 JOURNAL OF LAW AND POLITICS 377 (1965). Applying a political science analysis, Professor Stumpf looks at legislative responses to unpopular Supreme Court decisions.

He notes the distinction between decision reversal legislation (which he characterizes as generally accepted and regularized behavior) and court curbing actions (which he believes Congress perceives as irregular). He investigates hypotheses regarding factors (judicial sacrosanctity and interest groups) whose presence and degree of strength determine the extent of Congress' decision reversal activity.

Tacha, Deanell Reece. *Judges and Legislators: Renewing the Relationship*. 52 OHIO STATE LAW JOURNAL 279 (1991). Judge Tacha notes instances when better communication between Congress and the federal judiciary would have prevented perceived incursions into judicial independence or bickering between judges and legislators. She explores the nature of an appropriate relationship between the two branches and proffers guidelines which can enhance communication without impinging upon the judiciary's independence. [See also Judge Tacha's later article on this same topic: *Judges and Legislators: Enhancing the Relationship*. 44 AMERICAN UNIVERSITY LAW REVIEW 1537 (June 1995).]

White, J. Patrick. *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society*. 19 MARYLAND LAW REVIEW 181 (Summer 1959). The author discusses efforts by the public and Congress in opposition to Warren Court decisions in the areas of desegregation and civil liberties. He concludes that in contrast to prior periods of Court-Congress antagonism, the Warren Court is following the majority's wishes and is reflecting the temper of the time, and that it is the legislative and executive branches which have failed in this respect.

D. JUDICIAL COMPENSATION AND BUDGETARY MATTERS

Books, Papers, and Reports

GORDON, DENISE L. THE INDEPENDENCE OF THE JUDICIARY: SOPHISTICATED INTERDEPENDENCE AS A TOOL FOR SURVIVAL FOR CALIFORNIA'S TRIAL COURTS. Williamsburg: National Center for State Courts, 1998 (Court Executive Development Program Papers Series). In this essay, the author reviews the recent history of inter-branch conflicts between California's legislature and judiciary. She

discusses the resulting effects on court funding and judicial reactions and explores recent court consolidation efforts and proposals and their effect upon judicial independence.

Articles

- Jackson, Jeffrey. *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MARYLAND LAW REVIEW 217 (1993). The author looks at how the "inherent power" doctrine has been used to secure adequate state court funding. He examines specific disputes in which courts have issued orders demanding funds from the legislature.
- Rosenn, Keith S. *The Constitutional Guaranty Against Diminution of Judicial Compensation*. 24 UCLA LAW REVIEW 308 (1976). The author discusses the compensation clause of the Constitution and examines the salary of the federal judiciary in relation to inflationary factors and other measures. The author concludes that the real income of federal judges has declined dramatically in recent years and that this is a threat to the integrity of the judiciary.
- Sprecher, Robert A. *The Threat to Judicial Independence*. 51 INDIANA LAW JOURNAL 380 (Winter 1976) (Part of Symposium). Judge Sprecher argues that inadequate compensation of federal judges affects the quality and independence of the courts. He maintains that judicial salaries should not be compared to congressional salaries and that low salaries lead to judicial resignations.
- Toma, Eugenia Froedge. *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*. 20 JOURNAL OF LEGAL STUDIES 131 (1991). The author examines the role of the budget as a signaling device to the Supreme Court. She asserts that Congress signals its approval or disapproval of the decisions of the Supreme Court through its budget allocations.
- Toma, Eugenia Froedge. *A Contractual Model of the Voting Behavior of the Supreme Court: The Role of the Chief Justice*. 16 INTERNATIONAL REVIEW OF LAW & ECONOMICS 433 (December 1996). The author examines the Supreme Court's independence by focusing on whether the Chief Justice acts in reaction to budgetary signals from Congress. She analyzes the relationship between budgets and decisions of the Court between the years 1946 to 1988.

E. JUDICIAL DISCIPLINE, IMPEACHMENT, REMOVAL, AND RESIGNATION

Books, Papers, and Reports

BERGER, RAOUL. *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS*. Cambridge: Harvard University Press, 1973. The author explores the historical bases for impeachment in England and America. In Chapter IV, he focuses on judicial impeachment and whether impeachment is the sole means for removing Article III judges and whether it can be based on conduct less than "high crimes and misdemeanors." He concludes affirmatively as to the last issue, asserting that there is an implied power to remove judges for "misbehavior." He urges Congress to enact legislation confirming such a power.

THE GOOD JUDGE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON FEDERAL JUDICIAL RESPONSIBILITY. New York: Priority Press Publications, 1989 (includes Background Paper by Thomas E. Baker). The Task Force examines three major mechanisms for monitoring and sanctioning judges in connection with Article III's "good behavior" condition of judicial office: the 1980 Judicial Councils Reform and Judicial Conduct and Disability Act; impeachment; and judicial socialization. The Task Force makes recommendations for improving each method.

Judicial Independence: Discipline and Conduct: Hearings on H.R. 1620, H.R. 1930, and H.R. 2181 Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary, House of Representatives. 101st Cong., 1st sess. (1989). These Hearings are regarding H.R. 1620, the Judicial Discipline and Impeachment Reform Act of 1989, and H.R. 1930, relating to pay raises for senior status judges. The Hearings primarily focus on discipline and removal of judges. The appendix includes numerous letters, articles, and reports on the topic.

Judicial Misconduct and Discipline: Hearing Before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, House of Representatives. 105th Cong., 1st sess. (1997). This Hearing examines judicial activism as "misconduct" and as a basis for impeachment. Witness testimony and statements on this topic conflict, particularly as they relate to judicial independence.

Judicial Tenure Act: Hearings Before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary. 95th Cong., 1st sess. (1977). These Hearings are regarding a bill (S. 1423) preceding the later enactment of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. The Judicial Tenure Act would have established a Council on Judicial Tenure, and authorized it to receive, investigate and hear complaints against federal judges. Matters then would have been referred to a Court on Judicial Discipline. This court would have been authorized to temporarily suspend federal judges during inquiries and to order removal, censure, involuntary retirement, and dismissal.

Judicial Tenure Act: Hearings Before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary, 94th Cong., 2nd sess. (1976). These Hearings are regarding a bill (S. 1110) preceding the later enactment of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. This bill would have established the Council on Judicial Tenure and procedures other than impeachment for removing federal judges and for censuring them for misconduct.

Judicial Tenure and Discipline 1979-80: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives. 96th Cong., 1st & 2d sess. (1980). These Hearings regard bills which led to the enactment of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. The witness testimony and prepared statements, along with the appendix materials, substantially discuss judicial independence as it relates to the matters under consideration (which include disciplinary mechanisms for federal judges, removal short of impeachment, and other means of enforcing "good behavior" by federal judges).

NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL. REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL. Washington, D.C.: U.S. Government Printing Office, 1993. The Commission was charged with investigating problems related to discipline and removal of life-tenured federal judges and evaluating alternatives to the current system for judicial discipline and removal. This Report concludes that impeachment is the only means for removing an Article III judge and rejects proposed constitutional amendments and statutes which would effect other disciplinary and removal remedies. The Commission also issues recommendations

targeted at easing the burden on Congress inherent in current impeachment procedures and suggests greater involvement by the executive and judicial branches.

Report of the National Commission on Judicial Discipline and Removal: Hearing Before the Subcommittee on Intellectual Property and Judicial Administration of the Committee on the Judiciary, House of Representatives. 103rd Cong., 1st sess. (1993). This Hearing considers the tentative recommendations and draft Report of above National Commission with respect to discipline and impeachment procedures for life-tenured federal judges.

VAN TASSEL, EMILY FIELD. *WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789 TO 1992.* Washington, D.C.: Federal Judicial Center, 1993. The author looks at 188 Federal judges who have resigned from the bench for stated reasons other than age or health, and the relationship between resignation, malfeasance, and threats of punishment. She examines the effect of Justice Department investigations and local prosecutions and threats thereof as they relate to issues of judicial independence and accountability. The appendix and indices provide substantial judge-specific information, along with other charts and tables.

VOLCANSEK, MARY L. *JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE.* Urbana: University of Illinois Press, 1993. The author examines the impeachments of Judges Claiborne, Hastings, and Nixon during the 1980s, and the implications for judicial independence and accountability. She also assesses the effect of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, concluding that the Act played a significant role only in the Hastings impeachment.

WHEELER, RUSSELL R. & LEVIN, A. LEO. *JUDICIAL DISCIPLINE AND REMOVAL IN THE UNITED STATES.* Washington, D.C.: Federal Judicial Center, 1979. The authors trace the origins of, and evaluate, judicial discipline mechanisms used in the federal and state systems. They offer explanations for the growth in formal mechanisms of judicial discipline and proffer four normative considerations which must be addressed when such mechanisms are under consideration, including the obligation to preserve judicial independence and limits thereon.

Articles

- Abrams, Paula. *Spare the Rod and Spoil the Judge? Discipline of Federal Judges and the Separation of Powers*. 41 DEPAUL LAW REVIEW 59 (1991). The author presents an historic overview of judicial discipline and reviews various attempts to construct a mechanism for removal other than through impeachment. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 is discussed, and she concludes that the Act is unconstitutional.
- Baker, Lynn C. Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*. 94 YALE LAW JOURNAL 1117 (April 1985). The author argues that the 1980 Act violates the Constitution's allocation of powers and that it denies Article III judges proper judicial process. She expresses concern that issues of substance will be disguised as judicial administration complaints, turning into a license to harass judicial mavericks. She calls for a return to impeachment as the sole basis for punishing Article III judges for non criminal misbehavior, in order to restore the balance between judicial independence and accountability.
- Barr, Jeffrey N. & Willging, Thomas E. *Decentralized Self-Regulation, Accountability, and Judicial Independence under the Federal Judicial Conduct and Disability Act of 1980*. 142 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 25 (November 1993). The authors examine the National Commission on Judicial Discipline and Removal (NCJDR), which was created by the Judicial Conduct and Disability Act of 1980. They discuss the operation of the NCJDR and present empirical data concerning the types of complaints filed with the Commission and their dispositions.
- Battisti, Frank J. *The Independence of the Federal Judiciary*. 13 BOSTON COLLEGE INDUSTRIAL AND COMPARATIVE LAW REVIEW 421 (February 1972). Judge Battisti discusses several Congressional attempts in the past 50 years to encroach upon the independence of the federal judiciary. He argues that the impeachment provisions of the Constitution offer the exclusive means of removing federal judges from the bench. Adapted from a lecture before the Boston College Law School.
- Battisti, Frank J. *An Independent Judiciary or an Evanescent Dream*. 25 CASE WESTERN LAW REVIEW 711 (Summer 1975). Judge Battisti reviews the history and function of the Constitution's impeachment

provisions. He discusses 28 U.S.C. §332(d) and argues that using the statute to regulate conduct on the bench presents a threat to judicial independence.

Berger, Raoul. *"Chilling Judicial Independence": A Scarecrow.* 64 CORNELL LAW REVIEW 822 (1979). The author responds to "Chilling Judicial Independence," by Judge Kaufman (Section I, *supra*). He takes issue with Judge Kaufman's belief that it would be bad policy to establish a commission whereby judges would police themselves.

Berger, Raoul. *Impeachment of Judges and "Good Behavior" Tenure.* 79 YALE LAW JOURNAL 1475 (July 1970). The author examines the origins of tenure for the federal judiciary and investigates whether impeachment is the exclusive method of removing judges from the bench. The positions of various scholars are reviewed, and the author concludes that judges can be removed from the bench for something less than "high crimes and misdemeanors."

Burbank, Stephen B. *Alternative Career Resolution: An Essay on the Removal of Federal Judges.* 76 KENTUCKY LAW JOURNAL 643 (1987-88) (Part of Symposium). The author argues that a constitutional amendment that would change the current arrangement for the removal of federal judges should be deferred until adjustments or improvements in the current arrangement are proven inadequate. He suggests improvements in the appointments process, retirement and disability statutes, the 1980 Act, the criminal process, and the impeachment process.

Cameron, James Duke. *The Inherent Power of a State's Highest Court to Discipline the Judiciary.* 54 CHICAGO-KENT LAW REVIEW 45 (1977) (Part of Symposium). Judge Cameron examines the source and extent of the inherent power of a state's highest court to discipline its judges. He argues that the failure to use this power invites legislative encroachment, which is a greater threat to judicial independence than the exercise of self-discipline by the judicial branch.

Case Comment. *Courts—Judicial Responsibility—Statutory and Constitutional Problems Relating to Methods for Removal or Discipline of Judges.* 21 RUTGERS LAW REVIEW 153 (Fall 1966). This Comment examines *Chandler v. Judicial Council of the Tenth Circuit of the United States*, a case in which Judge Steven Chandler challenged the powers of the Judicial Council after the Council found him unable or

unwilling to perform his duties efficiently. The comment argues that current legislation is unclear regarding what procedures judges will face when they are guilty of misconduct.

Catz, Robert S. *Removal of Federal Judges by Imprisonment*. 18 RUTGERS LAW JOURNAL 103 (Fall 1986). Using the situation of Judge Harry Claiborne as a springboard, Professor Catz explores the propriety of imprisonment of a federal judge prior to impeachment. He concludes that imprisonment is an improper remedy for a sitting federal judge and that judicial independence is threatened when imprisonment precedes impeachment action.

Davis, Jr., Robert R. Note, *The Chandler Incident and Problems of Judicial Removal*, 19 STANFORD LAW REVIEW 448 (1966-67). The author looks at a 1965 incident in which the Judicial Council issued an order removing the judicial powers and cases of Judge Chandler. In so doing, he examines the implications for removal procedures for federal judges.

Edwards, Drew E. Comment, *Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act*. 75 CALIFORNIA LAW REVIEW 1071 (May 1987). The author focuses on the role that politics play in disciplining judges under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. He asserts that the Act may be used to compromise the political independence of judges because it exposes federal judges to censure or removal for upholding unpopular sentiments.

Edwards, Harry T. *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*. 87 MICHIGAN LAW REVIEW 765 (February 1989). Judge Edwards wrestles with the issue of how to deal with judicial "bad behavior" short of impeachable offenses. He questions the validity of various provisions of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, arguing that Congress itself lacked the power to delegate to the judiciary the power to self-regulate. He argues that the judiciary's power to self-regulate is inherent and that the only constitutionally permissible way to regulate judicial misconduct and disability that does not involve impeachment is through judicial self-regulation. He favors informal mechanisms, such as judicial persuasion and peer pressure.

Feerick, John D. *Impeaching Federal Judges: A Study of the Constitutional Provisions*. 39 FORDHAM LAW REVIEW 1 (1970-71). Motivated by then Representative Gerald Ford's assertion that an im-

peachable offense is whatever a majority of Congress says it is at that moment, the author explores the historical developments leading up to the impeachment provisions of the Constitution. He opines on the standard for impeachment and avers that views of the nature expressed by Ford constitute a grave threat to judicial independence.

Fitschen, Steven W. *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*. 10 REGENT UNIVERSITY LAW REVIEW 111 (1998). The author defends the current movement to remove federal judges whom, in the author's view, render opinions contrary to the Constitution or exercise arbitrary power. The author writes from a Christian viewpoint and argues that Congress should not hesitate to remove federal judges guilty of tyrannical behavior. He provides useful tables summarizing past targets of impeachment proceedings and the outcome of their cases.

Frankel, Jack E. *Judicial Conduct and Removal of Judges For Cause in California*. 36 SOUTHERN CALIFORNIA LAW REVIEW 72 (1962). The author explores the history of measures used in California to address judicial fitness and conduct, particularly regarding removal of judges. He examines the changes effected in 1960 and 1961 by the establishment of the Commission on Judicial Qualifications and the adoption of grounds for removal and retirement.

Frankel, Jack E. *Judicial Discipline and Removal*. 44 TEXAS LAW REVIEW 1117 (1966). The author examines judicial discipline and removal systems in four states: New Jersey, New York, Illinois, and California.

Gallo, Jon J. *Removal of Federal Judges—New Alternatives to an Old Problem: Chandler v. Judicial Council of the Tenth Circuit*. 13 UCLA LAW REVIEW 1385 (1965-66). The author examines the 1965 attempt to remove Judge Chandler from his judicial duties and discusses the problems with existing judicial removal mechanisms. He argues that the best safeguard for judicial misbehavior is to allow the Judicial Conference exclusively (or in concert with Judicial Councils) to determine whether a judge, by misbehavior, has forfeited judicial office.

Garvey, John H. *Foreword: Judicial Discipline and Impeachment*. 76 KENTUCKY LAW JOURNAL 633 (1987-88) (Part of Symposium). In this foreword to a symposium on judicial discipline and impeachment, the author provides an overview of judicial independence for federal judges. He asserts that the tension between judicial independence and

the control of judicial ethics exists because of the fear that the other branches of government will use control of judicial ethics to weaken judicial independence and judicial review.

Gerhardt, Michael J. *The Constitutional Limits to Impeachment and Its Alternatives*. 68 TEXAS LAW REVIEW 1 (November 1989). Professor Gerhardt traces the history of impeachment procedure and presents an in-depth analysis of the process. He argues that many commentators have ignored that impeachment essentially is a political process.

Hamilton, William. Note, *Indictment of Federal Judges: Chilling Judicial Independence*. 35 UNIVERSITY OF FLORIDA LAW REVIEW 296 (Spring 1983). The author discusses the criminal indictments of Article III judges prior to impeachment by Congress for crimes pertaining to official conduct. He concludes that criminal justice system procedures do not sufficiently protect the independence of Article III judges.

Kastenmeier, Robert W. & Remington, Michael J. *Judicial Discipline: A Legislative Perspective*. 76 KENTUCKY LAW JOURNAL 763 (1987-88) (Part of Symposium). The authors examine the alternative to impeachment—the 1980 judicial discipline legislation. The authors maintain that the current system under the Act works fairly well but that some statutory changes to the Act are needed as well as a study commission on judicial impeachment and removal.

Kramer, Robert & Barron, Jerome A. *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behaviour."* 35 GEORGE WASHINGTON LAW REVIEW 455 (March 1967). The authors examine the meaning of the constitutional phrase "during good behavior." They discuss the historical understanding of this phrase, especially that of Hamilton and Story.

Kurland, Philip B. *The Constitution and the Tenure of Federal Judges: Some Notes From History*. 36 UNIVERSITY OF CHICAGO LAW REVIEW 665 (1969). Professor Kurland discusses several critical episodes in American history when the legislative or executive branch proposed to limit the independence of the federal judiciary. He concludes that any legislative attempt to ease the removal of judges or limit their tenure is unconstitutional.

McConnell, Mitch. *Reflections on the Senate's Role in the Judicial Impeachment Process and Proposals for Change*. 76 KENTUCKY LAW JOURNAL 739 (1987-88) (Part of Symposium). The author discusses

his experiences as a member of the Special Senate Committee which was created to receive evidence in the impeachment proceedings against Judge Harry Claiborne. Based on his experiences, the author concludes that although impeachment drains legislative resources, the current system still is desirable because of the protection it affords judicial independence. He does not support delegating removal power to the judiciary.

Meites, Jerome B. & Pflaum, Steven F. & Krause, Carolyn H. *Justice James D. Heiple: Impeachment and the Assault on Judicial Independence*. 29 LOYOLA UNIVERSITY OF CHICAGO LAW JOURNAL 741 (Summer 1998). The authors discuss the appropriate standards for impeachment under the Illinois Constitution, in light of the recent impeachment investigation of Illinois Supreme Court Justice James D. Heiple. The authors find that the Illinois Constitution fails to provide explicit guidance as to what is an impeachable offense. They discuss the appropriate standards for impeachment of an Illinois official which will ensure that judicial independence is not harmed by politically motivated impeachment proceedings.

Moser, William R. *Populism, A Wisconsin Heritage: Its Effect on Judicial Accountability in the State*. 66 MARQUETTE LAW REVIEW 1 (Fall 1982). The author defines and places in historical context the following judicial accountability measures: removal by impeachment, incompatibility, mandatory retirement, address of the legislature, election, recall, and conviction of a felony. He then examines their actual implementation in populist Wisconsin, including their respective use and non-use throughout the state's history.

Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*. 41 NEW YORK UNIVERSITY LAW REVIEW 149 (March 1966). This Note discusses standards for judicial conduct in light of their possible impact on judicial independence. It also reviews the systems for discipline and removal of judges in California, New York, New Jersey, and Wisconsin.

Nunn, Sam. *Judicial Tenure*. 54 CHICAGO-KENT LAW REVIEW 29 (1977) (Part of Symposium). Senator Nunn's piece explores the effectiveness and constitutionality of impeachment and argues in favor of adoption of the then-pending Judicial Tenure Act (the forerunner to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980). He is dismissive of judicial independence concerns raised regarding the proposed Act, characterizing judicial independence as involving solely independence from other governmental branches.

- Re, Edward D. *Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*. 8 NORTHERN KENTUCKY LAW REVIEW 221 (1981). Judge Re surveys the history of judicial independence in the United States. He specifically examines the Judicial Councils Reforms and Judicial Conduct and Disability Act of 1980 and discusses whether such measures are an impingement on judicial independence or reasonable attempts to increase the accountability of the judiciary.
- Note, *Removal of Federal Judges—Alternatives to Impeachment*. 20 VANDERBILT LAW REVIEW 723 (April 1967). This unsigned student article examines inadequacies in both the impeachment process and current alternative statutory procedures that apply to misbehaving or disabled judges. The author suggests enacting legislation which would empower the Judicial Councils in each circuit to remove judges who misbehave or are permanently disabled from performing their duties.
- Rotunda, Ronald D. *An Essay on the Constitutional Parameters of Federal Impeachment*. 76 KENTUCKY LAW JOURNAL 707 (1987-88) (Part of Symposium). The author examines some of the unsettled issues of the impeachment process, such as the effect of resignation on the process and the meaning of the phrases “high Crimes and Misdemeanors” in Article II and “shall hold their Offices during good Behaviour” in Article III.
- Schoenbaum, Edward J. *A Historical Look at Judicial Discipline*. 54 CHICAGO-KENT LAW REVIEW 1 (1977) (Part of Symposium). Professor Schoenbaum examines various methods of judicial discipline in historical context. He cautions against use of methods which interfere with judicial decisionmaking or which are based on insubstantial or capricious grounds, because these methods impair judicial independence.
- Shaman, Jeffrey M. *State Judicial Conduct Organizations*. 76 KENTUCKY LAW JOURNAL 811 (1987-88) (Part of Symposium). The author examines the procedures followed by state judicial-conduct organizations for disciplining state judges. He maintains that this system does not threaten judicial independence because it is self-regulated, the discipline is directed towards activities not within the ambit of judicial independence, and it recognizes that judges may not be penalized for making wrong or unpopular decisions.

- Sherry, Suzanna. *Judicial Independence: Playing Politics with the Constitution*. 14 GEORGIA STATE UNIVERSITY LAW REVIEW 795 (July 1998) (Part of Symposium). The author questions whether the constitutional provisions safeguarding judicial independence protect judges from impeachment for issuing rulings that Congress considers erroneous or loathsome. She interprets the Constitution using the following approaches: textualism, originalism, and pragmatism. She finds that each of these approaches yields the same result: judges are constitutionally independent of other political branches and may not be impeached merely for objectionable decisions.
- Shipley, Carl L. *Legislative Control of Judicial Behavior*. 35 LAW & CONTEMPORARY PROBLEMS 178 (1970). The author reviews Congressional efforts to exert control over removal, retirement, and disciplining of federal judges. The author urges that the proponents of change review the historical foundations of judicial independence and the words of the framers of the Constitution.
- Smith, Alexa J. Note, *Federal Judicial Impeachment: Defining Process Due*. 46 HASTINGS LAW JOURNAL 639 (January 1995). The author reviews the current impeachment procedure for federal judges, emphasizing the changes effected by the Judicial Councils Act. The impeachment cases against Judges Claiborne, Hastings, and Nixon are examined. The author concludes that the current impeachment process violates the due process rights of accused judges and recommends specific reforms.
- Stern, Gerald. *Is Judicial Discipline in New York State a Threat to Judicial Independence?*. 7 PACE LAW REVIEW 291 (Winter 1987). The author discusses the history of judicial discipline in New York and the various categories of offenses that give rise to discipline. He is troubled by the dramatic increase in disciplinary cases that occurred since the establishment of the State Commission on Judicial Conduct in 1975.
- Stewart, Carl E. *Contemporary Challenges to Judicial Independence*. 43 LOYOLA LAW REVIEW 293 (Fall 1997). Judge Stewart provides an overview of attempts to remove judges from the bench because of unpopular rulings, particularly discussing the attack on Justice Chase and the more recent calls for the removal of Judge Harold Baer, Jr.

- Stolz, Preble. *Disciplining Federal Judges: Is Impeachment Hopeless?*. 57 CALIFORNIA LAW REVIEW 659 (1969). Professor Stolz explores the constitutional mechanism for impeaching federal judges. He concludes that while the process is flawed, current needs could be met through necessary reforms.
- Ward, Brent D. *Can the Federal Courts Keep Order in Their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils*. 1980 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 233. The author examines the propriety of appellate court mandamus orders and orders of judicial councils to redress alleged judicial misconduct at the district court level. He argues that when district court judges act abusively, both types of orders should be issued without hesitation. He characterizes these orders as mere caseload alterations rather than a threat to judicial independence.
- Weingarten, Reid H. *Judicial Misconduct: A View From the Department of Justice*. 76 KENTUCKY LAW JOURNAL 799 (1987-88) (Part of Symposium). In this speech, the author maintains that investigations and criminal prosecutions of federal judges for wrongdoing help ensure the integrity of the federal bench. He reviews some of the concerns that must be addressed, however, when investigating and prosecuting a judge, such as protecting the judge's confidential communications with staff, not interfering with the Fifth and Sixth Amendment rights of litigants appearing before the judge, and the difficulty of prosecuting judges in their own districts.
- Williams, Victor. *Third Branch Independence and Integrity Threatened by Political Branch Irresponsibility: Reviewing the Report of the National Commission on Judicial Discipline and Removal*. 5 SETON HALL CONSTITUTIONAL LAW JOURNAL 851 (Summer 1995). The author demonstrates the structural link between judicial independence and political branch responsibility for proper maintenance of the courts. He maintains that contemporary political branch irresponsibility is damaging judicial independence and integrity. He also asserts that the Senate evidence committee process possibly violates the Constitution's bill of attainder prohibition, criticizes the final report of the National Commission on Judicial Removal and Discipline, and examines the bad behavior charges and impeachment actions taken against two federal judges (Judge Robert Collins and Judge Robert Aguilar).

F. JUDICIAL DISQUALIFICATION

Articles

Banner, Stuart. Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*. 40 STANFORD LAW REVIEW 449 (January 1988). The author of this Note examines the issues that arise when a judicial campaign contributor appears in court as either a party or an attorney. He asserts that a judge should be disqualified from any case involving a party who has contributed to the judge's most recent campaign or involving an attorney who as contributed more than a certain amount to the judge's most recent campaign.

Symposium. *Disqualification of Judges (the Sarokin Matter): Is it a Threat to Judicial Independence?*. 58 BROOKLYN LAW REVIEW 1063 (Winter 1993). This panel discussion on the disqualification of judges on grounds related to impartiality uses the Third Circuit's disqualification of District Court Judge Lee Sarokin (based on his comments regarding tobacco company litigants) as a focal point. The panelists include Judge Jack B. Weinstein, Professor Stephen Gillers, Professor Monroe Freedman, and Joseph T. McLaughlin. The strain between the sometimes conflicting concerns of judicial independence and judicial impartiality are discussed.

Uelman, Gerald. *Disqualification of Judges for Campaign Support or Opposition*. 3 GEORGETOWN JOURNAL OF LEGAL ETHICS 419 (1990). In this short article, Professor Uelman proposes an amendment to Canon 3 of the Model Code of Judicial Conduct, which would require disqualification of a judge when a party has contributed \$500 or more or has served in a campaign leadership position.

G. JUDICIAL ETHICS AND SPEECH REGULATION

Books, Papers, and Reports

McFADDEN, PATRICK M. ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS. Chicago: American Judicature Society, 1990 (Studies of the Justice System). This monograph is part of the American Judicature Society's Judicial Elections Project. The author looks at the law and ethics governing judicial election campaigns, including campaign finance and campaign advertising and other related judicial speech. He suggests re-examining codes of ju-

ditional conduct and offers specific recommendations regarding campaign fundraising and campaign conduct.

Articles

Abramson, Leslie W. *The Judge's Ethical Duty to Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence*. 25 HOFSTRA LAW REVIEW 751 (Spring 1997). The author discusses the implications for independence when judges are required to report misconduct by other judges or lawyers. She analyzes the ABA Code of Judicial Conduct.

Alfini, James J. & Brooks, Terrence J. *Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7*. 77 KENTUCKY LAW JOURNAL 671 (1988-89) (Part of Symposium). After reviewing various ethics provisions related to judicial election campaigns and related case law and ethics advisory opinions, the authors conclude that Canon 7 of the ABA Model Code of Judicial Conduct is not achieving its goal of balancing accountability with the appearance of judicial impartiality and independence. They assert that due to judicial speech restrictions, electorates do not receive adequate information in order to judge judges, and that judicial candidates do become aware of contributors' identities (thereby affecting the appearance of impartiality). [Note: related Commentary at p. 747 of the Georgetown Journal's]

Copple, Robert F. *From the Cloister to the Street: Judicial Ethics and Public Expression*. 64 DENVER UNIVERSITY LAW REVIEW 549 (1988). The author explores the ethical boundaries of judicial comment, particularly as it relates to judicial independence and power. He reviews pertinent canons of the Judicial Code of Conduct. He argues that the benefits of judicial education of the public through judicial speech outweigh concerns about tainting judicial impartiality or power.

Craig, Amy M. Note, *The Burial of an Impartial Judicial System: The Lifting of Restrictions on Judicial Candidate Speech in North Carolina*. 33 WAKE FOREST LAW REVIEW 413 (1998). In Part 1 of the article, the author discusses restrictions on judicial candidate speech, including ABA proscriptions on speech and First Amendment challenges to restrictions. In Parts 2 and 3, she concentrates on North Carolina's approach to judicial candidate speech and the new canon adopted in North Carolina on this issue.

- D'Alemberte, Talbot. *Searching for the Limits of Judicial Free Speech*. 61 TULANE LAW REVIEW 611 (February 1987). The author argues that tolerance of occasional abuses of free speech by rogue judges is preferable to abridging those rights. He reviews the history of judicial speech and the Code of Judicial Conduct's standards for judicial speech.
- Gross, Leonard E. *Judicial Speech: Discipline and the First Amendment*. 36 SYRACUSE LAW REVIEW 1181 (1986). Professor Gross examines the limits on both in-court and out-of-court judicial speech and the disciplinary proceedings to which judges may be subjected. He discusses the relevant provisions of the ABA Code of Judicial Conduct.
- Johnson, Vincent R. *Ethical Campaigning for the Judiciary*. 29 TEXAS TECH LAW REVIEW 811 (1998). The author examines the scope of permissible campaign activity for Texas judicial candidates, including limitations on campaign speech. He examines the Texas Code of Judicial Conduct in detail.
- Kiovsy, Elizabeth. Comment, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*. 47 OHIO STATE LAW JOURNAL 201 (1986). The author argues that the standards that state courts apply in limiting attorney criticism and judges' speech during judicial election campaigns are overly restrictive and impinge on the free speech rights of both attorneys and judges. She proposes a standard of speech that she maintains is less restrictive and would maximize the flow of information to the electorate during judicial election campaigns.
- Levien, Jason Miles & Fatka, Stacie L. *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*. 2 MICHIGAN LAW AND POLICY REVIEW 71 (1997). The authors aver that there is a growing public cynicism with respect to the judicial election system which is not being redressed by current state efforts regarding judicial campaign finance. They argue that a cap on judicial campaign expenditures is necessary and constitutional given the overriding state interest in preserving judicial independence and integrity.
- Lubet, Steven. *Professor Polonius Advises Judge Laertes: Rules, Good Taste and the Scope of Public Comment*. 2 GEORGETOWN JOURNAL OF LEGAL ETHICS 665 (1988-89) (Part of Symposium). Professor

Lubet's essay is written partly in response to Symposium articles by Erwin Chemerinsky (Section II, Subsection I, *infra*) and William G. Ross (*See infra* this Section) and partly to emphasize his view that extrajudicial speech is a topic of great concern to judges and one which is in substantial need of spelled-out rules. He argues in favor of a bright-line approach with specifically articulated norms for judicial speech. [Professor Ross's response is contained at pp. 691-93 of the Georgetown Journal's Symposium.]

- Noseda, James R. Comment, *Limiting Off-Bench Expression: Striking a Balance Between Accountability and Independence*. 36 DEPAUL LAW REVIEW 519 (Summer 1987). The author analyzes the Model Code of Judicial Conduct and its application to impartiality issues arising from a judge's off-bench involvement with controversial or political issues. To improve the balance between judicial independence and judicial accountability, the author recommends amendments to the Code and judicial promulgation of definitions of permissible off-bench activity.
- Ross, William G. *Extrajudicial Speech: Charting the Boundaries of Propriety*. 2 GEORGETOWN JOURNAL OF LEGAL ETHICS 589 (1988-89) (Part of Symposium). Professor Ross argues that most extrajudicial speech is inappropriate and that it should be limited to rare situations. Rather than categorically banning or approving particular situations, he advocates use of a balancing test which accommodates the needs for judicial independence and impartiality, judges' First Amendment rights, and the value of judges' contributions to public debate and education.
- Schoshinski, Maura Anne. Note, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*. 7 GEORGETOWN JOURNAL OF LEGAL ETHICS 839 (Winter 1994). The author argues that judicial elections, by making judges dependent upon political and financial support, are incompatible with and compromise judicial independence and force judges to violate the Model Code of Judicial Conduct. Recognizing that judicial elections are unlikely to be abolished, she proffers several suggestions for improving them, including requiring actual and complete public disclosure of all aspects of campaign financing, and establishing election monitors and watch groups, who also can encourage voluntary limits on spending and advise on disqualification.
- Shaman, Jeffrey. *Judicial Ethics*. 2 GEORGETOWN JOURNAL OF LEGAL ETHICS 1 (1988-89). Professor Shaman briefly looks at state and federal judicial discipline systems. He concludes that the current judicial

discipline system (especially state judicial conduct organizations) is fair and usually consistent with due process and does not impinge on judicial independence.

Shepard, Randall T. *Campaign Speech: Restraint and Liberty in Judicial Ethics*. 9 GEORGETOWN JOURNAL OF LEGAL ETHICS 1059 (Summer 1996). Judge Shepard briefly examines the history of restraints on judicial speech in connection with judicial campaigns and the theories applied in striking down or criticizing such restraints, and finds those theories wanting. He argues that the issue principally is a due-process one based on threats to impartiality, and when balancing judges' First Amendment interests, he would opt in favor of litigants' due-process rights.

Snyder, Lloyd B. *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*. 35 UCLA LAW REVIEW 207 (December 1987). The author argues that the American Bar Association-sponsored proscription of campaign speech by judicial candidates violates the First Amendment. Further, he finds no evidence that free and open campaign debate diminishes judicial impartiality. The author also argues that the ABA restrictions on campaign speech create an uninformed electorate.

H. JUDICIAL IMMUNITY

Articles

Feinman, Jay M. & Cohen, Roy S. *Suing Judges: History and Theory*. 31 SOUTH CAROLINA LAW REVIEW 201 (1980). The author explores the history of judicial immunity in both English and American law. He discusses numerous decisions, including the U.S. Supreme Court case of *Stump v. Sparkman*.

Pennisi, Monica V. Note, *Simmons v. Conger: The Illusive Nature of Judicial Accountability*. 7 WIDENER JOURNAL OF PUBLIC LAW 177 (1997). The author of this Note critiques the decision in *Simmons v. Conger* (86 F.3d 1080 (11th Cir. 1996)) and discusses the historical development of judicial immunity and equitable injunctive relief. She examines how the Supreme Court has dealt with judicial protection in the area of monetary damages and injunctive relief awarded against judges in the context of section 1983 of the Civil Rights Act. She argues that the current test used to determine the availability of judicial immunity protection for a judicial officer must be reworked.

Weisberger, Joseph R. *The Twilight of Judicial Independence—Pulliam v. Allen*. 19 SUFFOLK UNIVERSITY LAW REVIEW 537 (Fall 1985). The author discusses the history of judicial immunity as developed in English and American law. The *Pulliam* case is discussed, in which the U.S. Supreme Court held that a state trial-court judge could be subject to an injunction and attorney's fee award in a Section 1983 action.

I. JUDICIAL SELECTION: FEDERAL JUDGES

Books, Papers, and Reports

CARTER, STEPHEN L. THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS. New York: BasicBooks, 1994. In this self-described extended essay, Professor Carter raises problems with the current confirmation process for U.S. Supreme Court nominees and proposes a number of solutions, some dramatic. A major theme of the book is the threat to judicial independence posed by (1) asking nominees how they would rule in particular cases under the guise of inquiries into "judicial philosophy," and (2) treating a nominee's views as extremist when the real objection is disagreement with such views. He explores the dilemma of how to confirm someone who will provide accountability (i.e., the role of the Court in implementing Rawls' "public reason" idea) without compromising independence and discusses the need to search for a nominee's "moral vision."

THE MILLER CENTER OF PUBLIC AFFAIRS, UNIVERSITY OF VIRGINIA. IMPROVING THE PROCESS OF APPOINTING FEDERAL JUDGES: A REPORT OF THE MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES. Charlottesville: Miller Center of Public Affairs, University of Virginia, 1996. This report analyzes current problems in the process of selecting and confirming nominees to the federal bench. A list of specific reforms is presented. Includes an appendix that summarizes questionnaires used by the Senate, Department of Justice, and American Bar Association as part of the nomination process.

SHELDON, CHARLES H. & MAULE, LINDA S. CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES. Pullman, WA: Washington State University Press, 1997. Professors Sheldon and Maule explore the interplay of judicial recruitment with what they re-

fer to as "The Judges' Dilemma," i.e., the competing demands of judicial accountability and independence. They apply an analytical framework (the "Articulation Model") to federal and state selection examples in order to explore how varying selection methods affect judicial behavior, including the degree of accountability and independence perceived by judges.

WOLFSON, BARBARA (ED.). PRESERVING THE INDEPENDENCE OF THE JUDICIARY: THE DUAL CHALLENGE OF DEMOCRACY AND THE BUDGET CRISIS: REPORT OF THE 1993 FORUM FOR STATE COURT JUDGES. Washington, D.C.: Roscoe Pound Foundation, 1994. This report focuses on several aspects of judicial selection, the ongoing crisis of funding, and the effect that both of these have on the integrity of the judiciary as a co-equal third branch of government.

Articles

Chemerinsky, Erwin. *Ideology, Judicial Selection and Judicial Ethics*. 2 GEORGETOWN JOURNAL OF LEGAL ETHICS 643 (1988-89) (Part of Symposium). After examining three approaches to evaluating judicial candidates (whether in the context of appointment or election), Professor Chemerinsky argues that evaluating judges on the basis of their ideology and likely decisions on important issues is appropriate. He recommends an approach and reconciles it with judicial-ethics standards.

Gavison, Ruth. *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1617 (September 1988) (Part of Symposium). The author discusses theories of law and theories of adjudication and their connection to judicial selection and judicial accountability. She recommends a role analysis of judges which factors in a logical linguistic basis, politics, psychology, and decision theory.

Hatch, Orrin G. *The Politics of Picking Judges*. 6 THE JOURNAL OF LAW AND POLITICS 35 (Fall 1989). Senator Hatch criticizes the politicization of the judicial selection process and maintains that it threatens judicial independence. He cites the Senate confirmation hearings for Judge Bork as an example.

Little, Laura E. *Loyalty, Gratitude, and the Federal Judiciary*. 44 AMERICAN UNIVERSITY LAW REVIEW 699 (February 1995). The process of appointing federal judges creates, according to the author,

several potential benefactors, including the President, legislators, and bar associations. She discusses the dilemma faced by federal judges in maintaining their impartiality and independence.

- Rader, Randall R. *The Independence of the Judiciary: A Critical Aspect of the Confirmation Process*. 77 KENTUCKY LAW JOURNAL 767 (1989). The author examines when detailed ideological inquiries are justified during the judicial confirmation process, the appropriate scope of these inquiries, and the role judicial independence plays in the Senate proceedings. To support his analysis, he relies both on the history of the drafting of the Constitution and the Senate's practices in past confirmation proceedings.
- Schauer, Frederick. *Judging in a Corner of the Law*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1717 (September 1988) (Part of Symposium). The author argues that appellate adjudication represents only a small part of the law and should be resolved through political, economic, and social criteria rather than through traditional legal theories. He maintains that judicial selection of appellate judges should thus consider the candidate's political, economic, and social views. He also maintains that some appellate judges need not be lawyers because the skills necessary to be a judge are not taught in law school.
- Shapiro, Michael H. *Introduction: Judicial Selection and the Design of Clumsy Institutions*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1555 (September 1988) (Part of Symposium). In this brief introduction to a symposium, the author argues that the theory of adjudication which an institution follows determines the method of judicial selection that it implements.
- Solum, Lawrence B. *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1735 (September 1988) (Part of Symposium). The author analyzes the arguments presented in Frederick Schauer's article from the same symposium (*See Schauer, supra*). He finds Schauer's suggestions worthy of consideration and encourages the examination of moral predispositions of judges during the selection process.
- Tushnet, Mark. *Constitutional Interpretation and Judicial Selection: A View from the Federalist Papers*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1669 (September 1988) (Part of Symposium). The author finds in his analysis of the Federalist Papers a connection between judicial tenure and a theory of constitutional interpretation. He concludes that the Papers suggest that long judicial tenure is required in

order to avoid unconstitutional laws produced by transient majorities. He also argues that the Papers' defense of judicial review is no longer tenable and must be replaced by a normative theory of interpretation.

Yarnold, Barbara M. *Politicized Judicial and Congressional Asylum Policymaking, 1980-1987*. 17 THE JUSTICE SYSTEM JOURNAL 207 (1994). The author maintains that federal judges continue to assess their political environments even after appointment to the bench because they owe their positions to political parties. She focuses on appellate cases regarding political asylum from 1980 to 1987 and finds that federal courts acted as policymakers when adjudicating these cases.

J. JUDICIAL SELECTION AND RETENTION: APPOINTMENT, ELECTION, AND RECALL OF STATE JUDGES

Books, Papers, and Reports

CARBON, SUSAN B. & BERKSON, LARRY C. JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES. Chicago: American Judicature Society, 1980. The authors of this study explore and refute many of the traditional assumptions underlying the use of judicial retention elections. They argue that retention elections were designed to allow qualified judges to serve for long terms with only a modest amount of accountability, and that low voter turn-out and low removal rates are consistent with the purposes of retention elections. They question, however, whether retention elections are an effective and efficient mechanism for balancing lengthy tenure with public accountability. They also look in some detail at thirty-three judges who were removed from office through retention elections.

CHAMPAGNE, ANTHONY & HAYDEL, JUDITH (EDS.). JUDICIAL REFORM IN THE STATES. Lanham: University Press of America, 1993. In this work, various authors explore the politics of state judicial selection reform from a political science perspective, using the Peltason-Rosenblum framework. Reform efforts in seven states are examined. The editors assert that these efforts establish conflicts of interests among competing groups over competing interests, i.e., competition over candidates and over selection methods.

DUBOIS, PHILIP L. FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY. Austin: University of Texas Press, 1980. Professor Dubois undertook to collect and analyze em-

pirical data for all state judicial elections (southern states excluded) from 1948 through 1974 for justices of state courts of last resort. His research focuses significantly on the ability of judicial elections to secure popular accountability of judges. He concludes that partisan elections more effectively meet accountability goals and overall are superior to nonpartisan elections.

SHELDON, CHARLES H. & MAULE, LINDA S. CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES. Pullman: Washington State University Press, 1997. [See *supra* Section II, Subsection I.]

WOLFSON, BARBARA (ED.). PRESERVING THE INDEPENDENCE OF THE JUDICIARY: THE DUAL CHALLENGE OF DEMOCRACY AND THE BUDGET CRISIS. REPORT OF THE 1993 FORUM OF STATE JUDGES. New Haven: Roscoe Pound Foundations, Yale Law School, 1993. This is a report of a conference exploring two potential threats to judicial independence: (1) state court judicial selection and retention; and (2) inadequate court funding. The report reprints papers by two Yale law professors, and judicial responses thereto, which respectively discuss these two issues: Carter, Stephen L., *Is Democracy a Threat to Judicial Independence*; and Wedgwood, Ruth, *Is There a Constitutional Claim to Minimum Funding of the Courts?*.

Articles

Adamany, David & Dubois, Philip. *Electing State Judges*, 1976 WISCONSIN LAW REVIEW 731. The authors examine the procedures for electing state judges, focusing on voter turnout, socioeconomic characteristics of voters, political attitudes, and other factors that have an impact on the "legitimacy" of the election results. They conclude that most jurisdictions have practices which limit voter participation and involvement, thus undermining the goal of accountability that should be furthered by a system of electing judges. They analyze the election procedure in Wisconsin.

Bierman, Luke. *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*. 60 ALBANY LAW REVIEW 339 (1996). The author disputes the claim that adopting a merit selection system for judges will avoid partisan politics and improve the quality of the bench. He asserts that New York's adoption of merit selection for the New York Court of Appeals has allowed the political leadership and organized bar to maintain their influence in selecting judges and has ended the challenge to their influence that they formerly faced from the populace in the electoral system.

- Brauer, Kurt M. Note, *The Role of Campaign Fundraising in Michigan's Supreme Court Elections: Should We Throw the Baby Out with the Bathwater?* 44 WAYNE LAW REVIEW 367 (Summer 1998). The author rejects adoption of alternative judicial selection methods and asserts that it is possible to achieve judicial independence and accountability, fairness, and impartiality by modifying Michigan's current campaign financing mechanism. He suggests changes related to equality in funding for all Michigan Supreme Court candidates, spending and contribution limits, and time limits for fundraising.
- Bright, Stephen B. *Can Judicial Independence be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary.* 14 GEORGIA STATE UNIVERSITY LAW REVIEW 817 (July 1998) (Part of Symposium). The author asserts that attaining an independent state judiciary is essential because of the federal courts' declining role in enforcing the Bill of Rights on behalf of minorities and the poor. He maintains that this is particularly true in southern states because, he argues, their courts have a history of deciding cases based on political pressure. The author strongly urges states to replace judicial elections with merit selection systems so that state judges may be insulated from political influence.
- Bright, Stephen B. & Keenan, Patrick J. *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases.* 75 BOSTON UNIVERSITY LAW REVIEW 759 (1995). The authors examine the reality that popularly-elected judges must consider public opinion when ruling in capital cases. They believe that it is difficult for judges to maintain their independence in capital cases when faced with election or retention campaigns.
- Bright, Stephen B. *Political Attacks on the Judiciary: Can Justice Be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?* 72 NEW YORK UNIVERSITY LAW REVIEW 308 (May 1997). The author reviews the recent barrage of criticisms of judges and their decisions and warns of the consequences for judicial independence. He discusses specific political campaigns, including the retention election for Tennessee Supreme Court Justice Penny White.
- Case, David W. *In Search of Independent Judiciary: Alternatives to Judicial Elections in Mississippi.* 13 MISSISSIPPI COLLEGE LAW REVIEW 1 (Fall 1992). The author criticizes Mississippi's popular election of judges. He maintains that it opens the judiciary to the influence and control of political parties. He suggests that Mississippi implement a

judicial-selection system of merit or commission selection and discusses the advantages of such a system.

- Champagne, Anthony. *The Selection and Retention of Judges in Texas*. 40 SOUTHWESTERN LAW JOURNAL 53 (May 1986) (Part of Symposium). The author presents an empirical analysis of judicial selection in Texas and compares it with studies of other systems of selection in other states. He discusses the problem of insufficient information given to voters in partisan elections and the campaign techniques used in issue-less judicial elections.
- Chemerinsky, Erwin. *Evaluating Judicial Candidates*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1985 (September 1988) (Part of Symposium). Professor Chemerinsky explores some of the ideas presented in an article from the same symposium (*See infra* Grodin, this Subsection) and agrees with the article's premise that judicial retention elections should be abolished in California and elsewhere.
- Chemerinsky, Erwin. *Ideology, Judicial Selection and Judicial Ethics*. 2 GEORGETOWN JOURNAL OF LEGAL ETHICS 643 (1988-89) (Part of Symposium) [*See supra* Section II, Subsection I.]
- Croley, Steven P. *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*. 62 UNIVERSITY OF CHICAGO LAW REVIEW 689 (Spring 1995). The author examines how elected judges advance or undermine the principles of constitutional democracy. He discusses the disincentive for elected judges to secure protection of individuals and minorities when these judges may face defeat by the majority during elections.
- Dubois, Philip L. *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*. 40 SOUTHWESTERN LAW JOURNAL 31 (May 1986) (Part of Symposium). In addition to discussing the tremendous attention generated by the judicial selection process, the author addresses the role that elections play in the selection of state judges, clarifies some of the empirical findings that have been made with respect to the operation of judicial elections, and argues that partisan elections ensure judicial accountability.
- Dubois, Philip L. *Penny for Your Thoughts? Campaign Spending in California Trial Court Elections, 1976-1982*. 39 THE WESTERN POLITICAL QUARTERLY 265 (1986). The author analyzes the campaign spending of over four hundred candidates who competed in 153 contested nonpartisan primary and run-off elections for seats on California's Superior Court from 1976 through 1982. He uses these

findings to examine the role of money in financing campaigns for elective judicial positions in other states and suggests that discussions on campaign finance reform should focus on whether the patterns of contributions to judicial campaigns exacerbate the potential for conflict of interest on the part of judges.

Feerick, John D. & Vance, Cyrus. *Becoming a Judge: Report on the Failings of Judicial Elections in New York State*. 9 PACE LAW REVIEW 199 (Spring 1989). This Report of the Commission on Government Integrity established in New York in 1987 examines judicial selection methods in New York, including their effect on judicial independence issues. The Commission found that New York judicial elections are captive to political party organizations to such a degree that it threatens judicial independence and impartiality. The Commission recommends abolishing judicial elections and utilizing only a merit-based appointment system.

Gavison, Ruth. *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1617 (September 1988) (Part of Symposium). [See *supra* Section II, Subsection I.]

Grodin, Joseph R. *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1969 (September 1988) (Part of Symposium). This former California Supreme Court justice argues that developing objective criteria for voters in judicial retention elections is futile because they will continue to cast their ballots on the basis of whether they agree with the cases that the judge has decided. He maintains that the electoral review of justices should be abolished in California and elsewhere.

Hall, Melinda Gann. *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*. 49 THE JOURNAL OF POLITICS 1117 (November 1987). In this limited case study of the Louisiana Supreme Court, the author explores the hypothesis that justices who desire reelection will not dissent in cases involving politically sensitive issues. She concludes that perceived constituent values may suppress dissents on highly salient issues for certain types of justices, although further research is needed.

Hall, Melinda Gann. *Electoral Politics and Strategic Voting in State Supreme Courts*. 54 THE JOURNAL OF POLITICS 427 (May 1992). The author reports on a study exploring the voting behavior of state su-

preme court justices as it correlates to electoral variables. The study explored one type of constituency effect (liberal justices responding to a conservative electorate on controversial issues) in four state courts of last resort. The author concludes that the justices examined acted to minimize electoral defeat by not dissenting in cases involving politically volatile issues.

- Hall, Kermit L. *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*. 1984 AMERICAN BAR FOUNDATION RESEARCH JOURNAL 345 (Spring). Professor Hall looks at four states (California, Ohio, Tennessee, and Texas) and the switch from partisan, popular election of judges to nonpartisan elections over the period 1850-1920. He views this change as detrimental to accountability and judicial credibility. He also concludes that these changes did not measurably affect dissent rates and that appellate judges viewed popular partisan election as a potential rather than real threat to judicial independence.
- Handberg, Roger. *Judicial Accountability and Independence: Balancing Incompatibles? (Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise?)*. 49 UNIVERSITY OF MIAMI LAW REVIEW 127 (Fall 1994). The author discusses Florida's judicial selection process and the difficulties of balancing the values of judicial independence against judicial accountability. He also discusses lobbying efforts aimed at converting the entire state judiciary to full merit selection. He maintains that merit selection in Florida will not effectively handle the problem of intense interest group involvement in retention elections.
- Hill, Jr., John L. *Taking Texas Judges Out of Politics: An Argument for Merit Election*. 40 BAYLOR LAW REVIEW 339 (Summer 1988). The author advocates adopting a system of merit selection for Texas judges. He proposes a "Texas Plan" similar to the "ABA Plan" and the "Missouri Plan." The author maintains that the Texas Plan would remove appellate judges from partisan politics and restore the public's confidence in the political independence of the Texas judiciary.
- Horan, Michael J. & Griffin, Kenyon N. *Ousting the Judge: Campaign Politics in the 1984 Wyoming Judicial Retention Elections*. 24 LAND AND WATER LAW REVIEW 371 (1989). The authors present a case study in which a twelve year veteran of Wyoming's bench lost in a 1984 retention election. The authors conclude that this resulted from judicial supervisory agencies' failure to resolve complaints made about the judge's administrative steps taken to promote judicial effi-

ciency. This issue instead went to the electorate and resulted in the judge's ouster. The authors note the threat posed to judicial independence when a judge is removed for essentially administrative decisions he has made.

Koch, Edward J. *The Independence of the Judiciary?* 1 NEW YORK CITY LAW REVIEW 457 (Fall 1996). The author compares the merit-based judicial selection system that he followed while Mayor of the City of New York to the merit-based judicial selection system followed by Mayor Giuliani. The author concludes that the system he followed while Mayor promoted judicial independence while Mayor Giuliani's system compromises it.

Ladinsky, Jack & Silver, Allan. *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections.* 1967 WISCONSIN LAW REVIEW 128. The authors, both sociology professors, examine two direct electoral challenges to Wisconsin State Supreme Court justices in 1964-65, and the social and political contexts in which they occurred. They explore the nature of a judicial election expressly founded on the issue of the electorate's right to judge the judiciary on the basis of particular decisions.

Linde, Hans A. *Elective Judges: Some Comparative Comments.* 61 SOUTHERN CALIFORNIA LAW REVIEW 1995 (September 1988) (Part of Symposium). The author agrees with the arguments presented in an article from this same symposium (*see supra* Grodin, this Subsection) and analyzes Oregon's judicial election system in light of the points raised in Justice Grodin's article.

Mosk, Stanley. *Commentary: "Chilling Judicial Independence"—The California Experience.* 3 WESTERN NEW ENGLAND LAW REVIEW 1 (Summer 1980). Justice Mosk's commentary, adapted from a lecture, criticizes the 1978 investigation by the California Commission on Judicial Performance into allegations that justices of the California Supreme Court may have manipulated the electoral system for their own political gain. Justice Mosk asserts that this investigation demonstrates that once a nonjudicial body is permitted to investigate the internal functions of the judiciary, absent clear charges of corruption, judicial independence is gravely threatened.

Nelson, Dorothy W. *Variations on a Theme—Selection and Tenure of Judges.* 36 SOUTHERN CALIFORNIA LAW REVIEW 4 (1962). Judge Nelson argues that the California judicial selection and retention pro-

cess jeopardizes judicial independence. She summarizes the history of judicial selection and tenure in California and compares California's methods of selection and retention to the methods implemented by the American Bar Association, Missouri, and foreign legal systems. She proposes major changes in California's system for selecting and retaining judges.

Note, *The Ethical Dilemma of Campaigning for Judicial Office: A Proposed Solution*. 14 FORDHAM URBAN LAW JOURNAL 353 (1986). This Note examines Canon 7B(2) of the Code of Judicial Conduct (relating to judicial campaign financing), particularly as adopted, modified, and enforced in various states. The Note also discusses the results of a survey of elected state judges regarding judicial campaign conduct. Finally, the Note proposes modifications to Canon 7B(2) based on concerns raised by survey respondents and modifications made by various states.

Note, *Extrajudicial Activities of Judges*. 47 IOWA LAW REVIEW 1026 (1962). This Note discusses the various legal and ethical restrictions on extrajudicial activities of judges and maintains that the policy underlying these restrictions is the preservation of judicial independence. Particular focus is placed on state constitutional limitations on non judicial governmental activities of judges.

Papier, David J. Note, *Insulating Incumbent Judges from the Vicissitudes of the Political Arena: Retention Elections as a Viable Alternative*. 15 FORDHAM URBAN LAW JOURNAL 743 (1986-87). The author asserts that there is a basic conflict between judicial ethics rules and New York's practice of requiring trial level judges to run for reelection in popular elections. He proposes legislative change toward a retention election-style method for trial judges: a judge first would seek approval from a nonpartisan screening panel, then participate in an uncontested retention election.

Schauer, Frederick. *Judging in a Corner of the Law*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1717 (September 1998) (Part of Symposium). [See *supra* Section II, Subsection I.]

Schotland, Roy A. *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?* 2 JOURNAL OF LAW AND POLITICS 57 (1985). The author analyzes the cost of judges' campaign financing and the weakness of current ethical guidelines for judicial campaigns. He offers numerous proposals for improving the current system, including the creation of a judicial

campaign financing project, issuing voter's pamphlets to all registered voters, conditioning eligibility for bar endorsement on agreement to solicitation and contribution limits, barring personal use of campaign funds, and campaign statements about sentencing practices.

Shapiro, Michael H. *Introduction: Judicial Selection and the Design of Clumsy Institutions*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1555 (September 1988) (Part of Symposium). [See *supra* Section II, Subsection I.]

Solum, Lawrence B. *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1735 (September 1988) (Part of Symposium). [See *supra* Section II, Subsection I.]

Swanson, Rick A. & Melone, Albert P. *The Partisan Factor and Judicial Behavior in the Illinois Supreme Court*. 19 SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL 303 (Winter 1995). The authors test whether judges under the current Illinois partisan election system lack a sufficient degree of "judicial independence." They mathematically study the voting behavior of the Illinois Supreme Court from June 1991 through April 1993 and find that a justice's party affiliation is a principal predictor of voting behavior.

Thompson, Robert S. *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate*. 59 SOUTHERN CALIFORNIA LAW REVIEW 809 (May 1986). Justice Thompson proposes standards that should be considered by the public when evaluating judicial candidates in retention elections. He discusses the standards in the context of the 1986 California retention election.

Thompson, Robert S. *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*. 61 SOUTHERN CALIFORNIA LAW REVIEW 2007 (September 1988) (Part of Symposium). The author examines the judicial selection method used for the California Supreme Court and how this method affected California's 1986 judicial retention election. He maintains that the process of judicial selection in California is inherently unfair to judges because the campaigns in judicial retention elections focus on unpopular case decisions and not on the judges' accountability to the dictates of their office.

Traynor, Roger J. *Who Can Best Judge the Judges?* 53 VIRGINIA LAW REVIEW 1266 (1967). In this address by Justice Traynor, he discusses

issues such as popular election of judges and merit review. He examines California's experience, including the operation of the Commission on Judicial Qualifications.

Uelmen, Gerald F. *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME LAW REVIEW 1133 (May 1997). Professor Uelmen reviews the most contentious issues facing state Supreme Court justices in retention campaigns, specifically death penalty, abortion, and ballot measure rulings. He warns that the independence of these justices is threatened when a court must make rulings in the midst of a charged political climate. Florida is cited as the jurisdiction where the independence of the Supreme Court judiciary is being best preserved despite the threat of retention elections. [An adapted version of this article was published at 13 CRIMINAL JUSTICE 4 (Spring 1998) under the title *The Fattest Crocodile: Why Elected Judges Can't Ignore Public Opinion*.]

Uelman, Gerald F. *Essay—Supreme Court Retention Elections in California*. 28 SANTA CLARA LAW REVIEW 333 (Spring 1988). In this essay presented at the 1987 California Supreme Court Conference, Professor Uelman examines the history of California Supreme Court retention elections from 1849-1986 to determine if the 1986 election situation was an aberration. After looking at previous elections (as well as retention elections in other states), he concludes that although 1986 did not represent an aberration as such, the cushion of protection for justices has been steadily eroding, especially since 1966. He concludes that increased vulnerability and increased politicization in retention elections will be a part of every justice's future, and proposes that full twelve year terms be granted upon appointment and reelection for every justice. [The defense of and panelist responses to this essay are contained at pp. 357-372.]

K. OTHER OUTSIDE INFLUENCES ON JUDICIAL INDEPENDENCE

Books, Papers, and Reports

LEDFORD, RONALD. JUDICIAL INDEPENDENCE: A STUDY OF JUDICIAL ACTIVITY IN ILLINOIS. Williamsburg: National Center for State Courts, 1993 (Court Executive Development Program Papers Series). This study sought to ascertain the impact which judicial perception of

inadequate local jail facilities might have on judicial behavior. The project utilized survey responses from 230 judges. The author concludes that 80-100% of the respondents do not let outside influences with respect to jail conditions influence their decisions.

MADDI, DOROTHY LINDER. JUDICIAL PERFORMANCE POLLS Chicago: American Bar Foundation, 1977 (Research Contributions of the American Bar Foundation 1977, No. 1). In this brief paper, the author describes a study which assessed polls undertaken by thirty-four bar associations and judicial councils regarding judicial performance. The author concludes that these polls are undertaken to influence the electorate, judges, and appointed officials and thus potentially bear on judicial independence and accountability. The author provides guidelines for conducting future judicial performance polls and an appendix discussing the thirty-four polls she analyzed.

Articles

Dreschel, Robert E. *Accountability, Representation and the Communication Behavior of Trial Judges*. 40 THE WESTERN POLITICAL QUARTERLY 685 (1987). The author uses data from a survey of Wisconsin trial judges to explore the relationship between judges' feelings of accountability, representational role orientations, and media reliance and their off-bench communication behavior. He finds that public opinion plays a significant role in judicial decision-making and off-bench communication, and that while judges may not actively cooperate with the news media, their feelings of accountability lead them to monitor news media content for various purposes. He also finds judges' political background, age, legal experience, and decisional role orientations affect their cooperation with and reliance on the media.

Dubois, Philip L. *The Illusion of Judicial Consensus Revisited: Partisan Conflict on an Intermediate State Court of Appeals*. 32 JOURNAL OF AMERICAN POLITICAL SCIENCE 946 (1988). The author examines the outcomes of decisions made by three-judge appellate panels in a large sample of cases considered by the California Courts of Appeal from 1970 to 1983. He finds, despite the frequent occurrence of unanimity,

a significant variation in the outcome of intermediate appellate decisions depending upon the party affiliation of the judge writing the majority opinion and the partisan composition of the panel.

Freedman, Monroe H. *The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem*. 25 HOFSTRA LAW REVIEW 729 (Spring 1997) (Part of Symposium). The author asserts that criticism of judges by lawyers is constitutionally protected and desirable in a democratic society. However, in the rare case when judicial independence is threatened because of criticism of a judge's decision, such as in a pending case, he suggests that the judiciary disqualify itself from rehearing the case or that the higher court should let the criticized decision stand. The author maintains that either approach sends a message to the critics that criticizing decisions in pending cases will backfire against them.

Kaye, Judith S. *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*. 25 HOFSTRA LAW REVIEW 703 (Spring 1997) (Part of Symposium). The author asserts that criticism of the courts by lawyers is useful so long as it is responsible criticism. Responsible criticism requires, according to the author, that lawyers study decisions in their entirety before commenting on them.

Lieberman, Hal R. *Should Lawyers be Free to Publicly Excoriate Judges?* 25 HOFSTRA LAW REVIEW 785 (Spring 1997) (Part of Symposium). The author argues that lawyers do not have an unlimited right to make false or reckless personal attacks against judges in the press. He notes that such attacks are forbidden by various provisions of the ABA Model Code of Professional Responsibility, the ABA Model Rules of Professional Conduct, case law, and public policy.

Zagal, James & Winkler, Adam. *The Independence of Judges*. 46 MERCER LAW REVIEW 795 (Winter 1995) (Part of Symposium). The authors seek an introspective understanding of judicial independence. They find that in some instances the constraints experienced by judges in adjudicating cases stem not from the other branches of government but from within the judiciary and from cultural pressures.

III. WORKS ON FOREIGN, COMPARATIVE, AND INTERNATIONAL LAW AND JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

A. GENERAL AND MULTI-SUBJECT WORKS

Books, Papers, and Reports

SHETREET, SIMON & DESCHENES, JULES, EDS. *JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE*. Dordrecht: Martinus Nijhoff Publishers, 1985. Part I of this edited work includes twenty-nine papers analyzing how the concept of judicial independence is viewed by twenty-six national judicial systems. Part II addresses transnational jurisprudence on the topic, and reprints the text of related international documents with reports and commentary. Part III contains six essays exploring the doctrinal framework and theoretical background (including recent conceptual analyses) of judicial independence and judicial accountability.

STURGESS, GARRY & CHUBB, PHILIP. *JUDGING THE WORLD: LAW AND POLITICS IN THE WORLD'S LEADING COURTS*. Sydney: Butterworths, 1988. The authors' self-described "work of journalism" is divided into two sections. The first examines seventeen major courts (Anglo-American systems and international tribunals) and how they handle or fare with respect to political issues, including independence and accountability issues. The second part consists of interviews with over forty-two Chief Justices and Court Presidents, who are asked questions about judging and various political matters. The book is general and relies significantly upon comments and quotations from judges around the world.

Articles

Kirby, Michael. *Attacks on Judges: A Universal Phenomenon*. 72 THE AUSTRALIAN LAW JOURNAL 599 (August 1998). The author, a Justice of the High Court of Australia, asserts that political and public criticism of judges has increased in the last decade in common law countries, particularly in the United States. Justice Kirby fears that these attacks increasingly have as their aim interference with judicial decisionmaking, and he decries the targeting of individual judges and partisan political attacks. He advocates recruiting the media and the

Bar to defend the judiciary, increased use of court public affairs officers, increased civics education, and greater responses by Chief Justices on behalf of their courts.

Salzberger, Eli M. *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?* 13 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 349 (December 1993). The author examines why independent judiciaries are an almost universal phenomenon in democratic countries. He offers a positive analysis of judicial independence based on public-choice theory.

B. COMPARATIVE LAW

Books, Papers, and Reports

BECKER, THEODORE L. COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURTS. Lanham: University Press of America, 1987. In this self-described "exploratory investigation," Professor Becker examines the interrelations of courts and politics from a political science and comparative perspective. The book contains a substantial discussion of the measures, conditions, and functions of the judicial independence concept in various countries. The author also opines on the interrelation between judicial review and judicial independence, asserting that although the actual exercise of the power of judicial review is a measure of the degree of judicial independence present in any system, the latter may exist without the presence or exercise of the former.

MOHAN, S. JUSTICE TRIUMPHS (A COMPARATIVE STUDY OF THE INDEPENDENCE OF THE JUDICIARY). Madras: C. Subbiah Chetty, 1982. In this short book, the author, a Judge of the High Court of Madras, explores the historical developments related towards fostering judicial independence in certain countries (England, India, the United States, Canada, Malaysia, Nigeria, Australia, and Sri Lanka) with common law systems. The Appendix includes a table of further countries, with brief information provided regarding highest court, method of judicial selection, judicial tenure, and judicial power to determine the constitutionality of legislation.

VOLCANSEK, MARY L. WITH DE FRANCISCIS, MARY & LAFON, JACQUELINE LUCIENNE. JUDICIAL MISCONDUCT: A CROSS-NATIONAL COMPARISON. Gaineville: University Press of Florida,

1996. The authors compare the judicial discipline and removal systems of England, France, Italy, and the United States. Throughout, the relationship to judicial independence and accountability is considered.

WALTMAN, JEROLD L. & HOLLAND, KENNETH M. (EDS.). *THE POLITICAL ROLE OF LAW COURTS IN MODERN DEMOCRACIES*. New York: St. Martin's Press, 1988. The contributions in this work address the political roles played by courts in the United States, Australia, Canada, England, Germany, France, Italy, Sweden, and Japan, including judicial independence issues and relations with other governmental branches.

Articles

Anderson, Stanley. *Judicial Accountability: Scandinavia, California & the U.S.A.* 28 *AMERICAN JOURNAL OF COMPARATIVE LAW* 393 (Summer 1980). Professor Anderson compares and contrasts the Swedish Ombudsman, the Danish Special Court, and the California Commission on Judicial Performance to discuss their effectiveness as mechanisms for ensuring judicial accountability balanced with judicial independence.

Breyer, Stephen G. *Judicial Independence in the United States.* 40 *SAINT LOUIS UNIVERSITY LAW JOURNAL* 989 (Summer 1996) (Part of Symposium). This is a reprint of Justice Breyer's remarks at the 1995 Conference of the Supreme Courts of the Americas. He identifies and discusses five components of federal judicial independence in the U.S.: constitutional protections for judges; independent administration of the judiciary by the judiciary; the judiciary's authority over discipline for judicial misconduct; handling conflicts of interest; and ensuring that judges' decisions are effective. The responses of the Justices from Argentina, Jamaica, and Venezuela, comparing judicial independence issues in their respective countries, are reprinted in this same issue starting at p. 997.

Geller, Paul Edward. *Staffing the Judiciary and "Tastes" in Justice: A Commentary on the Papers by Professors Bell and Clark.* 61 *SOUTHERN CALIFORNIA LAW REVIEW* 1849 (September 1988) (Part of Symposium). The author critiques papers presented in the same symposium (*see infra* Bell, this Section, Subsection C7 and *infra* Clark, this Section, Subsection C7) and analyzes the common features of French and West German procedures for judicial selection, election, and accountability.

- Holland, Kenneth M. *Judicial Activism and Judicial Independence: Implications of the Charter of Rights and Freedoms for the Reference Procedure and Judicial Service on Commissions of Inquiry*. 5 CANADIAN JOURNAL OF LAW AND SOCIETY 95 (1990). In this brief commentary, the author compares the role of the judiciary in Canada and the United States with particular focus on Canadian courts rendering advisory opinions and Canadian justices serving on commissions of inquiry.
- Kennedy, Anthony M. *Judicial Ethics and the Rule of Law*. 40 SAINT LOUIS UNIVERSITY LAW JOURNAL 1067 (Summer 1996) (Part of Symposium). In this reprint of Justice Kennedy's remarks at the 1995 Conference of the Supreme Courts of the Americas, he describes the intertwined nature of judicial independence and judicial ethics, and discusses rules governing judges in their relations to other attorneys, parties, and to other judges, and rules governing judges' activities in society. He particularly disputes reports of hostility between U.S. Supreme Court Justices. The responses of the Chief Justices from Peru, Argentina, and Paraguay are reprinted in the same issue starting at p. 1079.
- Kumo, Suleimanu. *The Rule of Law and Independence of the Judiciary under the Sharia*. 8 JOURNAL OF ISLAMIC AND COMPARATIVE LAW 100 (1978). In this short paper, Professor Kumo compares Western ideas of judicial independence and separation of powers with the Sharia attitude towards these principles. He notes that the separation of powers principle does not exist under the Sharia. He concludes that judicial independence from the executive is untenable under the Sharia but in practice is a reality.
- Larkin, Christopher M. *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*. 44 AMERICAN JOURNAL OF COMPARATIVE LAW 605 (Fall 1996). The author looks at theoretical and conceptual problems associated with establishing judicial independence in democratizing countries. He proposes a definition of judicial independence carrying three characteristics: impartiality, insularity, and a defined institutional scope of authority. He discusses problems associated with interpreting the evidence of judicial independence in regimes moving from authoritarianism and reviews the related literature. He suggests looking for evidence of dependence rather than independence and considering judicial independence in such countries as being "regime relative."

- Motala, Ziyad. *Independence of the Judiciary, Prospects and Limitations of Judicial Review in Terms of the United States Model in a New South African Order: Towards an Alternative Structure*. 55 ALBANY LAW REVIEW 369 (1991). Professor Motala questions assumptions as to the independence and impartiality of the South African judiciary and contends that its members are unable to undertake judicial review adequately in light of the post-apartheid political realities in South Africa. He argues against the imposition of an Anglo-American system of judicial review in South Africa and proposes adoption of a model judicial system based on European practices.
- Pizzorusso, Alessandro. *Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies*. 38 AMERICAN JOURNAL OF COMPARATIVE LAW 373 (Spring 1990). Professor Pizzorusso discusses the similarities between the U.S. and Italian judicial systems, noting that both share a constitutionally guaranteed structure independent of other state powers and the power of constitutional review of legislation. He compares the Italian model with other European systems of judicial review and organization. He concludes that, unlike in other systems, U.S. and Italian judges share a guaranteed degree of internal and external independence which is not just theoretical.
- Ramseyer, J. Mark. *The Puzzling (In)Dependence of Courts: A Comparative Approach*. 23 JOURNAL OF LEGAL STUDIES 721 (1994). Professor Ramseyer contrasts American courts with the non-independent courts of modern and Imperial Japan. He concludes that American politicians assert themselves politically during the appointment process but do not intervene thereafter, while Japanese politicians assert themselves both during the appointment process and throughout a judge's tenure. He discusses Game Theory in relation to these conclusions.
- Russell, Peter H. *High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence*. 61 SASKATCHEWAN LAW REVIEW 247 (1998). Professor Russell looks at instances of Aboriginal peoples' legal cases and victories from a comparative framework (Australia, Canada, New Zealand, and the U.S.) and within the larger political context of colonization and decolonization. He concludes that the judicial system historically has fallen short of judicial independence with respect to indigenous peoples.

- Salzberger, Eli M. *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?* 13 INTERNATIONAL REVIEW OF LAW & ECONOMICS 349 (1993). The author applies Public Choice Theory to the subject of judicial independence. He studies the judiciary of several democratic nations, including the United States, England, and Israel.
- Sully, Brian. *Judicial Independence Under a Charter of Rights: Australian Snapshot—Canadian Camera.* 1 MACARTHUR LAW REVIEW 1 (1997). Judge Sully asserts that if Australia were to enact a constitutionally entrenched Charter of Rights, this would undermine rather than protect judicial independence. He reaches this conclusion by analyzing the effect of Canada's constitutionally entrenched Charter of Rights and Freedom on judicial independence in Canadian courts.
- Tourella, Juan R. & Mihm, Michael M. *Foreword: To Promote and Strengthen Judicial Independence and the Rule of Law in the Hemisphere.* 40 ST. LOUIS LAW JOURNAL 969 (Summer 1996) (Part of Symposium). Judges Torruella and Mihm discuss the 1995 Conference of the Supreme Courts of the Americas and the approval and ratification of the Charter of the Organization of the Supreme Courts of the Americas. They briefly report on the remarks of conference attendees (i.e., various countries' supreme court members) on issues relating to judicial independence and judicial accountability.
- Wallace, Judge J. Clifford. *Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives.* 28 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 341 (Spring 1998). In this brief article, Judge Wallace discusses the problems, issues, and insights related to combating judicial corruption in Asia and the United States. He maintains that judicial corruption must be accurately detected, investigated fairly, and effectively eradicated without eroding an independent judiciary.

C. FOREIGN LAW

1. AFRICA

Books, Papers, and Reports

- ADEMOLA, ADETOKUNBO. INDEPENDENCE OF THE JUDICIARY: PROBLEMS AND PERSPECTIVES IN NIGERIA. Enugu: Faculty of Law, University of Nigeria, Enugu Campus (1987) (Sir Louis Mbanefo Memorial Lectures No. 4, 1987). Justice Ademola lectures on the history and

current status of judicial independence in Nigeria. He focuses on judicial appointments, salaries, retirement age, removal, the judiciary's control of funds and staff, and the future of the judiciary in Nigeria.

THE INDEPENDENCE OF THE JUDICIARY AND THE LEGAL PROFESSION IN ENGLISH-SPEAKING AFRICA. A REPORT OF SEMINARS HELD IN LUSAKA FROM 10 TO 14 NOVEMBER 1986 AND IN BANJUL FROM 6 TO 10 APRIL 1987. Geneva: International Commission of Jurists (1988). This report on two seminars contains the recommendations of the participants, excerpts from opening speeches, and some of the working papers presented at the meetings. The seminars address the administration of justice and the functioning of the judiciary and the legal profession. Working paper topics include a broad overview of judicial independence in English-speaking Africa, the rights and duties of the legal profession in Africa, the status and rights of judges, and the separation of powers.

Articles

Amoah, P.K.A. *Independence of the Judiciary in Lesotho: A Tribute to Judge Mofokeng*. 3 LESOTHO LAW JOURNAL 21 (1987). The author contends that the Lesotho judiciary have enjoyed a degree of independence unique among Commonwealth African nations, notwithstanding many years of political upheaval. He describes the structure of Lesotho's courts and the post-independence safeguards implemented to support judicial independence, as well as important cases. He also highlights the contributions of the late Justice Mochoroane Peter Mofokeng towards an independent Lesotho judiciary.

Ankumah, Evelyn Ama. *The Right to Counsel and the Independence of Judges against the Background of the African Charter on Human and Peoples' Rights*. 3 AFRICAN JOURNAL OF COMPARATIVE LAW 573 (1991). The author examines the efficacy of the right to counsel and judicial independence as contained in the African Charter on Human and Peoples' Rights. She maintains that the language regarding the right to counsel is restrictive and that while the Charter addresses judicial independence, judicial independence has yet to be realized in Africa.

Cameron, Edwin. *Judicial Accountability in South Africa*. 6 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 251 (1990). With emphasis on the South African regime, Professor Cameron assesses some of the

problems traditionally associated with a judiciary which lacks democratic structures of accountability. South African judges have been criticized for being under active with respect to meeting duties of impartiality and equality under the law. He opines as to the bases and nature of judicial accountability, especially under judicial systems derived from the British system.

Eweluka, D.I.O. *The Independence of the Judiciary*. 14 THE NIGERIAN BAR JOURNAL 38 (1977) (Part of Symposium). The author maintains that an independent judiciary is the most effective guarantee that society has for ensuring constitutionalism, individual rights, law and order, and stability. In this general analysis of judicial independence in Nigeria, the author defines the doctrine and discusses the appointment process, qualifications for appointment, tenure, salaries, and impeachment.

Ikhariale, M.A. *The Independence of the Judiciary under the Third Republican Constitution of Nigeria*. 34 JOURNAL OF AFRICAN LAW 145 (Autumn 1990). The author examines the history, scope, and relevance of judicial independence to the Nigerian polity. The author also examines politicians' hostile attitudes toward the doctrine, the effect of military rule on its application, the judiciary's own role in sustaining its independence, and new constitutional reforms intended to increase the judiciary's independence.

Nwodo, Regina Oby. *The Notion of the Independence of Judges: Myth or Reality*. 9 AFRICAN SOCIETY OF INTERNATIONAL AND COMPARATIVE LAW, NINTH ANNUAL CONFERENCE 212 (August 4-6, 1997). The author examines judicial independence in Nigeria, focusing on judicial powers and executive interference with judicial independence. The author notes that while the Constitution of the Federal Republic of Nigeria has provisions for judicial independence, implementation of these provisions has in many instances failed.

Nyambo, Temngah Joseph. *The Independence of the Judiciary in Emerging Democracies in Africa: The Case of Cameroon*. 9 AFRICAN SOCIETY OF INTERNATIONAL AND COMPARATIVE LAW, NINTH ANNUAL CONFERENCE 355 (August 4-6, 1997). The author maintains that the Cameroon Judiciary is subject to the influence of the political elite. To ensure an independent judiciary in Cameroon, he suggests that the government implement the following: a judicial appointment

machinery, reasonable tenure of office for judges, strict respect for judicial independence, and adequate salaries, pensions and accommodations for judges.

Olowofoyeku, A.A. *The Beleaguered Fortress: Reflections on the Independence of Nigeria's Judiciary*. 33 JOURNAL OF AFRICAN LAW 55 (Spring 1989). The author examines the institutional and individual independence of Nigeria's judiciary (and particular factors in each respect) and concludes that judicial independence is seriously compromised and deficient in both areas.

Pfeiffer, Steven B. *Notes on the Role of the Judiciary in the Constitutional Systems of East Africa Since Independence*. 10 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 11 (Winter 1978). The author examines the post-independence role of the courts in Kenya, Tanzania, and Uganda, including the degree of independence experienced by the judiciary in these three countries.

Quansah, E.K. *The Independence of the Judiciary in Botswana: The Law and the Reality*. 9 AFRICAN SOCIETY OF INTERNATIONAL AND COMPARATIVE LAW, NINTH ANNUAL CONFERENCE 196 (August 4-6, 1997). The author describes the state of judicial independence in Botswana and finds that while the Botswana Constitution provides for attainment of judicial independence, in practice judicial independence in Botswana has not been fully achieved.

Scotton, J.F. *Judicial Independence and Political Expression in East Africa—Two Colonial Legacies*. 6 EAST AFRICAN LAW JOURNAL 1 (March 1970). The author suggests that the East African government is suspicious of the judiciary because of the judiciary's growing reliance on common law precedents when deciding cases involving government restriction of political expression. The author maintains that this is an effort by the courts to become more independent from the influence of East African government. The author cites and analyzes several African cases to support this argument.

Vyas, Vash. *The Independence of the Judiciary: A Third World Perspective*. 1992 THIRD WORLD LEGAL STUDIES 127. Professor Vyas explores the nature and parameters of judicial independence as considered and applied in various post-colonial countries, with an emphasis on African nations. He considers selected countries' constitutional frameworks for judicial independence, as well as significant cases.

2. ASIA

Books, Papers, and Reports

BAKKER, JAN WILLEM. THE PHILIPPINE JUSTICE SYSTEM: THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY AND HUMAN RIGHTS FROM 1986 TILL 1997. Leiden: Geneva: Centre for the Independence of Judges and Lawyers (1997). The author's study analyzes the factors that influenced the quality of the justice system in the Philippines and respect for human rights there between 1986, when the dictatorship was ousted by popular revolt, and 1997. The author focuses on the qualifications, selection, training, promotion, discipline, and removal of judges, and the efficiency and accessibility of the justice system.

Articles

Barnes, Eric. *The Independence of the Judiciary in Hong Kong*. 6 HONG KONG LAW JOURNAL 7 (1976). Magistrate Barnes looks at the independence of the colonial Hong Kong judiciary and disputes the contention that the executive branch interferes with the judiciary. He does find, however, independence wanting to varying degrees with respect to matters such as salary, tenure, appointment, and general respect.

Cohen, Jerome A. *The Chinese Communist Party and "Judicial Independence": 1949-1959*. 82 HARVARD LAW REVIEW 967 (1969). Professor Cohen examines the history prior to and after the PRC's 1954 adoption of a constitutional provision which on its face purported to provide Chinese judges with judicial independence. He finds that within a few years of the provision's adoption, the Communist Party openly preached and practiced interference with judicial decision-making, and Chinese judges operated in an insecure environment subject to significant external interference.

Ginsburg, Tom. *The Transformation of Legal Institutions in Mongolia, 1990-93*. 30 ISSUES & STUDIES 77 (June 1994). Professor Ginsburg explores how Mongolia's post-socialism developments have affected its courts, among other legal institutions. He also addresses some of the obstacles to reform which affect an increasingly independent judiciary.

- Haley, John O. *Judicial Independence in Japan Revisited*. 25 LAW IN JAPAN 1 (1995). The author argues that Japan's judiciary has maintained cohesion and autonomy despite the threat of political control by other branches of government. He also maintains that evaluation of judicial independence in postwar Japan should be made within the broader comparative context of other civil law systems and not from a solely American perspective.
- Liao, Kuang-sheng. "People's Supervision" and Communist China's Legal System. 28 ISSUES & STUDIES 34 (August 1988). This article explores the development of the system of "People's Supervision" over Communist China judicial institutions. The author concludes that the system is vague, impracticable, and vulnerable to political changes. The author also discusses the increasing power and role played by the media with respect to supervising judicial work in China.
- Patwari, A.B.M. Mafizul Islam. *Independence of Judiciary in the Third World: The Case of Bangladesh*. 39 JOURNAL OF THE ASIATIC SOCIETY OF BANGLADESH 131 (December 1994). The author discusses judicial independence in third world countries in general and specifically in Bangladesh. The author maintains that judicial independence in Bangladesh is almost non-existent because of the volatile nature of Bangladesh's society and because the judiciary, rather than serving as a co-equal branch, is subordinate to the executive.
- Ramseyer, J. Mark & Rasmusen, Eric B. *Judicial Independence in a Civil Law Regime: The Evidence From Japan*. 13 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 259 (October 1997). Professors Ramseyer and Rasmusen report on their study exploring the general determinants of career success for, and the extent of political influence among, members of the Japanese judiciary. They find, inter alia, that the Japanese government rewards its most productive judges and that political considerations are affecting the careers of sitting judges.
- Seu, Yeong Sien. Note, *Clarity or Controversy—The Meaning of Judicial Independence in Singapore and Malaysia*. 13 SINGAPORE LAW REVIEW 85 (1992). The author compares judicial independence in Singapore and Malaysia and finds that judicial independence in Malaysia has been greatly jeopardized by several judicial dismissals, but that judicial independence is more intact in Singapore where the courts have stated their Constitutional role more clearly than the Malaysian courts. The author also finds that despite the close historical ties between the countries and common origins of their judicial sys-

tems, these countries do not have identical definitions of judicial independence.

- Smeets, Larry. *Judicial Independence in the People's Republic of China*. 8 AUSTRALIAN JOURNAL OF LAW AND SOCIETY 60 (1992). The author examines events between 1978 and 1988 and claims that judicial independence of a sort and extent not seen before in China has emerged. He acknowledges, however, that it remains to be seen what happens in light of post-1989 events and discusses China's history of executive control of the judicial function. He finds that while a presumption exists that Party cadres should respect judicial independence, the Party still reserves the right to intervene in the judicial process.
- Tan, David. *Death of Judicial Independence: Putting the Japanese Judicial Bureaucracy on Trial*. 70 THE AUSTRALIAN LAW JOURNAL 125 (February 1996). The author asserts that certain institutional frameworks in Japan render judicial independence illusory. He argues that judges in Japan are assigned to realize a goal of a homogeneous judiciary, that the reappointment, transfer, and promotion process is used as a weapon of coercion and punishment, and that transfers of personnel between the judiciary and the Ministry of Justice and Public Prosecutors Office is incompatible with the maintenance of an independent judiciary.
- Tan, David. *Judicial Independence in the People's Republic of China: Myth or Reality?* 68 THE AUSTRALIAN LAW JOURNAL 660 (September 1994). The author attempts—through an analysis of Marxist-Leninist jurisprudence, the ideology of Mao Zedong Thought, and judicial independence developments in recent Chinese history—to define judicial independence as presently understood and developing in the PRC. The author discusses the practice of adjudication supervision and the concept of *youju zhengti* (organic whole) as underpinning Chinese understanding of the concept of judicial independence, i.e., that it relates to the independence of the court as a whole and not the individual judge. He concludes that judicial independence in the PRC is dormant.
- Woo, Margaret Y.K. *Adjudication Supervision and Judicial Independence in the P.R.C.* 39 AMERICAN JOURNAL OF COMPARATIVE LAW 95 (Winter 1991). The author's commentary is a useful follow-up to the Cohen, Liao, and Tan articles noted above. Professor Woo addresses the legal and philosophical bases for the PRC practice of "adjudication supervision" of Chinese courts (which allows for the re-opening

of final judgments) as well as how the doctrine works in practice. She asserts that Chinese notions of judicial independence are directed only to the court system as a whole rather than to individual judges and doubts that the Chinese judicial system enjoys much of a degree of judicial independence under current practices.

Xu, Xiaoqun. *The Fate of Judicial Independence in Republican China, 1912-37*. 149 *THE CHINA QUARTERLY* 1 (1997). The author discusses the judicial reforms which occurred during the Republican government period and concludes that although judicial independence expressly was a guiding principle during this time, commitment thereto was limited and that the progress of judicial reform thereby was constrained.

3. AUSTRALIA AND NEW ZEALAND

Books, Papers, and Reports

CUNNINGHAM, HELEN (ED.). *FRAGILE BASTION: JUDICIAL INDEPENDENCE IN THE NINETIES AND BEYOND*. Sydney: Judicial Commission of New South Wales, 1997. This collection of essays written by Australian judges, professors, and lawyers examines the historical and modern bases for judicial independence in Australia, compares the current position of the Australian judiciary with that of the French judiciary, reviews current judicial appointment procedures and suggests alternatives, and suggests increased judicial communication with the media and public regarding the courts' work.

Palmer, Geoffrey. *Judicial Selection and Accountability: Can the New Zealand System Survive?* in *COURTS AND POLICY: CHECKING THE BALANCE* 11 (B.D. Gray and R.B. McClintock, eds., 1995). The author compares New Zealand's judicial appointment procedures with other countries, particularly the United States. Based on these comparisons, he offers several recommendations for improving New Zealand's system of judicial selection and accountability. Further, he opposes implementing a Judicial Commission to advise on judicial appointments and instead suggests implementing a mandatory consultation procedure which must be followed before judges may be recommended to the Governor-General.

Articles

- Brown, David. *Judicial Independence: An Examination*. 58 AUSTRALIAN QUARTERLY 348 (1986). In this thought-provoking short article, Professor Brown explores the nature of judicial independence using a framework of four incidents in which a claim of judicial independence was invoked on various grounds. He decries assertions of the doctrine which presuppose that judges must live and render judicial decisions in "monastic isolation." He bemoans what he sees as highly selective use of the judicial independence doctrine to privilege judicial intervention and to prevent democratic debate.
- Goldfinch, Shaun. *Judicial Independence and the Administration of the Courts in New Zealand*. 45 POLITICAL SCIENCE 153 (December 1993). The author examines the judiciary's role in court administration in New Zealand, focusing on the role judicial administration may have in safeguarding judicial independence. The author supports the current partnership between the judiciary and the staff of Courts Division of the Department of Justice because it leaves judges free to concentrate on adjudication and avoid potentially damaging controversy. The author also argues that there may be a loss of judicial efficiency if the judiciary administers the courts.
- Kirby, M.D. *Judicial Independence in Australia Reaches a Moment of Truth*. 13 UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL 187 (Spring 1990). In this short article (adapted from a talk), Justice Kirby reviews the bases for judicial independence in Australia, examines recent legislative actions designed to increase judicial accountability, and examines reactions to notable cases involving members of the judiciary, including responses affecting judicial independence.
- Legomsky, Stephen H. *Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia*. 76 WASHINGTON UNIVERSITY LAW QUARTERLY 243 (Spring 1998). The author discusses recent threats to the independence of Australian administrative judges, particularly in the area of immigration. He cites two refugee cases where the Minister of Immigration publicly chastised the administrative judges for their decisions in these cases.
- Mason, Anthony F. *Judicial Independence and the Separation of Powers—Some Problems Old and New*. 24 UNIVERSITY OF BRITISH COLUMBIA LAW REVIEW 345 (1990). This short adaptation of a 1989

talk by the Chief Justice of the High Court of Australia examines areas of potential tension between the judiciary on the one hand and the executive and legislative branches on the other in Australia (and, in brief, the United Kingdom). Some of the areas discussed include: court administration and funding; judicial salaries; judicial reticence as to public speech; the power of courts to stay criminal proceedings; judicial review of cabinet decisions; and judicial expansion of government and public entity liability.

- Nicholson, R.D. *Judicial Independence and Accountability: Can They Co-exist?* 67 THE AUSTRALIAN LAW JOURNAL 404 (June 1993). The author, a judge of the Supreme Court of Western Australia, explores the theoretical and historical origins of the judicial independence doctrine in Australia. He examines the co-existence of judicial independence and accountability within the framework of institutional and individual structural factors and institutional and individual operational factors.
- Stephen, Ninian M. *Judicial Independence: A Fragile Bastion.* 13 MELBOURNE UNIVERSITY LAW REVIEW 334 (1982). In this lecture, Justice Stephen of the High Court of Australia asserts that judicial independence is a fragile matter which comes most under stress in two instances: (1) when judicial law making occurs, i.e., judicial activism; and (2) when courts must interpret provisions guaranteeing individual rights. As to (1), he believes that this risk should not preclude judicial development of the law and that judges must draw their own individual lines between proper and excessive lawmaking.
- Stockley, Andrew P. *Judicial Independence: The New Zealand Experience.* 3 AUSTRALIAN JOURNAL OF LEGAL HISTORY 145 (1997). The author provides an overview of the way in which judicial independence, including appointments, security of tenure, financial security, institutional independence, and immunity from political attack, has been given effect in New Zealand during the last 155 years.
- Williams, Daryl. *Judicial Independence and the High Court.* 27 THE UNIVERSITY OF WESTERN AUSTRALIA LAW REVIEW 140 (July 1998). The author, Australia's Commonwealth Attorney-General, profiles the High Court since its inception and describes the Court's appointment process. He opposes suggested changes to confirmation by the legislative branch, citing the U.S. as an example of an unacceptably politicized process. He particularly notes the impropriety of expecting candidates to give answers on issues possibly to be decided once

appointed and the related threat to public confidence in judicial impartiality and independence. He also discusses the problems judges have in responding to public and political criticism at the risk of compromising impartiality and independence.

4. CANADA

Books, Papers, and Reports

Cromwell, Tom. *Judicial Independence and Justice: The Pillars and the Temple*, in CANADIAN CONSTITUTIONAL DILEMMAS REVISITED 163 (Denis M. Magnusson & Daniel A. Soberman eds., 1997). In this essay, the author reviews the key elements of judicial independence as identified by Professor William Ralph Lederman. The author analyzes Lederman's *Act of Settlement* model for the Superior Courts, which was the basis of Lederman's description of judicial independence. The author concludes that because judicial independence is a constitutional principle, it must be recognized as a core value of society.

FRIEDLAND, MARTIN L. A PLACE APART: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN CANADA. Ottawa: Canadian Judicial Council/Canada Communication Group-Publishing, 1995. Professor Friedland's report prepared for the Canadian Judicial Council is a detailed examination of the history of and current mechanisms in Canada which are directed towards meeting the twin goals of judicial accountability and independence. Topics discussed include physical protection, immunity, security of tenure, financial security, discipline, and performance evaluations. He suggests, inter alia, adoption of a code of judicial conduct, a greater buffer between the courts and the attorney general, and changes in the appointment of the chief justice and other judges.

Articles

Baar, Carl. *Judicial Independence and Judicial Administration in the Tobias Case*. 9 CONSTITUTIONAL FORUM 48 (Winter 1998). Professor Baar reports on a 1997 decision of the Supreme Court of Canada involving a meeting between the Chief Justice of the Federal Court of Canada and a government official, who expressed concern over the

progress of certain citizenship revocation proceedings. The Court concluded that the meeting compromised the appearance of judicial independence. The author concludes that the real "serious affront" to the appearance of judicial independence was a failure of judicial administration.

Baar, Carl. *Judicial Independence and Judicial Administration: The Case of Provincial Court Judges*. 9 CONSTITUTIONAL FORUM 114 (Summer 1998). Professor Baar explores the interrelation of court administration (and existing trial court organization and proposed changes thereto) and the independence and impartiality of Canadian Provincial Court judges. He argues that judicial independence concerns are more likely to arise in those certain adjudicatory processes which are more dependent on executive branch support.

Barry, Leo. *Judicial Free Speech and Judicial Discipline: A Trial Judge's Perspective on Judicial Independence*. 45 UNIVERSITY OF NEW BRUNSWICK LAW JOURNAL 79 (1996) (Part of Symposium). The author argues that the Canadian Judicial Council is too quick to express disapproval of a judge whenever a public controversy arises. He recommends that the Council resist the urge to defuse public criticism by issuing mild rebukes before complaints against judges have been adequately investigated.

Colvin, Eric. *The Executive and the Independence of the Judiciary*. 51 SASKATCHEWAN LAW REVIEW 229 (Summer 1986). Professor Colvin looks at judicial independence as a constitutional value vis-à-vis particular patterns of executive-judiciary relations in Canada. He reviews three areas of change signaling a more vigorous assertion of judicial independence in Canada than has been the case in the past (when the English model has been followed). He also examines particular examples of executive control and discusses levels of judicial exemption from executive control as constitutionally mandated and/or desirable.

Doi, Michael. *The Judicial Independence of Canadian Forces General Court Martials: An Analysis of the Supreme Court of Canada Judgment in R. v. Genereux*. 16 DALHOUSIE LAW JOURNAL 234 (Spring 1993). Within the framework of a decision of the Supreme Court of Canada questioning the procedures and judicial independence of Canadian Forces General Court Martial, the author argues that these court-martial proceedings are fair and appropriate.

- Friedland, Martin L. *Judicial Independence and Accountability: A Canadian Perspective*. 7 CRIMINAL LAW FORUM 605 (1996). In this essay, Professor Friedland briefly addresses three topics: (1) a history of judicial independence in England and Canada; (2) the Canadian Charter of Rights and Freedoms provision for judicial independence, and significant cases following its enactment; and (3) international norms and principles regarding judicial independence.
- Greene, Ian and others. *Law, Courts and Democracy in Canada*. 40 INTERNATIONAL SOCIAL SCIENCE JOURNAL 225 (1997). The authors report on a study of the views of Canadian judges on their "power," particularly with respect to public policymaking and democratic expectations (including transparency of decisionmaking and accountability). Judges were questioned on various issues related to judicial independence.
- Lederman, W.R. *Judicial Independence and Court Reforms in Canada for the 1990's*. 12 QUEEN'S LAW JOURNAL 385 (1988). Professor Lederman briefly examines historical bases (English and Canadian) for the independence of the Canadian judiciary. He examines elements of the English Act of Settlement model and their possible influence on future court reform.
- MacDonald, Roderick A. & Lajoie, Andr e. *Auctioneers, Fence-Viewers, Popes—And Judges*. 9 CONSTITUTIONAL FORUM 95 (Summer 1998). The authors assert that there are distinctive, yet plural, role moralities which attach to legislators and judges and that the rationality of adjudication is evolving. They briefly address the impact of this view on judicial selection.
- MacKay, A. Wayne. *Judicial Free Speech and Accountability: Should Judges Be Seen But Not Heard?* 3 NATIONAL JOURNAL OF CONSTITUTIONAL LAW 159 (October 1993). In a lengthy article, Professor MacKay first argues that out-of-court judicial speech should be given greater reign and that doing so will maximize judicial independence. He then argues that increased judicial free speech must be followed by increased and improved mechanisms for accountability, both formal (e.g., Canadian Judicial Councils) and informal (e.g., the Bench and Bar, media, academics, and lobbying groups).
- McConnell, W.H. *The Sacrifice of Judicial Independence in Saskatchewan: The Case of Mr. Mitchell and the Provincial Court*. 58 SASKATCHEWAN LAW REVIEW 63 (1994). The author asserts that the

Saskatchewan Legislature compromised judicial independence when, in 1994, it repealed the law which established a process for setting provincial judge's salaries independently from the cabinet.

- McCormick, Peter. *Twelve Paradoxes of Judicial Discipline*. 9 CONSTITUTIONAL FORUM 105 (Summer 1998). Professor McCormick explores the dilemma of balancing judicial independence with judicial accountability via judicial discipline mechanisms. He does so through examining the work of Canada's provincial judicial councils and within the framework of twelve paradoxes, each involving opposing principles in need of balance in judicial-discipline systems.
- Nemetz, Nathan Theodore. *The Concept of an Independent Judiciary*. 20 UNIVERSITY OF BRITISH COLUMBIA LAW REVIEW 285 (Summer 1986). In this brief article adapted from a speech, the Chief Justice of British Columbia examines the notion of judicial independence as a matter of question when public law is implicated, as opposed to matters of private law when it is rarely questioned. He raises three areas of concern: (1) the growing body of disputes resolved by administrative tribunals, without judicial review; (2) the lack of control in Canadian courts over judicial administration; and (3) growing suggestions that Canadian judges should be appointed provincially.
- Scott, Richard J. *Accountability and Independence*. 45 UNIVERSITY OF NEW BRUNSWICK LAW JOURNAL 27 (1996) (Part of Symposium). The author reviews the constitutional framework within which the Canadian judiciary operates and discusses how complaints against judges are dealt with and how the Canadian judiciary responds to these complaints. He also reviews the Canadian Judicial Council's statement of principles.
- Ziegel, Jacob S. *Judicial Free Speech and Judicial Accountability: Striking the Right Balance*. 45 UNIVERSITY OF NEW BRUNSWICK LAW JOURNAL 175 (1996) (Part of Symposium). The author asserts that the Canadian judiciary would suffer fewer complaints of judicial misconduct if all of the provinces and the federal government adopted a merit system of appointment. He also recommends that judges who engage in offensive off-bench judicial speech be admonished for the first offense and removed from the bench for the second offense. For offensive speech on the bench, he recommends ignoring the judge's comments unless the judge's views will interfere with an impartial trial.

5. THE CARIBBEAN

Articles

Glinton, Maurice O. *Judicial Independence in the Post-Independence Commonwealth Caribbean: Ethic or Mere Principle?* 14 WEST INDIAN LAW JOURNAL 1 (May/October 1990). The author explores the nature of judicial independence as a value, as distinct from the legal safeguards through which it is fostered. The author asserts that the notion of judicial independence too often is treated as descriptive of the problems facing the judiciary as well as of the outward manifestations and guarantees of its existence.

6. EASTERN EUROPE

Articles

Brzezinski, Mark F. *The Emergence of Judicial Review in Eastern Europe: The Case of Poland.* 41 AMERICAN JOURNAL OF COMPARATIVE LAW 153 (Spring 1993). The author examines the history of judicial review in Poland up through the establishment of the Polish Constitutional Tribunal, an independent judicial body empowered to review the constitutionality of legislative acts. The author asserts that the Tribunal's decisions have become increasingly politicized due to its judgments' lack of finality and suggests various reforms designed to strengthen and authenticate Poland's system of judicial review.

Melone, Albert P. *The Struggle for Judicial Independence and the Transition Toward Democracy in Bulgaria.* 29 COMMUNIST AND POST-COMMUNIST STUDIES 231 (1996). Using a Weberian perspective, Professor Melone explores the difficulties faced in implementing an independent judiciary in a transitional political system. He finds a number of problems, including political attempts to limit judicial budgets and tenure, interference with judicial selection, and the eviction of the Constitutional Court from its quarters.

Plank, Thomas E. *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia.* 5 WILLIAM AND MARY BILL OF RIGHTS JOURNAL 1 (Winter 1996). The author identifies four institutional elements necessary to establish and maintain an independent judiciary: fixed tenure, fixed and adequate compensation, minimum

qualifications, and limited civil immunity. To test the universal applicability of these four elements, he analyzes the viability of judicial independence in nineteenth-century Russia.

7. EUROPE

Books, Papers, and Reports

ODERSKY, WALTER. JUDICIARY INDEPENDENCE IN THE FEDERAL REPUBLIC OF GERMANY. Washington, D.C.: World Peace Through Law Center (1990) (Beijing Conference on the Law of the World Work Paper). In this seventeen-page paper, the author discusses the independence of the judiciary as articulated in the Constitution of the Federal Republic of Germany, the meaning and extent of judicial power in the Federal Republic, judicial independence vis-à-vis the legislature and executive, and the material and personal independence of judges.

OLSSON, CURT. THE INDEPENDENCE OF THE JUDICIARY IN FINLAND. Washington, D.C.: World Peace Through Law Center, 1990 (Beijing Conference on the Law of the World Work Paper). The author, the President of the Supreme Court in Finland, opines as to the nature of judicial independence as an end in itself—to guarantee the freedom of courts from outside influences and thereby secure the role of law. He discusses this generally and as practiced in Finland.

STEVENS, ROBERT. THE INDEPENDENCE OF THE JUDICIARY: THE VIEW FROM THE LORD CHANCELLOR'S OFFICE. Oxford: Clarendon Press; New York: Oxford University Press, 1993. In this book, Professor Stevens attempts to rethink the topic of judicial independence as seen through the papers generated by the Lord Chancellor's Office in England. The Lord Chancellor's Office, according to Stevens, has as one of its primary roles protection of the independence of the judiciary notwithstanding its status as a member of all three branches of government. The papers covered range from 1880 through the early 1970s, and Stevens addresses later events in an epilogue.

SHETREET, SHIMON. JUDGES ON TRIAL: A STUDY OF THE APPOINTMENT AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY. Amsterdam: North-Holland Publishing Company, 1976. The author focuses on appointment, promotion, removal, standards for judicial behavior, and mechanisms for public review and accountability with respect to High Court level and above judges in England. The author addresses sug

gested reforms regarding the appointment, removal, and discipline processes. He also provides historical background for judicial independence issues in England.

Articles

- Bell, John. *Principles and Methods of Judicial Selection in France*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1757 (September 1998) (Part of Symposium). The author discusses the judicial selection process in France, including the selection of ordinary judges, administrative law judges, and members of the Constitutional Council.
- Brazier, Margaret. *Judicial Immunity and the Independence of the Judiciary*. 1976 PUBLIC LAW 397 (1976). The author begins with the premise that the core of judicial independence is immunity from civil actions. She examines the immunity and protection afforded to judges in England and whether judicial immunity extends any effective security to others entrusted with public judicial functions.
- Clark, David S. *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*. 61 SOUTHERN CALIFORNIA LAW REVIEW 1795 (September 1988) (Part of Symposium). The author describes the selection, promotion, and accountability of judges in the Federal Republic of Germany. He also discusses the education of career judges, how judges fit within the legal profession, the structure of the court system, and judicial procedure.
- Malleson, Kate. *Judicial Training and Performance Appraisal: The Problem of Judicial Independence*. 60 MODERN LAW REVIEW 655 (September 1997). Judges in England traditionally have viewed the use of training and performance appraisals of the judiciary as an external threat to their independence. Professor Malleson asserts that there is no external threat because control of training and appraisal has remained within the judiciary. She argues, however, that there is an internal threat to judicial independence stemming from other judges. This threat arises from the erosion of a culture of individualism (which she characterizes as a prerequisite to strong judicial independence) resulting from such matters as formalization of a career judiciary, increased appointment of judges with a certain outlook, and the introduction of team work in civil cases.

- Pederzoli, Patrizia & Guarnieri, Carlo. *Italy: A Case of Judicial Democracy?* 49 INTERNATIONAL SOCIAL SCIENCE JOURNAL 253 (1997). Professors Pederzoli and Guarnieri discuss how post-World War II developments in Italy have reinforced the institutional independence of the Italian judiciary and have expanded judicial power, including the structure of the criminal process. The “judicialization of politics” in Italy is discussed and compared with other democratic countries’ judicial systems, including its relation to judicial independence and accountability.
- Polden, Pat. *Judicial Independence and Executive Responsibilities: The Lord Chancellor’s Department and the County Court Judges, 1846-1971. Part One: The Management of the Courts.* 25 ANGLO-AMERICAN LAW REVIEW 1 (1996). The author is concerned with the following judicial independence issue: the extent to which an executive department (such as the Lord Chancellor’s Department in England), which is responsible for providing an efficient justice system, can interfere with individual judges’ independence in the running of their courts and caseloads. The history of the relationship between the county clerks and the Lord Chancellor’s Department up until 1971 shows, for the most part, a lack of strong interference and control by the latter as to organizational matters, which later changed. [See Part Two below.]
- Polden, Pat. *Judicial Independence and Executive Responsibilities: The Lord Chancellor’s Department and the County Court Judges, 1846-1971. Part Two: Executive Influence on Judicial Behavior.* 25 ANGLO-AMERICAN LAW REVIEW 133 (1996). In this continuation of the above article, the author concludes that although the Lord Chancellor’s Department had a variety of means at its disposal for controlling county court judge behavior—through rewards and punishment—the Department was relatively inactive in this respect until the 1920s.
- Shapiro, Martin. *Judicial Independence: The English Experience.* 55 NORTH CAROLINA LAW REVIEW 577 (April 1977). The author presents a critical analysis of the English tradition of judicial independence. He finds that throughout England’s history courts were often dependent on another branch of government, either the monarchy or Parliament. He argues that viewing judicial independence as a distinguishing characteristic of courts that differentiates them from other institutions oversimplifies the complex, ambiguous role of courts.

Toharia, José J. *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*. 9 LAW AND SOCIETY REVIEW 475 (Spring 1975). Professor Toharia explores the paradox of the co-existence of a non-democratic society with a substantially independent judiciary. Based on survey data, he finds that Spanish judges are ideologically diverse and enjoy substantial personal independence. He argues, however, that Spanish judges are powerless over matters of a political nature because the regime operates two parallel systems of justice: one for ordinary cases (which are heard by Spanish judges, with some independence) and another for all matters of a potentially political nature (which are heard by special tribunals controlled by the regime).

8. INDIA AND PAKISTAN

Books, Papers, and Reports

BRODY, REED, ED. INDEPENDENCE OF THE JUDICIARY IN INDIA: REPORT OF A SEMINAR HELD IN NEW DELHI ON 20 AND 21 JANUARY 1990. Geneva: International Commission of Jurists, 1990. This report reprints addresses and presentations made at a seminar organized by the Centre for the Independence of Judges. Participants identified obstacles to judicial independence in India, including excessive Executive influence and interference through such matters as appointment (or non-appointment) and transfers, budget allocation, and conditions of service.

DHAR, PANNALAL. INDIAN JUDICIARY. Allahabad: The Law Book Company (1993). The author analyzes judicial independence, the separation of powers, and judicial review in India. Because these doctrines were developed through case law and are not expressly provided for in the Indian Constitution, he argues that the current role of the judiciary in India is contra to the intent of the framers of the Indian Constitution.

HALEEM, MUHAMMAD. INDEPENDENCE OF JUDICIARY. Washington, D.C.: World Peace Through Law Center, 1990 (Beijing Conference on the Law of the World Work Paper). The author of this paper, the Chief Justice of Pakistan, discusses historical threats to judicial independence in Pakistan, as well as in Malaysia and India. He makes

recommendations for measures to advance the independence of the judiciary, both at an individual level and through the International Court of Justice.

SHARMA, B.R. *JUDICIARY ON TRIAL: APPOINTMENT, TRANSFER, ACCOUNTABILITY*. New Delhi: Deep & Deep Publications, 1989. Professor Sharma is deeply concerned about the status of judicial independence in India. His book provides an historical overview regarding the independence of the judiciary in India and focuses most significantly on problems regarding judicial appointment and transfer. He recommends, inter alia, establishing an ombudsman-type institution to hear complaints against judges, establishing a judicial college, and creating an All-India Body to handle all judicial appointments and transfers.

9. LATIN AMERICA

Books, Papers, and Reports

DAKOLIAS, MARIA. *THE JUDICIAL SECTOR IN LATIN AMERICA AND THE CARIBBEAN: ELEMENTS OF REFORM*. Washington, D.C.: The World Bank, 1996 (World Bank Technical Paper, No. 319). The author proposes a program for judicial reform for the Latin American and Caribbean regions, including elements related to judicial independence. Some of the means discussed for strengthening judicial independence include: judicial budget autonomy; uniform appointment systems; stable terms; a disciplinary system for court personnel; adequate salaries and retirement benefits for judges; building the administrative capacity and training of judges and court personnel; and transparent methods of appointment, removal, and supervision of judges.

STOTZKY, IRWIN, ED. *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY*. Boulder: Westview Press, 1993. Four essays in this book deal with judicial independence issues. Owen Fiss examines four types of judicial independence and argues that in Argentina and Chile, democracy may be helped along by certain political interferences with the judiciary (e.g., court-packing). Paul Kahn argues that the concept of judicial responsibility in its relation to the state is as important as and serves as a limit on judicial independence. Jorge Correa Sutil analyzes threats to democracy posed by judicial independence in Chile. Robert Gagarella looks at the impact of three impartiality models on transitional democracies.

Articles

- Anenson, T. Leigh. Note & Comment, *For Whom the Bell Tolls . . . Judicial Selection by Election in Latin America*. 4 SOUTHWESTERN JOURNAL OF LAW AND TRADE IN THE AMERICAS 261 (Fall 1997). The author of this Note criticizes Latin America's current judicial appointment system and argues that an elected judiciary will create a stronger, more independent judiciary for Latin America. She examines the historical role of the judiciary in Latin America as it relates to its current judicial appointment system.
- Fiss, Owen M. *The Limits of Judicial Independence*. 25 UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW 57 (Fall 1993). In this essay, Professor Fiss focuses on a third type of judicial independence (political insularity) and what it means for transitional democracies in Latin America. He notes that judicial independence in countries such as Argentina and Chile is regime-relative, and that assumptions about the independence of the judiciary in continuous democracies such as the U.S., cannot be transferred automatically to these countries in political transition. [Note that an earlier version of this essay appeared in the Stotzky book, *supra* this Section.]
- Schwarz, Carl. *Judges Under the Shadow: Judicial Independence in the United States and Mexico*. 3 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 260 (May 1973). The author examines the extent to which Mexican federal courts, with their exclusive *amparo* jurisdiction, are as independent and effective in adjudicating constitutional rights cases as are U.S. federal courts. He uses four comparative indicators to evaluate judicial independence on a cross-national basis. He concludes that although Mexican courts have been more reluctant to adjudicate constitutional rights cases, they have shown a high degree of independence in *amparo* matters.
- Taylor, Michael C. *Why No Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*. 27 NEW MEXICO LAW REVIEW 141 (Winter 1997). The author looks at the institutional sources of judicial weakness in Mexico. He finds that judicial review is unduly limited by the restrictions of the *amparo* suit mechanism for constitutional cases. He also finds that 1994 constitutional reforms continue the history of executive branch co-optation and control of the judicial branch notwithstanding giving the Supreme Court certain additional powers and control. Other sources of weakness include a parallel

system of specialty courts controlled by the executive branch, the executive branch's failure to enforce judicial decisions in all instances, and the low prestige of the judiciary.

Verner, Joel G. *The Independence of Supreme Courts in Latin America: A Review of the Literature*. 16 JOURNAL OF LATIN AMERICAN STUDIES 463 (1984). The author conducts a literature survey focusing on the extent of judicial independence in Latin America and variations over time and between countries. He reaches several tentative conclusions notwithstanding a need for more research in these areas. He concludes that the typical Latin American court is politically weak and dependent, although there are variations between nations.

10. THE MIDDLE EAST

Articles

Eisenberg, Y. *Independence of Judges in the State of Israel*. 5 JOURNAL OF THE INTERNATIONAL COMMISSION OF JURISTS 74 (Summer 1964). In this short address, the author briefly reviews the steps taken to ensure judicial independence in Israel. He discusses the selection and appointment procedures for judges, restrictions placed on judges while in office, and the status Israeli judges enjoy during their tenure.

Quigley, John. *Judicial Autonomy in Palestine: Problems and Prospects*. 21 UNIVERSITY OF DAYTON LAW REVIEW 697 (Spring 1996) (Part of Symposium). The author examines the prospects for judicial independence in an independent Palestine state. His discussion is based on the history of judicial autonomy in Palestine during its pre-independence period and on factors that may influence Palestine's system of justice as it moves toward statehood. He asserts that the most serious factor threatening judicial autonomy is terrorist action by Palestinians.

Shetreet, Shimon. *Judicial Independence and Accountability in Israel*. 33 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 979 (1984). Professor Shetreet analyzes the bases and mechanisms for the independence and accountability of the Israeli judiciary. He concludes that although Israeli judges have a substantially entrenched personal and substantive independence, there remains too high a degree of executive control over judicial administration. He also criticizes some of the mechanisms for judicial accountability and offers recommendations for improving both.

D. INTERNATIONAL LAW

Articles

Baudenbacher, Carl. *Between Homogeneity and Independence: The Legal Position of the EFTA Court and the European Economic Area*. 3 COLUMBIA JOURNAL OF EUROPEAN LAW 169 (Winter/Spring 1997). Professor Baudenbacher (who also is a judge of the EFTA Court), describes the history of the European Economic Area (EEA) Agreement and the related EFTA Court. He discusses the problem of how to achieve the goal of homogeneity with two parallel court systems (the EFTA Court and the European Court of Justice) while preserving the independence of both courts, including the consequences of case law divergence.

Kirby, Michael. *The Globalisation of Media and Judicial Independence*. 1 TOLLEY'S COMMUNICATIONS LAW 115 (1996). This article is based on an address given by Justice Kirby before the International Commission of Jurists. He argues that the power of judges to make orders which will be obeyed within their jurisdictions has been significantly diminished as a result of the enormous global power of the modern media and the interests which own or control the media.

Koenig, Dorean Marguerite. *Independence of the Judiciary in Civil Cases & Executive Branch Interference in the United States: Violations of International Standards Involving Prisoners and Other Despised Groups*. 21 UNIVERSITY OF DAYTON LAW REVIEW 719 (Spring 1996) (Part of Symposium). The author identifies the international ramifications of executive or legislative interference with the right to a fair civil trial. She examines the international standards on judicial independence and emphasizes that these standards help ensure a fair trial when one of the parties is a despised group. She argues that neither the federal nor state judiciary have been apprised of these standards and that they remain vulnerable to criticism from the executive and legislature for unpopular decisions.

Lippman, Matthew. *They Shoot Lawyers Don't They?: Law in the Third Reich and the Global Threat to the Independence of the Judiciary*. 34 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 257 (Spring 1993). Professor Lippman examines the rise of Nazism and the architecture of the Nazi legal system. He discusses actions taken by the Nazis to impair judicial independence and impartiality, as well as substantial changes in criminal law and procedure which occurred in

Germany. He contends that the Nazi legal system is a prototype for contemporary totalitarian regimes and proposes various international-level measures designed to protect judicial independence.

Shelton, Dinah. *The Independence of International Tribunals*. 56 THE REVIEW/INTERNATIONAL COMMISSION OF JURISTS 23 (June 1996). In this study, Professor Shelton tests the independence and impartiality of six international tribunals against the United Nations Basic Principles on the Independence of the Judiciary. She concludes that the independence of these tribunals compares favorably with that of many national tribunals, although they cannot be fully insulated from international political bodies. She suggests lengthening judicial terms and strengthening norms on incompatibility of functions.

Steinberg, Robert S. Note, *Judicial Independence in States of Emergency: Lessons from Nicaragua's Popular Anti-Somocista Tribunals*. 18 COLUMBIA HUMAN RIGHTS LAW REVIEW 359 (Spring 1987). The author examines the creation and operation of Nicaragua's Popular Anti-Somocista Tribunals (TPAs). He argues that the TPAs are an example of the failure of international human rights law to prevent the operation of extrajudicial courts without guarantees of judicial independence in authorized states of emergency. He contends that that international human rights law must develop the means for preventing emergency derogation from certain guarantees of judicial independence.