JUDICIAL INDEPENDENCE IN THE UNITED STATES FEDERAL COURTS

*Charles D. Cole**

This article presents an overview of the explicit provisions of the United States Constitution which relate to an independent judiciary, asserts the practical benefits thereof, and offers examples of American judicial independence in action. The author suggests that judicial independence is a viable concept in the United States and any form of government which seeks to promote the fundamental rights of human kind should consider the basic characteristics of the American Constitution regarding judicial independence as a beginning for its constitutional deliberations.

I. INTRODUCTION

During March of 1988, the author of this article had the pleasure to deliver a series of four papers to The International Meeting—Brazil and the United States of America in Sao Paulo, Brazil.[1] This article provides an opportunity for the author to present the substance of the paper addressing judicial independence with more depth and additional contemplation.

When one considers the nature of governmental systems on con-

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* B.S. 1960, Auburn University; J.D. 1966, Cumberland School of Law; LL.M. 1971, New York University; Professor, Cumberland School of Law of Samford University.

1. The First International Meeting — Brazil and The United States of America was sponsored by the Associacao Paulista De Magistrados, March 7-18, 1988, with Judge Antonio Rulli Junior of Sao Paulo coordinating the activity. In addition to the paper styled "Judicial Independence in the Federal Courts of the United States of America," the author delivered papers entitled "Judicial Education for State Judges and Justices in the United States and Suggestions for Organization and Implementation of a Judicial Education Program for Brazil," "Court Organization in the Federal and State Courts of the United States of America with Emphasis upon State Court Organization," and "Financing of State Courts in the United States of America" during the course of the conference. License is herewith granted to the Associacao Paulista De Magistrados to publish any or all of the papers delivered during the course of the International Meeting; provided, however, the author reserves the right to publish, authorize for publication, revise, rewrite, and recompile any and/or all of the papers above enumerated, using the complete papers or portions thereof.

temporary earth, he should recognize the apparent need for an independent judicial branch of government to determine justiciable controversies in free societies. An independent judiciary serves as a check upon the actions of the executive and legislative branches of government, assuring that one branch does not exercise the power of the other. Further, an independent judiciary, in a society with a constitution which provides either explicitly or implicitly for separation of governmental powers, can assure that the legislative and executive powers are not merged, destroying the essence of representative government. As a matter of historical fact, one of the complaints asserted by the American colonists in declaring independence from England was the lack of judicial independence of colonial judges who served at the pleasure of the King.[2]

Indicative of the recognition of the importance of an independent judiciary in a country with a governmental structure similar to that of the United States, the Right Honorable Sir Ninian Stephen, Governor General of the Commonwealth of Australia, recently stated:

> Just laws certainly, and perhaps also more or less entrenched safeguards of human rights, whether as constitutional guarantees or otherwise, may be first and essential steps towards human freedom and recognition of the rights of each individual. But no less important is the second step, the integrity and freedom from influence, in sum the independence, of the judiciary whose task it is to administer those laws. Only with a truly independent judiciary can freedom under the law have meaning and democracy's enacted laws prevail.[3]

The abiding concern of Americans for judges who are independent to render fundamentally fair judgments has been recognized by the Sao Paulo State Judges Association. Judge Antonio Rulli, Junior, of

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2. *See* Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 UCLA L. REV. 308, 311 (1976).

3. Stephen, *Address of His Excellency The Right Honorable Sir Ninian Stephen*, 15 MELB. U.L. REV. 746, 748 (1986). The Governor General further noted that "given just and equal laws, only an independent judiciary can ensure that in their impact on the citizen such laws do operate with that fairness which their text demands." *Id.* at 747; *see also*, Gibbs, *The Appointment of Judges*, 61 AUSTL. L.J. 7 (1987); Re, *The Administration of Justice and the Courts*, 18 SUFFOLK U.L. REV. 1 (1984). Judge Re states that "[t]he independence of the federal judiciary, meticulously established by the framers of the Constitution is indispensible to principled decision-making. Judicial independence is the element which makes possible the deciding of important, controversial issues on the basis of merit and principle, rather than expediency." *Id.* at 4.

Sao Paulo delivered a paper to the Third Annual Conference of the International Political Science Association, Comparative Federalism Study Group, during March, 1987, at Philadelphia, Pennsylvania. In that paper, entitled "Conceptualizing State Constitutions in Brazil," Judge Rulli noted that the Sao Paulo State Judges Association had approved the thesis that:

> The citizen has the right to count on an independent Judiciary.
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> 1.1 An independent Judiciary is one with all its predicaments constitutionally ensured, therein included its economic, financial and administrative autonomy, in order to effectively guarantee the rights provided for in the Constitution, none of which shall fail to be appreciated, regardless of law or regulatory rule, which in case of omission may be made up for by the Judiciary itself.[4]

Consistent with both Judge Rulli's paper and Governor General Stephen's address at the University of Melbourne, Justice Joseph R. Weisberger, a Justice of the Supreme Court of the State of Rhode Island, recently stated that "[T]he secret weapon which assured the success of [the Constitution of the United States of America] was the provision for an independent judiciary."[5]

Justice Weisberger illustrated his point by describing the resolution of the American Watergate scandal of the 1970's as a tribute to an independent judiciary. While the Justice recognized that Watergate is cited as a low point in the history of the American presidency, he very accurately described the event as a "magnificent testimonial to the durability of the American constitutional system."[6]

The Watergate case to which Justice Weisberger referred is *Nixon v. United States*.[7] In *Nixon*, the President of the United States was ordered by a federal district court judge to produce tapes of conversations to aid in the prosecution of a pending criminal case in which he was named as an unindicted coconspirator.[8] The President resisted the subpoena, asserting both the doctrine of separation of powers and the need for confidentiality of high-level communications. The district court

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4. Address by Judge Antonio Rulli, Junior, *Conceptualizing State Constitutions in Brazil*, The Third Annual Conference, International Political Science Association, Comparative Federalism Study Group, Center for the Study of Federalism, Temple University, Philadelphia, Pennsylvania, U.S.A. (March 12-14, 1987).

5. Weisberger, *Judicial Independence*, 72 MASS. L. REV. 28 (1987) (Special Constitutional Issue).

6. *Id.* at 30.

7. 418 U.S. 683 (1974).

8. *Id.* at 687.

rejected the President's claims of absolute executive privilege and the United States Supreme Court unanimously affirmed that holding. The Court, citing *Marbury v. Madison*,[9] stated that "it is the province and duty of this Court 'to say what the law is'[10] with respect to the claim of privilege presented in this case."[11] The Supreme Court then held that the President must respond to the order of the district court and noted:

> The impediment that an absolute, unqualified [executive] privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under art. III [of the Constitution of the United States].[12]

In his comments concerning *Nixon*, Justice Weisberger eloquently asserted that judgment was the only power possessed by the Supreme Court. In contrast, he noted that the President was the Commander-in-Chief of the Armed Forces, head of the Department of Justice (through his appointee, the Attorney General), the executive head of the police forces of the United States, and the appointing authority of all federal marshals, the only direct means by which the federal courts implement their judgments and decrees.[13] The resolution of the Watergate scandal serves as an excellent illustration of judicial independence in action. According to Justice Weisberger, the President obeyed the decision of the Court because:

> So ingrained had the concept of the supremacy of law become in our national psyche that the President of the United States, to his credit, gave no serious consideration to resisting this purely moral force of judgment. Probably no such example of triumph of moral over physical power has been seen since the Holy Roman Emperor Henry IV came to Carnossa as a penitent and humbled himself before Pope Gregory VII in 1076. No more persuasive evidence could be given of the power of the judiciary than this example.[14]

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9. 1 Cranch 137 (1803).

10. *Id.* at 177.

11. *Nixon*, 418 U.S. at 703.

12. *Id.* at 707.

13. Weisberger, *supra* note 5, at 31.

14. *Id. See also* United States v. Lee, 106 U.S. 196, 220 (1882), for early evidence of a judicially independent Supreme Court, wherein the Court stated:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

This article will discuss the nature of judicial independence under the United States Constitution ("Constitution") by looking to the explicit provisions applicable to the principle in the document. The specific provisions which will be discussed relate to judicial compensation (the Compensation Clause), tenure of judicial office (the Tenure Clause), and judicial selection (the Appointments Clause). The Tenure Clause discussion will include comments concerning the doctrine of judicial immunity.

The primary emphasis throughout this article will be upon the applicable provisions of the United States Constitution because that Constitution provides a more effective basis for judicial independence than do the state constitutions within the United States ("United States"). Also, the state constitutions differ dramatically in their provisions for the judicial branch of government; therefore, generalizations regarding the specific characteristics of state constitutions concerning judicial independence are not possible.

This article will seek to sustain the premise that any form of government which seeks to avoid tyranny and to promote the fundamental rights of human kind, including state governments within the United States of America, should consider the basic characteristics of the American Constitution regarding judicial independence as a point of beginning for constitutional deliberations.

II. The Compensation Clause

The Compensation Clause provides that: "The judges, both of the supreme and inferior courts, . . . shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."[15]

To the casual observer, the meaning of the Compensation Clause would appear to be rather obvious; however, in an economy influenced by inflation, the clause merits additional analysis. In fact, a law suit was filed in 1977 by 140 United States circuit and district court judges against the Government of the United States in an attempt to obtain the compensation which they claimed was due them because of

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. . . .

Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class.

15. U.S. Const. art. III, § 1.

the diminution of the real purchasing power of their compensation which had been caused by inflation.

The class action, *Atkins v. United States*,[16] alleged that inflation had effectively diminished the judges' compensation in violation of the Compensation Clause, and that the Congress of the United States ("Congress") had discriminated against judges in dealing with the problem of inflation as compared to their own members and other employees of the Government.[17] The facts of the case indicated that Congress had increased the compensation of most Government employees 36.5% between December, 1969 and December, 1975 and raised the beginning salaries for Government lawyers 59.32% between March, 1969 and October, 1975. During that same period, however, judges salaries were not increased at all.[18]

Plaintiffs also alleged that the action of the Senate in disapproving the President's recommendations for increases in the compensation of judges and justices pursuant to the Salary Act of 1967, a method established by Congress which allowed the President to recommend increases every fourth year, was an unconstitutional exercise of executive power reserved for the President under article II, section 1, of the Constitution.[19] The President had recommended 7.5% compensation increases in each of the fiscal years 1974, 1975, and 1976.[20] The increases would have become effective under the terms of the Salary Act at the beginning of the first pay period which began 30 days following the transmittal of the President's recommendations.[21] The Senate action disapproving the President's recommendations was construed to be consistent with the applicable provisions of the Salary Act.[22]

The Court of Claims first considered the need for the judges of the court to disqualify themselves due to either a financial interest in the litigation, or circumstances in which a judge's impartiality might reasonably be questioned under the Code of Judicial Conduct of the American Bar Association, which had been adopted by the Judicial

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16. 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

17. *Atkins*, 556 F.2d at 1033.

18. *Id.* at 1034.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* (Citing 2 U.S.C. § 359(1)(B) (1970)). *But cf.*, 2 U.S.C. § 359 (Supp. IV 1986) (Presidential recommendations effective unless disapproved by a *joint resolution*).

Conference of the United States.[23] It was ultimately determined that the Court of Claims was the only court with original jurisdiction and that "disqualification [would] not be permitted to destroy the only tribunal with power in the premises."[24] The Court recognized that all judges could be disqualified on the basis of their impartiality's being questioned. The Court stated that: "[T]here is a maxim of law to the effect that where all are disqualified, none are disqualified."[25] Thus, the Court found that the rule of necessity both authorized and required it to decide the cases. The rule of necessity, as defined by the Court, provides that "a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case."[26]

In resolving the dispute, the Court of Claims looked to the history of the Compensation Clause. The Court took note that the Framers of the Constitution in 1787 had first considered a compensation clause which would have prohibited the Congress from either increasing or decreasing the compensation of judges. The Court further recognized, however, that after discussion, the Convention determined that the purpose of the Compensation Clause was to prohibit Congress from tampering with judges' salaries as a means of diminishing the authority of the judicial branch of government, and, on balance, the power to diminish judicial salaries created the most danger to an independent judiciary.[27] The *Atkins* opinion ultimately recognized that the Convention determined that the power to increase judicial compensation was less dangerous than the power to diminish compensation given the nature of changing circumstances which could be anticipated.[28] Thus, the Court proceeded to the merits of the case with the realization that the Framers' purpose in drafting the Compensation Clause was not to ensure a real income purchasing power for judicial compensation but to preserve judicial independence. The Court then stated:

> Indirect, nondiscriminatory diminishments of judicial compensation,

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23. *Id.* at 1035-40 (quoting Brinkley v. Hassig, 83 F.2d 351, 357 (10th Cir. 1936)).

24. *Id.* at 1037 (quoting Turner v. American Bar Ass'n, 407 F.Supp 451, 483 (W.D. Wis. 1975) (citing Evans v. Gore, 253 U.S. 245 (1920)).

25. *Id.* at 1038.

26. *Id.* at 1036.

27. *Id.* at 1048. The Court noted that in 1776 the Continental Congress had complained, in the Declaration of Independence, that George III had made colonial judges dependent upon him for both tenure and compensation as a means to extend his rule over the colonies.

28. *Id.* at 1048.

> those which do not amount to an assault upon the independence of the third branch or any of its members, fall outside the protection of the Compensation Clause, and the allegation of facts showing their existence does not state a claim for which relief can be granted in this court.[29]

Further, the Court found that the intention of the Framers to protect the judicial branch of government with the Compensation Clause did not include protection from the real value decline in compensation through inflation in the absence of proof of a discriminatory attack. The Court then considered whether plaintiffs had established a case showing "discriminatory diminishment of their salaries, in a manner that amounts to an attack on the judiciary by the political branches, warranting protection under the Compensation Clause. . . ."[30] In essence, the members of the judicial branch were recognized as having a right to recover for either a direct or indirect diminution of their compensation if it could be shown that such occurred in a manner that attacked their independence as judges. Thus, the Court recognized that judicial independence was the value to be protected by the Compensation Clause instead of the purchasing power of the compensation.

Obviously, drafters of constitutional provisions should take note of this construction. Judicial salaries should be linked to an appropriately recognized standard of value or consumer pricing index to ameliorate the devastating effect of inflation on judicial compensation. The *Atkins* Court noted that such a suggestion was made by one of the most illustrious Framers, James Madison, over two hundred years ago at the Philadelphia Constitutional Convention. Madison proposed that using a standard such as wheat or other item of permanent value could guard against variations in the value of money.[31] The Court further noted, however, that Madison only raised the issue once and did not further elaborate upon it after another prominent delegate, Gouverneur Morris, called the idea unworkable because it did not account for the fact that the standard of living itself might change, not just the cost of living.[32]

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29. *Id.* at 1045. One would note, therefore, that the key to understanding *Atkins* is that a tax or other diminution would not violate the Compensation Clause unless such assaulted the purpose of the Clause, that is, preserving the independence of judges.

30. *Id.* at 1051.

31. *Id.* at 1046; *see also* 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 45 (1966).

32. *Atkins*, 556 F.2d at 1046.

The *Atkins* Court then discussed the circumstances under which the plaintiffs could recover pursuant to the Compensation Clause as follows:

> [T]o make out a case, plaintiffs need not show a direct diminution of judicial compensation, but the indirect diminution that they complain of must be of a character discriminatory against judges and, paraphrasing Justice Holmes, must work in a manner to attack their independence as judges.[33]

The Court recognized that if Congress refused to raise the nominal dollar salaries of judges during a period of hyperinflation, the threat to the ability of judges to remain at their posts would be so great that relief under article III of the Constitution (presumably referring to both the Compensation and Tenure Clauses) would be hard to refute.[34] The Court found, however, that hyperinflation was not present and moved to a discussion of the facts surrounding the congressional action and inaction which resulted in the seven year judicial salary freeze.

The majority of the Court noted, after examining the political aftermath of the post-Watergate scandal, that the American people had lost confidence in Government, and increases in compensation of executive-level federal employees was not politically viable during the years in question. Accordingly, the Court found that the circumstances surrounding the salary freeze did not suggest an assault on judicial independence. In failing to find congressional discrimination against the judicial branch of government, the Court concluded as follows:

> [W]e conclude that the recent action [presumably action of Congress in granting cost-of-living increases after this law suit was filed] demonstrates the belated good faith, nondiscriminatory efforts of the Congress and the Executive to secure a level of compensation to the judges that the public is willing to pay, inadequate as it may be for numerous cogent reasons of less political weight.[35]

Thus, in *Atkins*, the Court of Claims held that the plaintiffs had failed to state claims which entitled them to recover and the government's motion to dismiss the complaint was granted.[36] The Supreme

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33. *Id.* at 1054.

34. *Id.* The Court did not indicate what would constitute "hyperinflation" as a basis for relief. One could conjecture, however, that either double-digit inflation over a relatively short-term or high single-digit inflation over the long-term should suffice.

35. *Id.* at 1057.

36. *Id.* Two other issues in the case, *i.e.*, justiciability of the alleged discriminatory conduct of Congress and the constitutionality of the legislative veto allowing one

Court of the United States ("Supreme Court") denied review of the case.[37]

The diminution of compensation issue was not, however, abandoned by the federal judiciary. Within a year after the Supreme Court denied review in *Atkins*, thirteen federal district judges sued the Government in *Will v. United States*.[38] The plaintiff-judges in *Will* claimed cost-of-living adjustments pursuant to the Cost-of-Living Adjustment Act,[39] which provided that judges and other executive level employees would receive an annual cost-of-living adjustment as determined under the Federal Pay Comparability Act of 1970.[40] This statutory mechanism provides that the President shall issue executive orders establishing the amount of the cost-of-living increases after considering inflationary indicators. The President issued the appropriate executive orders granting the increases in the scenario leading to the *Will* case; however, the Congress passed an appropriations act on the first day of the 1976 fiscal year which prohibited the use of appropriated funds for payment of executive-level employees. In 1977, the Congress enacted legislation several months prior to the new fiscal year which provided that adjustments to the executive-level salaries would not take effect.

The district court articulated the question as "whether the Compensation Clause of Article III, § 1 of the United States Constitution has been violated by Congress' refusal to pay plaintiffs cost-of-living adjustment for the salary periods commencing October 1, 1976 and October 1, 1977."[41] The district court found that Congress' refusal to pay the cost-of-living adjustments in question constituted a diminution in the judges' compensation and, therefore, violated the Compensation Clause.[42]

The plaintiffs in *Will* filed a second law suit based upon the same theory of relief for the years 1978 and 1979. In those years, by legislative enactment, Congress stopped payment of the cost-of-living adjust-

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House of Congress to defeat recommendations of the President for judicial salary increases under the Salary Act, were not discussed in this article because such were not considered particularly relevant to the topic. *See* Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983) for a rationale of the Court regarding the constitutional problem applicable to legislative veto provisions.

37. Atkins v. United States, 434 U.S. 1009 (1978) (*certiorari denied*).

38. 478 F. Supp 621 (N.D. Ill. 1979).

39. *Id.* at 624 (citing 28 U.S.C. § 461 (1975) (Cost-of-Living Adjustment Act)).

40. *Id.*; *see also* Pub. L. No. 91-656, 84 Stat. 1946, 1946-55 (codified as amended at scattered sections of 5 U.S.C.).

41. *Will*, 478 F. Supp. at 623.

42. *Id.*

ments for judges and executive-level Government employees. In one of the years in question the President signed the bill into law prior to the beginning of the fiscal year, and in the other year he signed the bill into law after the fiscal year had begun. After judgment for the plaintiffs in both cases, the Supreme Court consolidated the cases for appellate review. The Court articulated the issues as: "[W]hether under the Compensation Clause, Article III, § 1, Congress may repeal or modify a statutorily defined formula for annual cost-of-living increases in the compensation of federal judges, and, if so, whether it must act before the particular increases take effect."[43]

The Supreme Court noted first that the Compensation Clause was designed to benefit the public interest in a competent and independent judiciary, not the judges as individuals.[44] Further, in answering the question that the Supreme Court posed for itself, it found that the cost-of-living increases which had vested prior to the Congressional action became compensation that could not be diminished. Even so, the increases which were cancelled by legislation prior to vesting at the beginning of the respective fiscal years were not held to be compensation due and payable, and the Congress was found to have authority to repeal such legislation under the Compensation Clause.

The discussion of *Atkins* and *Will* is meaningful in that it provides the current interpretation of the Compensation Clause of the United States Constitution. More importantly, however, the fact that the cases were presented by judges of the federal judicial system and adjudicated by that same system indicates that the United States Constitution does provide for judicial independence—both in theory and fact.

III. The Tenure Clause And The Doctrine Of Judicial Immunity

The Tenure Clause of the Constitution provides that "[t]he judges, both of the supreme and inferior courts, shall hold their offices during good behavior. . . ."[45] Much, if not all, of the discussion concerning the Compensation Clause should be recognized as applicable to the Tenure Clause. As pointed out by the Court of Claims in *Atkins*:

> Long ago Justice Story noted the integral relationship of the Compensation Clause and the Tenure Clause, the latter securing to judges, . . . their continuance in office "during good Behavior." Without the one provision, he said, guaranteeing an undiminished

43. United States v. Will, 449 U.S. 200, 202 (1980).
44. *Id.* at 217.
45. U.S. CONST. art. III, § 1.

> compensation, "the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery. . . ." The two clauses are inextricably tied to one another in pursuit of securing judicial independence, and to allow the indirect diminution of judges' salaries to accomplish what the political branches are forbidden to do directly under the Tenure Clause would be to sanction a deplorable ruse at the expense of constitutional principle.[46]

The Tenure Clause was separated from the Compensation Clause for the purpose of this article for two reasons: (1) the Compensation Clause discussion required that the cases discussed *supra* should be handled separately; and, (2) the independence created by allowing federal judges to continue in office during good behavior has historically constituted virtual life-tenure. Virtual life-tenure in judicial office is certainly conducive to the facilitation of independent judicial decisions. Even so, when virtual life-tenure is recognized, the body politic becomes concerned about accountability. These comments concerning the Tenure Clause, with a brief comment concerning the doctrine of judicial immunity, emphasize the need for the discussion of judicial accountability *infra*.[47]

The prudent observer should recognize that the judicial independence gained by judicial immunity from liability for all judicial acts increases the accountability concern perceived by the general public. In the United States, the Supreme Court recognized the doctrine of judicial immunity in 1871, asserting that:

> [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.[48]

Our consideration of judicial immunity would not be adequate

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46. *Atkins*, 556 F.2d at 1055 (quoting 2 STORY ON THE CONSTITUTION § 1628 (5th ed. 1891)).

47. *See infra* text accompanying notes 54-73.

48. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871); *see also* Re, *Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 8 N. KY. REV. 221, 227 (1981).

without a recognition that a recent case, *Pulliam v. Allen*,[49] allowed attorney's fees to be assessed against a judge held subject to prospective injunctive relief, pursuant to federal statute.[50] The Supreme Court allowed the award of attorney's fees to stand, asserting that the common law did not prohibit such and it is for the Congress to abrogate the judiciary's common law immunity. In commenting upon the applicable statute, the Court noted that the Congress had made it clear that attorney's fees should be recoverable in an action to enforce a provision of the civil rights law.[51]

Even though *Pulliam* seems to be a crack in the judicial immunity armor, it does not greatly diminish the current practical effect of judicial immunity. Also, currently there are three bills pending in the Congress which would change the prospective effect of the *Pulliam* holding. Senator Howell T. Heflin, the author of one of the bills, reportedly agrees with the Conference of Chief Justices that the decision has a chilling effect on the judicial independence of both state and federal courts.[52] Senator Heflin, a former Chief Justice of the Supreme Court of Alabama, recently asserted: "Harassing litigation brought by disappointed parties against judicial officers can only result in increasing timidity and tendency to avoid close and controversial decisions whenever possible."[53]

Pulliam constitutes a problem which the Congress should rectify at the earliest possible time; however, it does not materially diminish the practical recognition that the doctrine of judicial immunity continues to contribute to the need for judicial accountability. Thus, when the gen-

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49. 466 U.S. 522 (1984).

50. *Pulliam*, 466 U.S. at 544 (construing 42 U.S.C. § 1988 (1982)).

51. *Id.*; *see also*, 466 U.S. at 544; *see also* 42 U.S.C. § 1983 (1982).

52. The Nat'l L.J., Feb. 22, 1988, at 5, col. 3.

53. *Id. See also* Weisberger, *The Twilight of Judicial Independence—Pulliam v. Allen*, 19 SUFFOLK U.L. REV. 537 (1985) (examines the Pulliam opinion and provides an excellent history of judicial immunity). In his article, Weisberger noted:

> Although I feel Justice Blackmun's opinion in *Pulliam v. Allen* is based upon an erroneous application of history and a faulty analysis of the effects of injunctive relief upon judicial independence, I recognize this majority opinion is now the law of the land. Since the Court interpreted the intention of Congress as enunciated in sections 1983 and 1988, however, it is within Congress's province to clarify these statutes so that they provide specifically for judicial immunity from both injunctive relief and the award of counsel fees. No other course will guarantee the future of judicial independence in this country.

Id. at 559.

eral public considers a federal judge's tenure in office and the judicial immunity from civil liability for the exercise of judicial authority when acting within the jurisdiction of the court, the accountability concern is heightened. While the doctrine of judicial immunity is necessary to maintain judicial independence, a balance must be sought between judicial independence and procedures promoting judicial accountability.

Judge Edward D. Re, the Chief Judge of the United States Court of International Trade, recently recognized the tension engendered when seeking both judicial independence and accountability as follows:

> In the United States we require and expect the judiciary:
> to maintain independence from the public and the executive and legislative branches of government; to remain impartial while hearing cases, and to render equal justice; to be fair and just in making decisions and memorializing the law in lucid, principled judicial opinions; and effectively to make available judicial service to all who seek justice. Thus, beyond the qualities of heart and mind indispensable for judicial office, there are two ideals that need to be reconciled: *independence* from political and public pressures, and *accountability* to the body politic and the people.[54]

The only constitutional sanction applicable to federal judges in the United States is the impeachment process. The Constitution provides that "The House of Representatives . . . shall have the sole Power of Impeachment."[55] It further provides that "The Senate shall have the sole Power to try all Impeachments."[56] The cumbersome impeachment process has long been perceived as inadequate for disciplinary problems generally. While judicial independence is served by limiting the means by which a judge may be removed from the bench, misconduct by the judge which does not justify removal is without remedy when the only method of discipline is removal from office by impeachment.

The state court systems within the United States began fashioning a means for citizens to register complaints against judges nearly 30 years ago. In fact, the Director of the Center for Judicial Conduct Organizations of the American Judicature Society reports that:

> By 1981 all 50 states and the District of Columbia had established judicial conduct organizations with authority to investigate and adjudicate cases of judicial misbehavior, as well as to either impose or

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54. Re, *supra* note 3, at 4 (footnotes omitted).
55. U.S. CONST. art. I, § 2, cl. 5.
56. U.S. CONST. art. I, § 3, cl. 6.

> to recommend to a higher body a variety of sanctions ranging from admonishment to removal, where it has been determined that misconduct has occurred.[57]

The experience of the states with discipline and removal commissions has met or exceeded the expectations of many judicial reformers. The Center for Judicial Conduct Organizations reports that in excess of 4,000 complaints are filed against judges in state courts annually, and approximately 75% of the complaints are dismissed as groundless.[58] In

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57. Shaman, *An introduction*, 69 JUDICATURE 64 (1985). The survey material which follows offers the constitutional, statutory, and supreme court rule citations applicable to both the state and District of Columbia judicial conduct organizations. Alabama: ALA. CONST. amend. 328, § 6.17(b). Alaska: ALASKA CONST. art. IV, §§ 10, 11. Arizona: ARIZ. CONST. art. IV.I, §§ 1-5. Arkansas: ARK. STAT. ANN. §§ 16-10-120,-121 (1987). California: CAL. CONST. art. VI, § 18. Colorado: COLO. CONST. art. VI, § 23(3)(e). Connecticut: CONN. GEN. STAT. ANN. §§ 51-51i, -51k, 51l, -51n (West Supp. 1988). Delaware: DEL. CONST. art. IV, § 37. District of Columbia: D.C. CODE ANN. §§ 11-1521 to 1530 (1981 & Supp. 1987). Florida: FLA. CONST. art. V, § 12. Georgia: GA. CONST. art. VI, § 7, para. 5 to 7. Hawaii: HAW. REV. STAT. tit. 32, § 610 (repealed in 1980). Idaho: IDAHO CODE §§ 1-2101 to 2103 (1979 & Supp. 1987). Illinois: ILL. CONST. art. VI, § 15. Indiana: IND. CONST. art. VII, § 11; IND. CODE ANN. §§ 33-2.1-5-1 to 29. Iowa: IOWA CODE ANN. §§ 602.2101 to .2107 (West 1988). Kansas: KAN. STAT. ANN. § 20-176 (1981). Kentucky: KY. REV. STAT. ANN. §§ 34.010 to 34.340 (Baldwin 1980). Louisiana: LA. CONST. art. V, § 25(c). Maine: ME. REV. STAT. ANN. tit. 9, § B (Supp. 1987). Maryland: MD. CONST. art. IV, §§ 4A, 4B. Massachusetts: MASS. ANN. LAWS ch. 211C, §§ 1-11 (Law. Co-op. Supp. 1988). Michigan: MICH. CONST. art. VI, § 30. Minnesota: MINN. STAT. ANN. §§ 490.15, .16 (West Supp. 1988). Mississippi: MISS. CODE ANN. §§ 9-19-1 to 29 (Supp. 1987). Missouri: MO. CONST. art. 5, § 24. Montana: MONT. CODE ANN. §§ 3-1-1101, 1106, 1107 (1987). Nebraska: NEB. CONST. art. V, §§ 28-31; NEB. REV. STAT. § 24-723.02 (1985 Replacement Vol.). Nevada: NEV. CONST. art. V, § 21. New Hampshire: N.H. REV. STAT. ANN. § 490:4 (1983 Replacement Vol.). New Jersey: N.J. REV. STAT. ANN. §§ 2A:1B-1 to 11 (West 1987). New Mexico: N.M. CONST. art. VI, § 32. New York: N.Y. JUD. LAW §§ 40-48 (McKinney 1983 & Supp. 1988). North Carolina: N.C. GEN. STAT. § 7A-375 to 378 (1986). North Dakota: N.D. CENT. CODE §§ 27-23-01 to 12 (Supp. 1987). Ohio: OHIO REV. CODE ANN. § 2701.11 (Baldwin 1987). Oklahoma: OKLA. STAT. ANN. tit. 20, §§ 1651-61 (West Supp. 1988). Oregon: OR. REV. STAT. § 1.410 to .480 (1987 & Supp. 1987). Pennsylvania: PA. CONST. art. V, § 18. Rhode Island: R.I. GEN. LAWS §§ 8-16-1 to 14 (1985 & Supp. 1987). R.I. SUP. CT. R. 34. South Carolina: S.C. CONST. art. 5, § 17. South Dakota: S.D. CONST. art. V, § 9; S.D. CODIFIED LAWS ANN. §§ 16-1A-1 to 13 (1987). Tennessee: TENN. CODE ANN. §§ 17-5-101 to 314 (1980 & Supp. 1987). Texas: TEX. CONST. art. V, § 1-A. Utah: UTAH CODE ANN. § 78-7-30 (1987 Replacement Vol). Vermont: VT. SUP. CT. R. FOR DISCIPLINARY CONTROL OF JUDGES, 1 to 11. Virginia: VA. CONST. art. VI § 9. Washington: WASH. CONST. art. IV, § 31. West Virginia: See Rules 3 & 5, Rules of Procedure for Handling of Complaints Against Justices, Judges and Magistrates. Wisconsin: WIS. STAT. ANN. §§ 757.83 to .99 (Supp. 1987). Wyoming: WYO. JUD. SUPERVISORY COMM'N R. 1-19.

58. Shaman, *supra* note 57, at 64.

1983, 105 state court judges were disciplined in some fashion, not necessarily removed from the bench.[59] The availability of sanctions other than removal from office by the impeachment process allows the commissions to aid the judge in correcting minor problems and questionable activities before removal from office is required. A further benefit to be gained from the discipline and removal commissions is the availability of a process which the body politic may utilize to make complaints concerning the conduct of a member of the judiciary without going through the cumbersome impeachment process.

The availability of discipline and removal commissions could raise questions concerning the effect of such upon judicial independence. Before becoming unduly concerned, however, one should recognize that all of the modern judicial disciplinary systems in the United States explicitly protect the judge from being penalized or censured for making erroneous or unpopular decisions. This approach is consistent with the premise that a governmental system should protect the independence of the judge only during good behavior.[60] The administrator of the New York Commission on Judicial Conduct reports that:

> Although the system tries to strike a perfect balance between fairness to judges and enforcement of standards, it errs on the side of leniency. Judges may be warned to abide by "high standards of conduct" and to lead lives above reproach, but these and other goals are unenforceable because too much enforcement would impair both judicial discretion and judges' privacy rights. Accordingly, those who enforce the lofty goals apply a sense of reasonableness in determining whether a judge engaged in misconduct.[61]

The error "on the side of leniency" quoted above would appear to this author to indicate that a workable, even though imperfect, balance has been achieved. Further, one should recognize that an appropriate balance is necessary to be achieved in the interest of accommodating the public's right to accountability with the public's need for an independent judiciary.

Many of the state judicial systems within the United States moved from primary reliance upon impeachment as a means for judicial discipline to a commission and/or court of the judiciary to investigate and determine complaints of misconduct of judges by constitutional amend-

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59. *Id.*

60. *Id.* at 65.

61. Stern, *Is Judicial Discipline in New York State a Threat to Judicial Independence?*, 7 PACE L. REV. 291, 386-87 (1987).

ments.[62] The Congress of the United States enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("Act") to create a procedure within each circuit for investigation and action upon complaints by any person of judicial misconduct in the federal system.[63]

The Act provides a procedure for filing of complaints with the clerk of the court of appeals of the circuit in question by persons alleging that a member of the federal judiciary has engaged in conduct prejudicial to the administration of the business of the courts or is unable to discharge the duties of the office by reason of mental or physical disability.[64] The chief judge of the circuit, or the next most senior circuit judge where the chief judge is the subject of the complaint, has the authority to determine that the complaint is frivolous and dismiss those complaints which do not address judicial conduct which is prejudicial to the administration of justice or a judge's disability (either mental or physical).[65] If the chief judge dismisses a complaint, he provides a copy of that order to the complainant and the judge who was the subject of the complaint.[66] If the chief judge determines that an investigation is warranted, he appoints a special committee of judges from the circuit to conduct such.[67] The special committee of judges, after conducting the necessary investigation, files a comprehensive written report with the judicial council of the circuit.[68]

The council may, after an investigation and hearing consistent with the fundamental fairness required by due process of law, order such sanctions as considered to be appropriate, except removal from office.[69] In cases where the judicial council determines that a judge has

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62. *See* Cole, *Judicial Reform in Alabama: A Survey*, 4 CUMB. L. REV. 41 (1973); *see also* Cole, *Discipline, Removal or Exoneration of Alabama Jurists*, 5 CUMB. L. REV. 214 (1974); and, note 57 *supra* for a survey of the constitutional, statutory, and rule provisions applicable to judicial conduct commissions and procedures in the States of the United States and the District of Columbia.

63. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2036 (codified as amended at 28 U.S.C. §§ 331-73 (1982 & Supp. IV 1986)).

64. 28 U.S.C.A. § 372(c)(1) (Supp. 1988).

65. 28 U.S.C.A. § 372(c)(3) (Supp. 1988).

66. *Id.*

67. 28 U.S.C.A. § 372(c)(4) (Supp. 1988).

68. 28 U.S.C.A. § 372(c)(5) (Supp. 1988).

69. 28 U.S.C.A. § 372 (c)(6)(B)(vii) (Supp. 1988); *see also* Catz, *Removal of Federal Judges by Imprisonment*, 18 RUTGERS L.J. 103, 118 (1986) (imprisonment of federal judges before impeachment is an unconstitutional violation of the doctrine of separation of powers); Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117, 1118 (1985) (the entire Act is

engaged in conduct which might constitute one or more grounds for impeachment, it certifies that determination to the Judicial Conference of the United States.[70] When the Judicial Conference either concurs with the judicial council's determination or makes its own determination that impeachment might be warranted, it certifies that determination to the House of Representatives of the United States for action by that body.[71] An aggrieved judge or the complainant may petition either the judicial council or the Judicial Conference of the United States for review during the course of the proceedings before each respective entity.[72]

The statutory procedure described in the preceding paragraphs is an attempt to accommodate the need for an independent judiciary and provide a means by which society's rights can be protected. The balance is a difficult one to achieve; however, if the Act discussed above is ultimately determined to be unconstitutional,[73] a constitutional amendment providing societal relief in addition to the impeachment process would appear to be in the interest of both the polity and the judicial branch of government.

IV. The Appointments Clause

The method of selection of judges is an important ingredient in the establishment and maintenance of judicial independence. Judges should not have to compromise their independence to interpret and apply the law without favor or fear to achieve or retain judicial office.

The Appointments Clause in the Constitution provides: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: . . . ."[74]

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unconstitutional because the judiciary is exercising powers expressly delegated to the legislature).

70. 28 U.S.C.A. § 372(c)(7)(B) (Supp. 1988).

71. 28 U.S.C.A. § 372(c)(8) (Supp. 1988).

72. 28 U.S.C.A. § 372(c)(10) (Supp. 1988).

73. *See* Hastings v. Judicial Conference of the United States, 829 F.2d 91 (D.C.Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1487 (1988); *See also* Battisti, *An Independent Judiciary or an Evanescent Dream*, 25 Case W. Res. 711 (1975); Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681 (1979); Gross, *Judicial Speech: Discipline and the First Amendment*, 36 Syracuse L. Rev. 1181 (1986); *but cf.*, Berger, *"Chilling Judicial Independence": A Scarecrow*, 64 Cornell L. Rev. 822 (1979).

74. U.S. Const. art. II, § 2, cl. 2.

The selection of all federal justices of article III courts is controlled by the Appointments Clause. This appointment method, with the advice and consent of the Senate, is quite different from the wide variety of methods of selection of judges used in the States of the United States.[75] Substantive comment regarding the methods of selection of members of the judiciary in the state courts is beyond the scope of this article. One should recognize, however, that a 1980 study indicated that 31 of the 50 United States used screening commissions to aid the governor in selecting judges (twenty states used qualifications commissions for the initial selection of names to be presented to the governor for appointment, and 11 others used the commissions only for filing vacancies).[76] The combination of selection schemes in the respective states has been described as almost endless, with little similarity from state-to-state.[77]

At the federal level, however, there is uniformity in the judicial selection process. The Appointments Clause gives the President the authority to nominate, and with the advice and consent of the Senate, to appoint the justices of the Supreme Court. Federal district and circuit judges are also appointed in the same manner as a matter of practice, those judges are presumably within the scope of article II which provides that:

> [The President] shall have power, by and with the Advice and Consent of the Senate, . . . [to] nominate . . . and . . . appoint . . . Judges of the supreme Court, and *all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law*; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[78]

If one assumes, as the italicized portion of article II above would

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75. *See* Berkson, Beller & Grimaldi, *Judicial Selection in the United States: A Compendium of Provisions*, AMERICAN JUDICATURE SOC'Y (1980); *See also* Slotnick, *Federal Judicial Recruitment and Selection Research: A Review Essay*, 71 JUDICATURE 317 (1988) (asserts that the selection methods are diverse between the states and the federal government, and that there are great difficulties in translating the effect of selection into documented alterations in judicial behavior).

76. Berkson, *Judicial selection in the United States: a special report*, 64 JUDICATURE 176 (1980); *see also* Vandenberg, *Voluntary merit selection: its history and current status*, 66 JUDICATURE 265 (1983).

77. Berkson, *supra* note 76, at 178.

78. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

seem to justify, that judges of the inferior courts of the United States are "inferior officers," it would appear that Congress could provide that federal district and circuit court judges could be appointed by the President or courts of law without the advice and consent of the Senate. Even so, one should recognize a very recent case, *Morrison v. Olson*,[79] wherein the Supreme Court set forth factors leading it to determine that the independent counsel appointed pursuant to the Ethics in Government Act[80] was an inferior officer. The opinion could be construed to indicate that judges of inferior federal courts are principal officers, requiring appointment by the President with the advice and consent of the Senate.[81]

Many observers assert that the appointment process is obviously political, with the President's political decision in nominating a candidate, and the Senate's fulfilling its duty to advise and consent in a similar manner. Certainly, it is impossible to remove political reality from the appointment process; however, the Senate has recently assumed an active role in determining whether to give its consent to the President's nominee, and qualifications commissions have been established in some states to advise the Senators in suggesting qualified candidates for vacant judicial positions to the President.

While some persons believe that formal nominating commissions are reforms that do not guarantee better results,[82] this author suggests that their use provides some progress toward assuring that competent judges are selected by the process, notwithstanding the continued presence of the politics of selection. In any event, for the purposes of this article, it must be recognized that the judicial selection process should be designed to identify and appoint the most qualified candidates possible for appointment purposes, with the minimum of politics in the process. A former United States Senator recognized the serious nature of the advice and consent role of the Senate in judicial appointments as follows:

> The Senate's duty in this sphere is extraordinary. Most other senatorial decisions are subject to revision, either by the Congress itself or by the executive branch. Statutes can be amended, budgets rewritten, appropriations deferred or rescinded. But a judicial confir-

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79. ___ U.S. ___, 108 S. Ct. 2597 (1988).

80. Ethics in Government Act of 1978, 28 U.S.C.A. §§ 49, 591-99 (Supp. 1988).

81. *See Morrison*, 108 S. Ct. at 2608-09.

82. *See* Stevenson, *"Reform" and Judicial Selection*, 64 A.B.A. J. 1683 (1978).

mation is different.[83]

The increased scrutiny that the Senate recently gave to President Reagan's nominees to the Supreme Court was, perhaps, a healthy change. The Senate exercised the authority and responsibility that the Constitution placed upon it by requiring that it advise and consent to the President's nomination. Chief Justice William H. Rehnquist of the United States Supreme Court, in a recent address at Columbia University School of Law in New York, stated:

> No one who has read the newspapers in the United States for the past few months can fail to be aware—perhaps more aware than one might wish to be—of the process by which a person is nominated and confirmed to be a Justice of the Supreme Court of the United States. There has been considerable criticism over the perceived excesses of the confirmation process; without in any way deprecating that criticism I think that in the United States, at any rate, we recognize that there is apt to be some inquiry by the Senate as well as by the President into what may be called the "judicial philosophy" of a nominee to our Court.
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> . . . .
>
> This has always seemed to me entirely consistent with our Constitution and serves as a way of reconciling judicial independence with majority rule.[84]

The remarks of the Chief Justice indicate an objective awareness that the judicial independence necessary for an effective judiciary is a vital part of the checks and balances which maintain the three co-equal branches of the federal government of the United States. The roles of the Senate and President in selecting the federal judiciary, constitutionally mandated, are indeed a means of reconciling judicial independence with majority rule.

V. CONCLUSION

The value to be protected, for the public interest—not for the individual judge—is a competent and independent judiciary. That value, judicial independence, is achievable with a governmental structure which recognizes the value of the concept of supremacy of law. Even so, judicial independence is not merely based upon governmental

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83. Mathias, *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200 (1987).

84. Address of Chief Justice William H. Rehnquist at Columbia University School of Law, New York, New York, November 19, 1987.

structure. The principles, rights, and responsibilities enumerated in the social compact between a people and their government must be translated into reality by a judicial branch of government and individual judges, who are willing to face the adversity of exercising their independence.

An independent judiciary provides a basis for the judicial branch of government to fill the vacuums in public law that the political branches of government are unwilling to face, such as providing equal protection of the law for discrete and insular minorities within society. The appropriate design for the constitutional assurances for an independent judicial branch of government must, however, provide realistic assurances to the judges charged with the responsibility of independence of decision.

The constitutional provisions for the judicial branch of government should provide tenure guarantees which preserve independence but offer some check and balance of accountability, so that citizen complaints can be heard and acted upon in appropriate cases. Further, the adequate tenure assurances should be combined with provisions for adequate compensation which should be adjusted periodically to reflect increases in the Consumer Price Index. When these assurances are in place, giving the individual judge the practical means for independence of decision, the judge must then translate the rights and responsibilities of a national or state constitution into reality.

Judicial independence, in both theory and fact, is a viable concept in the United States. Any form of government which seeks to promote the fundamental rights of human kind would be well advised to consider the basic characteristics of the American Constitution regarding judicial independence as a beginning for its constitutional deliberations.