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The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia

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THE ESSENTIAL ELEMENTS OF JUDICIAL INDEPENDENCE AND THE EXPERIENCE OF PRE-SOVIET RUSSIA

Thomas E. Plank*

Judicial independence, which first developed in the Anglo-American legal system, is valued by many countries as an important condition for the rule of law. Its existence in any legal system, however, depends on concrete institutional arrangements. In this Article, Professor Plank identifies four institutional elements necessary to establish and maintain an independent judiciary: fixed tenure (with limited exceptions), fixed and adequate compensation, minimum qualifications, and limited civil immunity. The presence of these elements ensures an independent judiciary in many countries. The lack of permanent tenure for judges in most American states, however, raises serious questions about their independence.

To test the extent to which these elements may be universally applicable, Professor Plank analyzes the viability of judicial independence in nineteenth-century Russia. In 1864, Russia first created an independent judiciary when it radically transformed its legal system by incorporating and adapting a Western-style civil law system that purposely established an independent judiciary. The Judicial Reform contained all the institutional elements necessary to ensure the independence of Russian judges, and their independence endured during the remaining half-century of the

* Associate Professor of Law, University of Tennessee College of Law. A.B., Princeton University, 1968; J.D., University of Maryland, 1974. I thank Joe Cook, Judy Cornett, Tom Davies, and Carol Parker for their comments on drafts of this Article, Bella Saffro for her research assistance in the Russian language materials, and L. Eric Ebbert and J. Britton Gibson for their research assistance in English language materials. This Article was inspired by and is dedicated to the late Everett F. Goldberg, my teacher, mentor, and friend at the University of Maryland School of Law. All translations of English language materials are mine unless otherwise indicated.

Russian Empire despite attacks from the government and significant members of society. The successful implementation and operation of an independent judiciary even in the autocratic state of Russia demonstrates that any society desiring to implement a government based on the rule of law may establish and maintain an independent judiciary by incorporating these four institutional elements.

* * *

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INTRODUCTION

Political systems that aspire to the rule of law consider judicial independence indispensable.¹ Many view judicial independence—used here

¹ See THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Benjamin F. Wright

to mean the freedom of judges to decide individual cases according to their view of the law—as necessary to protect the liberty of the individual citizen.² In addition, an independent judiciary may also promote the efficient administration of a complex social system, regardless of the value that the society places on individual liberty.³ In either event, despite otherwise different legal cultures, many countries of the world subscribe to the importance of judicial independence.⁴

ed., 1961) (asserting that a judiciary holding office during good behavior “is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws”); MODEL CODE OF JUDICIAL CONDUCT Preamble (1990) (“Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law.”); *id.* at Canon 1 (“A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.”) *id.* at Canon 1.A (“An independent and honorable judiciary is indispensable to justice in our society.”); *see also infra* notes 2, 19. For a short but informative discussion of the “rule of law,” *see* Jeffrey Jowell, *The Rule of Law, in THE CHANGING CONSTITUTION* 57 (Jeffrey Jowell & Dawn Oliver eds., 3d ed. 1994).

² *See* THE FEDERALIST NO. 78, *supra* note 1, at 491, 494-95; U.N. SOCIAL DEFENCE RES. INST. & INT’L ASS’N OF JUDGES, THE ROLE OF THE JUDGE IN CONTEMPORARY SOCIETY 11 (1984) (“[A] free society, democratically organized, must of necessity rely on the concept of a state governed by the rule of law, since the priority of such rule over social forces and trends is the only legal way to guarantee freedom. It follows that the judge, in order to protect this essential value, must be free to decide according to the law and be independent of other influences”); Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 567-74 (1996); Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 B.Y.U. L. REV. 827, 846 (judicial independence helps check a government’s efforts to control its citizens because it interposes an additional obstacle between the government and its citizens); Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 684, 689 (1979); Maeva Marcus, *The Adoption of the Bill of Rights*, 1 WM. & MARY BILL RTS. J. 115, 119 (1992) (quoting James Madison’s speech to the House of Representatives that “independent tribunals of justice will consider themselves in a peculiar manner the guardians” of the Bill of Rights).

³ *See* DIETRICH RUESCHEMEYER, LAWYERS AND THEIR SOCIETY: A COMPARATIVE STUDY OF THE LEGAL PROFESSION IN GERMANY AND THE UNITED STATES 69 (1973) (noting that “with increasing complexity of the system of legal rules and a persistent moral authority of ‘the law,’ open and continuous interference with judicial decisionmaking by outside lay parties has become intolerable in modern societies, since it would seriously disturb the predictable functioning of the legal system, a matter of practical as well as intense moral concern”); Jiang Ping, *Chinese Legal Reform: Achievements, Problems and Prospects*, 9 J. CHINESE L. 67, 73 (1995) (noting that some individuals in China believe that an independent judiciary is necessary for the development of a market economy and the prevention of corruption in the courts). This Article assumes the importance of judicial independence. Why judicial independence may be important is beyond the scope of the Article.

⁴ BASIC LAW FED. REP. GER. art. 97(1) (official trans.) (“Judges shall be indepen-

Proclaiming the importance of judicial independence, however, does not make judges independent. For example, the 1936 Constitution of the former Union of Soviet Socialist Republics, adopted under the Stalin regime, states that "Judges shall be independent and subordinate to law."⁵ Notwithstanding this formal recognition of judicial independence, judges in the former Soviet Union were not independent. Members of the Soviet government or the Communist Party regularly interfered with judicial deliberations in individual cases, instructing the judges to reach particular decisions.⁶

Although judicial independence may be an abstract social value, its existence depends upon specific institutional elements that can be analyzed. This Article has two goals: first, to identify the specific institutional elements of judicial independence; and second, to analyze those elements in the context of the nineteenth-century Russian legal culture. This Article concludes that, if a society makes a commitment to judicial independence, judicial independence can survive even in a hostile autocratic environment.

Part I describes four institutional elements necessary to establish and

dent and subject only to the law."); CONST. FRANCE art. 64 ("The President of the Republic shall be the guarantor of the independence of the judicial authority."); CONST. JAP. art. 76(3) (official trans.) ("All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws."); CONST. RUS. FED. art. 120 (Vladimir V. Belyakov & Walter J. Raymond eds., 1994) ("Judges shall be independent and subject only to the Constitution of the Russian Federation and federal law."); GEORGE E. GLOS, *COMPARATIVE LAW* 28-29 (1979); *see also infra* notes 21, 23, 348.

⁵ U.S.S.R. CONST. art. 112 (1936) (replaced 1977), *quoted in and translated by* ARYEH L. UNGER, *CONSTITUTIONAL DEVELOPMENT IN THE USSR* 154 (1982).

⁶ ROBERT CONQUEST, *JUSTICE AND THE LEGAL SYSTEM IN THE U.S.S.R.* 27, 111-15 (1968); Donald D. Barry, *The Quest for Judicial Independence: Soviet Courts in a Pravovoe Gosudarstvo [Rule Based State]*, in *TOWARD THE "RULE OF LAW" IN RUSSIA?: POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD* 257, 258 (Donald D. Barry ed., 1992); UNGER, *supra* note 5, at 126; *see also* Harvey M. Feinberg, *Africa, in LEGAL TRADITIONS AND SYSTEMS: AN INTERNATIONAL HANDBOOK* 7, 9-10, 21-28 (Alan N. Katz ed., 1986) (discussing the gulf between the ideals of an independent judiciary and significant governmental interference with courts in many African countries); Stanislaw Frankowski, *The Independence of the Judiciary in Poland: Reflections on Andrzej Rzeplinski's Sadownictwo w Polsce Ludowej (The Judiciary in Peoples' Poland (1989))*, 8 *ARIZ. J. INT'L & COMP. L.* 33 (1991) (describing the lack of independence of the Polish judiciary and the interference of the Polish Communist Party in individual cases (known as "telephone justice"), despite the formal constitutional provision that judges are independent, during the period of communist control from 1945 to 1989); Ping, *supra* note 3, at 73, 74-75 (noting that in China the courts are subject to control by local representatives of the Chinese Communist Party); *infra* note 122 (discussing China's flirtation with judicial independence).

maintain a judge's freedom to decide a case in accordance with the judge's view of the law: (1) fixed tenure that offers protection from arbitrary removal and that is subject only to narrowly tailored provisions allowing discipline or removal of judges for misconduct or incapacity; (2) fixed and adequate compensation; (3) minimum qualifications; and (4) limited civil immunity for judicial decisions. Part I also examines and excludes other possible factors as elements of judicial independence. Because this Article identifies the essential institutional elements of judicial independence, it does not address the difficult question of the optimal amount of power that should be assigned to judges in any political system.⁷ Accordingly, Part I also discusses why the doctrine of the separation of powers is not a separate element of judicial independence.

Using these four elements, Part II assesses the viability of judicial independence in nineteenth-century Russia. Russia radically transformed its judicial system through the Judicial Reform of 1864. Arguably the most successful of Tsar Alexander II's Great Reforms,⁸ the Judicial Reform transplanted a legal system modeled on the systems of Western Europe into a society having the most primitive legal institutions. Judicial independence, which was previously unknown in Russia, was a critical part of the Judicial Reform. Despite severe criticism from conservative elements in Russian society and attempts by later tsarist governments to abolish it, judicial independence survived in Russia, and the judiciary established by the Judicial Reform maintained its independence throughout the last fifty years of the tsarist regime.⁹

Part II begins with a discussion of the Russian legal system before the Judicial Reform and the changes that the Judicial Reform made. Part II next describes the structural provisions for an independent Russian judiciary that the Judicial Reform contained. Finally, Part II examines how judicial independence flourished in Russia until the Bolshevik revolution in 1917, which led to the creation of the Union of Soviet Socialist

⁷ See, e.g., *infra* note 13 and accompanying text; see also TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY (Irwin P. Stotzky ed., 1993).

⁸ See, e.g., NICHOLAS V. RIASANOVSKY, A HISTORY OF RUSSIA 377 (5th ed. 1993) ("The reform of the judiciary . . . proved to be the most successful of the 'great reforms.' Almost overnight it transformed the Russian judiciary from one of the worst to one of the best in the civilized world."); see also *infra* note 164.

⁹ This conclusion should be subject to further review. For this Article, I used only material that is available in the United States. As the significant amount of scholarly work on the pre-Soviet Russian legal system in the last fifteen years shows, the libraries and archives of Russia and the other countries that once constituted the Union of Soviet Socialist Republics contain an enormous amount of information about the operation of the Judicial Reform and the pre-Soviet legal system. This information could confirm or change my conclusion.

Republics.

I. THE ELEMENTS OF JUDICIAL INDEPENDENCE

Judicial independence originated during the development of the Anglo-American political and judicial systems. As one of the legacies of the Glorious Revolution of 1688, England permanently established the independence of the English judiciary.¹⁰ The Framers of the United States Constitution also enshrined the concept in 1789.¹¹ The development of judicial independence in England and the United States generates both the definition of judicial independence and the elements necessary to establish and maintain it.

A. *Definition*

Judicial independence means a judge's freedom to apply her interpretation of the law to each case before her.¹² The "law" is a source of authority that is applicable beyond any particular case—a constitution, statutes, or, to the extent relevant in the particular legal system, judicial precedent. Judicial independence does not exist if the government or the parties may define "law" in a way that would control how a judge—whether a single decision maker or a member of a panel—would dispose of a single, discrete case.

The term "judicial independence" is often used in a broader sense. Martin Redish identifies four types of judicial independence in the United States federal courts: institutional independence (tenure and salary protection); lawmaking independence; counter-majoritarian independence (a judge's ability to override legislative acts); and decisional independence.¹³ This Article considers only decisional independence to be judi-

¹⁰ See *infra* note 21.

¹¹ See *infra* note 23.

¹² See, e.g., *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871) ("[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."); see also THEODORE L. BECKER, *COMPARATIVE JUDICIAL POLITICS* 143-45 (1970); James Zagel & Adam Winkler, *The Independence of Judges*, 46 *MERCER L. REV.* 795 (1995) (exploring the extent of and the constraints on this freedom from the perspective of judges); *infra* note 38 (presenting a federal appellate judge's views on judicial independence).

¹³ Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 *MERCER L. REV.* 697, 698-99 (1995); see also Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 *MERCER L. REV.* 835, 838, 839, 844-45 (1995) (distinguishing deci-

cial independence. As discussed in Part I.B, Redish's "institutional independence" comprises some of the elements necessary to ensure decisional independence. Lawmaking independence is merely one way to allocate sources of authority in a political system; it is not indispensable to a government ruled by law or to an independent judiciary.¹⁴ Nor is "counter-majoritarian independence" essential, as discussed in Part I.C.

The definition of judicial independence necessarily embodies the subjective elements of judicial decisionmaking. It is impossible to distinguish between the law as an external object and a judge's, or anyone else's, interpretation of the law. Accordingly, there is no way to establish conclusive, "objective" standards for the "correct" interpretation of law.¹⁵ An attempt by political bodies—a legislature, an executive, or an electorate—to establish standards for reviewing "incorrect" decisions would present a threat to judicial independence. Consequently, judicial independence requires that a legal system protect its judges from governmental, business, personal, or social pressures that could force a judge to deviate from her interpretation and application of the law.¹⁶

sional independence from procedural and administrative independence).

¹⁴ Accordingly, Linda Mullenix went too far when she asserted that a "judiciary that cannot create its own procedural rules is not an independent judiciary." Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 734 (1995). The allocation of rule making power between the political bodies—the legislature, the executive, and the electorate—and the judiciary is a larger political-structural issue, but it is not an issue of judicial independence. Control by the political bodies over court procedure would only implicate judicial independence if the control were exercised in a way that influenced how a judge decided an individual case. Of course, to the extent that judges have more "judicial power," *id.*, they may have more independence. The lack of rulemaking power, however, does not take a judiciary below the threshold of independence.

¹⁵ One must be careful using the term "objective." See generally Jeanne Schroeder, *Subject: Object*, 47 U. MIAMI L. REV. 1 (1992). I am using the term "objective" in the sense of "external objectivity"—the idea that there is an object, like the true intent of the legislature or the true meaning of a legislative pronouncement, that exists independent of those who perceive it. *Id.* at 43-44. There are some notions of objectivity that may apply to judicial decisionmaking, such as "argumentative objectivity" or "community objectivity," but these depend on the collective subjective judgments of members of the community. *Id.* at 17-24, 28-31.

¹⁶ Jerome Cohen offered a comparable if more restricted definition:

[A]s a minimum, "Judicial Independence" means that political organs will not interfere with the application of these legal sources [constitutions, statutes, regulations, rules of decisions, and other sources of authority] to the facts of particular cases. In principle, it should also mean that political organs will not inflict deprivation upon honest judges who make undesired decisions, nor reward those who make favored decisions.

Jerome Alan Cohen, *The Chinese Communist Party and "Judicial Independence"*:

Thus, judicial independence requires that a judge who consistently interprets the law from a particular viewpoint (for example, Justices Scalia or Brennan) remain free to do so whether that viewpoint is personal (in the sense of a personal quirk rather than bias against a particular person), cultural (reflecting a judge's social and environmental background), or political-ideological (such as a Jeffersonian Democrat or a Hamiltonian Federalist).

In the extreme, the concept of judicial independence protects a judge who misreads or misinterprets relevant sources of the law, so long as her decisions result from her thought process and not from inappropriate outside pressures. Threats of bodily injury or premature removal from office exemplify "inappropriate outside pressures." Criticism by scholars, lawyers, litigants, and the press, however, is not an inappropriate outside pressure because a judge can ignore such criticism.¹⁷

The subjective nature of the definition of judicial independence offers an advantage—it frees the inquiry into judicial independence from the specific cultural features of any single legal system. Few judges will disagree with the prevailing premises of their society.¹⁸ Those premises may vary from one legal culture to another. The subjective definition of judicial independence eliminates the differences that may exist among legal cultures.

B. *Requirements for Judicial Independence*

The existence and degree of judicial independence depend upon specific institutional arrangements.¹⁹ The essential elements of these insti-

1949-1959, 82 HARV. L. REV. 967, 973 (1969). Note that Cohen restricted his definition to political pressure.

¹⁷ See *infra* note 78 (discussing the experience of United States District Judge Harold Baer, Jr.).

¹⁸ See Cohen, *supra* note 16, at 973.

¹⁹ See Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 210 (1993):

No feature of our public institutional life, however, is likely more essential to preserving a government of laws than an honorable and independent judiciary. Except perhaps for concerns surrounding the judicial nomination and confirmation processes, no issues pertain more directly to the quality of judicial integrity and independence than those of judicial tenure, compensation, discipline, and removal.

See also *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59-60 (1982) (discussing life tenure and fixed compensation); *The Declaration of San Juan de Puerto Rico*, quoted in Lorna A. Lockwood, *An Independent Judiciary*, 51 WOMAN L.J. 117, 117 (1965):

The First Judicial Conference of the Americas, assembled in the City of San Juan Bautista de Puerto Rico from May 24 through 26, 1965, consisting of Chief Jus-

tutional arrangements are: (1) guarantee of a fixed tenure, subject to a limited process of removal or discipline for misconduct or disability; (2) fixed and adequate compensation; (3) sufficiently high minimum qualifications in education and experience; and (4) limited judicial immunity. Tenure, the most important element, directly protects judges from outside pressures. Fixed compensation has a similar function. Adequate compensation and minimum qualifications do not directly protect judges from interference, but they are important. They furnish the means to establish and maintain judicial integrity and the respect of their society. Therefore, they are necessary to check the political factions that might otherwise try to weaken judges' tenure protection. They prevent

tices and Justices of the Supreme Courts of most of the nations of America, being aware that a stable judiciary, free from interference and pressure of any nature, is of paramount importance for the Rule of Law in a representative democracy, assumes its historic responsibility in the strengthening of democracy and solemnly

DECLARES

First: A vigorous and independent judiciary is a fundamental requisite, a basic element for the very existence of any society that respects the Rule of Law. Judicial independence should be secured by means of legal and constitutional guarantees that render impossible any interference or pressure of any nature with the judicial function.

Second: The judges and other judicial officers should be selected on the basis of their ability and integrity; political or partisan criteria should not be used in the selection of the members of the judiciary. For the attainment of these goals, taking into consideration the particular judicial structure of each state, adequate mechanisms are needed to make the principles necessary for judicial independence a reality.

Third: Security in office is an essential element for the achievement of true judicial independence. Judges should not be removed from office except for constitutionally established reasons and by due process of law.

Fourth: The economic autonomy of the Judicial Power, based on resources that permit the fulfillment of its high mission, should be constitutionally recognized. Judges should receive adequate compensation in order to free them from the pressures of economic insecurity. This compensation should not be altered to their detriment.

Fifth: It primarily behooves the lawyers, as auxiliaries of the judiciary, to make sure that the principles contained in this Declaration are truly achieved and maintained.

Sixth: Judicial independence in America will be greatly strengthened by the creation and development of permanent professional organizations and by the interchange of ideas and experiences through international congresses and conferences.

See also Peter G.B. McNeill, *The Independence of the Scottish Judiciary*, 3 JURID. REV. 134, 134 (1958) (listing several requirements for judicial independence: personal integrity, "payment of salaries out of the consolidated fund, immunity from legal proceedings, and appointment for life").

erosion of judicial independence. Finally, limited civil immunity provides some direct protection to judicial independence.

1. *Tenure and Accountability*

a. *Length of Tenure*

As is evident in England's century-long struggle for judicial independence,²⁰ the most important element is an assurance that judges will not be removed or disciplined because of their decisions. Tenure—either for life or until a specified retirement age—is the strongest way to provide this assurance. Since the beginning of the eighteenth century,²¹

²⁰ James I (1603-1625) dismissed Lord Coke as Chief Justice of the King's Bench in 1616; Charles I (1625-1649), Charles II (1660-1685), and James II (1685-1688) dismissed with increasing frequency judges who did not decide cases the way that the monarch desired. 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 509-14 (2d ed. 1924); COLIN R. LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY 333-35 (1962); BERNARD SCHWARTZ, THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND 121-23, 150, 190-91 (1967); SHIMON SHETREET, JUDGES ON TRIAL: A STUDY OF THE APPOINTMENT AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY 2-9 (1976).

²¹ After the Glorious Revolution of 1688, which deposed James II and invited William (1689-1702) and Mary (1689-1694) to assume the monarchy, English judges were appointed to serve "during good behavior" rather than at the King's pleasure. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 195 (7th ed. 1956); SCHWARTZ, *supra* note 20, at 199. The English Parliament codified the requirements of tenure during good behavior and fixed salaries in the Act of Settlement. Act of Settlement 12 & 13 Will. 3, ch. 2, § 3 (1701) (Eng.) ("Judge's Commissions [shall] be made *Quamdiu se bene gesserint* [during good behavior], and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them."). This provision was to become effective upon the death of Princess Anne of Denmark who became Queen Anne in 1702. *Id.* At that time, judges' commissions terminated upon the death of the sovereign, although the successor regularly reappointed the incumbent judge. LOVELL, *supra* note 20, at 453. In 1760, Parliament removed this limitation and fully implemented judicial independence. Act of 1 George III, 1 Geo. 3, ch. 23 (1760) (Eng.):

Whereas . . . your Majesty has been graciously pleased to declare . . . that you look upon the Independency and Uprightness of Judges, as essential to the impartial Administration of Justice, as one of the best securities to the rights and Liberties of your loving Subjects, and as most conducive to the Honour of your Crown, . . . be it enacted . . . That the Commission of Judges for the Time being, shall be, continue, and remain, in full Force, during their good Behavior, notwithstanding the Demise of his Majesty

II. Provided always, and be it enacted by the Authority aforesaid, That it may be lawful for his Majesty, his Heirs, and Successors, to remove any Judge or Judges upon the Address of both Houses of Parliament.

England's judges have had tenure "during good behavior," which was essentially life tenure until Parliament enacted a mandatory retirement age.²² Since 1789, federal judges in the United States have had life tenure.²³ Judges in a few American states,²⁴ in Canada²⁵ and other com-

III. And be it enacted by the Authority aforesaid, That such Salaries as are settled upon Judges for the time being, or any of them, by Act of Parliament, and also such Salaries as have been or shall be granted by his Majesty, his Heirs, and Successors, to any Judge or Judges, shall, in all time coming, be paid and payable to every such Judge and Judges for the time being, so long as the Patents or Commissions of them, or any of them respectively, shall continue and remain in force.

See also 1 WILLIAM BLACKSTONE, COMMENTARIES *258; SHETREET, *supra* note 20, at 10-15; Raoul Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475, 1478 (1970); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1054-55 (1994); John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1 (1970).

²² Generally, judges other than the Law Lords must retire at the age of 70, subject to discretionary extension to age 75. Judicial Pensions and Retirement Act, 1993, ch. 8, § 26 (Eng.).

²³ U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."). The standard of "good behavior" is the same as that in the 1701 Act of Settlement and in the 1760 Act of 1 George III. *See supra* note 21. The Framers of the Constitution intended to create an independent judiciary. THE FEDERALIST, *supra* note 1, No. 78, at 489-96, No. 79, at 497-99. They did so in response to British refusal before the American Revolution to extend the tenure protections of British judges to colonial judges. *See* Declaration of Independence, para. 11 (U.S. 1776) ("He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."); Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 112 (1970).

²⁴ *See, e.g.*, MASS. CONST. pt. 2d, ch. III, art. I (judicial officers hold offices during good behavior); N.H. CONST. pt. 2d, art. 73 (good behavior); R.I. CONST. art. X, § 5 (good behavior); *see also* N.J. CONST. art. VI, § VI, ¶ 3 (after initial seven-year term, judges who are reappointed by the Governor serve during good behavior). Before the enactment of an amendment to the Rhode Island constitution in 1994, a grand committee of the two legislative houses appointed judges, and those judges held office until their place was declared vacant by a majority of both houses. *See* R.I. CONST. art. X, § 4 (repealed 1994).

²⁵ *See, e.g.*, Ian Greene, *The Doctrine of Judicial Independence Developed by the Supreme Court of Canada*, 26 OSGOODE HALL L.J. 177, 179-82 (1988); W.R. Lederman, *Judicial Independence and Court Reforms in Canada for the 1990's*, 12 QUEEN'S L. J. 385, 387 (1987); Kersi B. Shroff et al., *Judicial Tenure: The Removal and Discipline of Judges in Selected Countries*, in 2 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 1459, 1501-03 (1993) [hereinafter RESEARCH PAPERS] (mandatory retirement generally at age 75); William K. Slate

mon law countries,²⁶ and in France,²⁷ Germany,²⁸ and other civil law countries²⁹ have permanent tenure.

In most American states, judges serve a fixed term of between six and twelve years,³⁰ although some judges have longer terms,³¹ and oth-

II, *New Paradigms of Judicial Discipline: Application of Foreign Models in the American System*, in 2 *id.* at 1427-29.

²⁶ Federal judges in Australia have tenure until mandatory retirement at age 70. Shroff, in 2 RESEARCH PAPERS, *supra* note 25, at 1480; Slate, in 2 RESEARCH PAPERS, *supra* note 25, at 1417. Judges in India also have permanent tenure. Shroff, in 2 RESEARCH PAPERS, *supra* note 25, at 1556. Judges in Ireland serve until retirement at ages 65 to 72, depending on the court, *id.* at 1563, and judges in Pakistan retire at ages 62 or 65, *id.* at 1622-23.

²⁷ Judges retire at age 65, and chief judges retire at 68. HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 50 (6th ed. 1993) (gradual development in France from 1800 to 1945); Shroff, in 2 RESEARCH PAPERS, *supra* note 25, at 1514-16; Slate, in 2 RESEARCH PAPERS, *supra* note 25, at 1437, 1441-42.

²⁸ Permanent tenure after initial probationary period for all federal judges other than the sixteen members of the Federal Constitutional Court; retirement at age 68; Shroff, in 2 RESEARCH PAPERS, *supra* note 25, at 1527-29; Slate, in 2 RESEARCH PAPERS, *supra* note 25, at 1450-53.

²⁹ These countries include Argentina (federal judges, life tenure), Shroff, in 2 RESEARCH PAPERS, *supra* note 25, at 1474; Belgium (mandatory retirement at 67 or 70 years of age), *id.* at 1489; Brazil (permanent tenure after a two-year probationary period, subject to retirement at age 70), *id.* at 1494-96; Greece (after one-year probationary period; retirement at ages 65 or 67), *id.* at 1547; Italy, *id.* at 1576; the Netherlands (retirement at 70), *id.* at 1611; Poland (retirement at 65-70), *id.* at 1626-28; and Sweden, at 1647-49.

In Mexico, federal judges other than members of the Supreme Court of Justice have life tenure after an initial six-year term. *Id.* at 1603. In 1995, Mexico adopted a constitutional amendment to change the tenure of members of its Supreme Court of Justice from tenure until mandatory retirement at age 70 to a maximum term of 15 years. See Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 AM. U. J. INT'L L. & POL'Y 295, 305-06 (1996). The rationale for the change was an expansion of the power of this court to declare acts of the federal legislature unconstitutional. *Id.* at 306, 312-14.

³⁰ *E.g.*, ALA. CONST. art. VI, § 6.15(a) (six years); ARK. CONST. art. VII, § 6 (eight years, supreme court); CAL. CONST. art. VI, § 16 (twelve years, supreme court and court of appeals; six years, superior court); DEL. CONST. art. IV, § 3 (twelve years); GA. CONST. art. VI, § VII, ¶ 1 (six years, supreme court and court of appeals); HAW. CONST. art. VI, § 3 (ten years, supreme court, court of appeals, and circuit court); IDAHO CONST. art. V, § 6 (six years, supreme court); ILL. CONST. art. VI, § 10 (ten years, supreme court and appellate court; six years, circuit court); IND. CONST. art. 7, §§ 7, 11 (ten years, supreme court and court of appeals; six years, circuit court); IOWA CODE § 46.16 (minimum of eight years, supreme court; six years, court of appeals); KAN. CONST. art. 3, § 2 (six years, supreme court); KY. CONST. § 119 (eight years, supreme court, court of appeals, and circuit court); LA. CONST. art. V, §§ 3, 8, 15 (ten years,

ers have terms of only four years.³² Similarly, judges in Japan are appointed for ten-year terms,³³ judges in most Swiss cantons are elected for fixed terms, the most common of which is six years,³⁴ and members of Mexico's Supreme Court of Justice have fifteen-year terms.³⁵ During these limited terms, protection against arbitrary removal is undoubtedly important. That judges face reappointment, however, raises questions about the extent to which they can exercise their judgement free from inappropriate outside pressures.³⁶

b. *Methods of Accountability*

Two hundred years of experience with an independent judiciary in the United States have produced an important corollary to a guarantee of

supreme court and court of appeals; six years, trial courts); ME. CONST. art. VI, § 4 (seven years); MD. CONST. art. IV, §§ 5A, 41D (ten years, court of appeals, court of special appeals, and district court); MICH. CONST. art. VI, §§ 2, 9, 12 (eight years, supreme court; six years, other courts); MINN. CONST. art. VI, § 7 (six years); MISS. CONST. art. 6, § 149 (eight years, supreme court); N.Y. CONST. art. VI, §§ 10.b, 12.c., 13.a (ten years, county court, surrogate court (excluding New York City), and family court); N.C. CONST. art. IV, § 16 (eight years); N.D. CONST. art. VI, §§ 7, 9 (ten years, supreme court; six years, district court); OHIO CONST. art. IV, § 6 (six years); ORE. CONST. art. VII (amended), § 1 (six years); S.C. CONST. art. V §§ 3, 8, 13 (ten years, supreme court; six years, court of appeals and circuit court); S.D. CONST. art. V, § 7 (eight years); TEX. CONST. art. V, §§ 2, 4, 6 (six years, supreme court, court of criminal appeals, and court of appeals); UTAH CONST. art. VIII, § 9 (ten years, supreme court; six years, other courts of record); VT. CONST. ch. II, § 34 (six years); WASH. CONST. art. IV, § 3 (six years, supreme court); W. VA. CONST. art. VIII, §§ 2, 5 (twelve years, supreme court of appeals; eight years, circuit court); WIS. CONST. art. VII, §§ 4, 5, 7 (ten years, supreme court; six years, court of appeals and circuit court); WYO. CONST. art. 5, § 4 (eight years, supreme court; six years, district court).

³¹ MD. CONST. art. IV, § 5 (fifteen years, circuit court); N.Y. CONST. art. VI, §§ 2.a, 6.c, 12.c (fourteen years, court of appeals, supreme court, and surrogate court (in New York City only)).

³² ARK. CONST. art. VII, § 17 (circuit court); GA. CONST. art. VI, § VII, ¶ 1 (superior court, the court of general jurisdiction, and state court, the court of limited jurisdiction); IDAHO CONST. art. V, § 11 (district court, court of general jurisdiction); KAN. CONST. art. 3, § 6 (district court, court of general jurisdiction); KY. CONST. § 119 (district court, limited jurisdiction); MISS. CONST. art. 6, § 153 (circuit and chancery courts); TEX. CONST. art. V, §§ 7, 15 (district court, the court of general jurisdiction, and the county court, a court of record with limited jurisdiction); WASH. CONST. art. IV, § 5 (superior court).

³³ See THE JAPANESE LEGAL SYSTEM 549-56, 558-62 (Hideo Tanaka & Malcolm D.H. Smith eds., 1976); Shroff, in 2 RESEARCH PAPERS, *supra* note 25, at 1583.

³⁴ GLOS, *supra* note 4, at 708.

³⁵ See Vargas, *supra* note 29, at 305-06.

³⁶ See *infra* notes 67-89 and accompanying text.

fixed tenure—the need for accountability. Accountability requires a procedure narrowly tailored to discipline or remove judges because of serious “bad behavior” or mental or physical incapacity.³⁷ Without a provision for accountability, the tendency of power to corrupt those who wield it will produce some judges whose behavior will cause a loss of respect for the judiciary and, in turn, the potential loss of judicial independence.³⁸

There are two ways to promote accountability. One is through removal by political bodies—the legislative body, the executive, or the electorate; the other is through removal or discipline by a supervisory judicial body. That either a political body or a judicial body may remove or discipline judges does not, by itself, interfere with judicial independence. The important issue is the specific basis for action against a judge. So long as action against a judge occurs for reasons other than her interpretation of the law in a particular case, judicial independence is preserved.

Removal of judges by political bodies may take one of several forms. The United States allows removal of federal judges for specific reasons

³⁷ The United States Supreme Court recognized the tension between judicial independence and the need for accountability in *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84-86 (1970). In *Chandler*, the Court refused to grant leave to a federal district judge to file a writ of mandamus to challenge an order from the Tenth Circuit’s judicial council not to hear any new cases until it made a further order.

³⁸ Judge John J. Parker, United States Court of Appeals for the Fourth Circuit, addressed this aspect of judicial independence:

There is one qualification which is the *sine qua non* of judicial success or even judicial respectability. That quality is independence. This, of course, is embraced in honesty and courage; but it is so important that it should be spoken of separately. The judge must not only be independent—absolutely free of all influence and control so that he can put into his judgments the honest, unfettered and unbiased judgment of his mind but he must be so freed of business, political and financial connections and obligations that the public will recognize that he is independent. It is of supreme importance, not only that justice be done, but that litigants before the court and the public generally understand that it is being done and that the judge is beholden to no one but God and his conscience. As was well said by John Marshall in the debate on the Constitution in the Virginia Convention:

The Judicial Department comes home in its effects to every man’s fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important, that he (the judge) should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary.

John J. Parker, *The Judicial Office in the United States*, 20 TENN. L. REV. 703, 705-06 (1949). Unfortunately, Judge Parker did not provide a citation for Marshall’s quote.

upon impeachment by the House of Representatives and conviction by two-thirds of the Senate.³⁹ Similarly, more than forty states provide for impeachment by one legislative body and removal upon conviction by a two-thirds vote of the members of the other legislative body; each state, however, has different standards for removal.⁴⁰ Although impeachment

³⁹ U.S. CONST. art. 2, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.);" *id.* art. 1, § 2, cl. 5 (impeachment by House of Representatives); *id.* art. 1, § 3, cl. 6 (conviction by two-thirds of Senators present). See generally RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973); Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643 (1987-1988); Robert S. Catz, *Removal of Federal Judges by Imprisonment*, 18 RUTGERS L.J. 103 (1986); Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763 (1987-1988); Kaufman, *supra* note 2, at 690; Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969); Maria Simon, Note, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617 (1994).

In 1986, the United States House of Representatives declined to initiate impeachment proceedings against three United States Court of Appeals judges for allegedly acting irresponsibly in ordering a new trial for a convicted murderer on the grounds of unfair pretrial publicity. Kastenmeier & Remington, *supra*, at 779. *But see infra* note 78.

⁴⁰ See, e.g., ALASKA CONST. art. II, § 20 and art. IV, § 12 (malfeasance or misfeasance; 2/3 vote of senate for impeachment; 2/3 vote of house of representatives for conviction); ARIZ. CONST. art. VIII, pt. 2, §§ 1-2 (high crimes, misdemeanors, or malfeasance in office); ARK. CONST. art. 15, § 1-2 (high crimes, misdemeanors, and gross misconduct in office); CAL. CONST. art. IV, § 18 (misconduct in office); COLO. CONST. art. XIII, §§ 1-2 (high crimes, or misdemeanors or malfeasance in office); CONN. CONST. art. 9th, §§ 1-3 (no cause specified); DEL. CONST. art. VI, §§ 1-2 (treason, bribery, high crime, or misdemeanor; 2/3 vote for impeachment and conviction); FLA. CONST. art. III, § 17 (misdemeanor in office; 2/3 vote for impeachment and conviction); GA. CONST. art. III, § VII, ¶¶ I, II (no cause); IDAHO CONST. art. V, §§ 3-4 (no cause); ILL. CONST. art. IV, § 14 (no cause); IND. CONST. art. 6, § 7, and IND. CODE §§ 5-8-1-1, 5-8-1-10 (state officers, including all judges other than supreme court justices and court of appeals judges; crime, incapacity, or negligence; 2/3 vote for impeachment and conviction); IOWA CONST. art. III, §§ 19-20 (misdemeanor or malfeasance in office); KAN. CONST. art. 2, §§ 27-28; art. 3, § 15 (justices of the supreme court, for treason, bribery, or other high crimes and misdemeanors); KY. CONST. §§ 66-68, 109 (misdemeanors in office); LA. CONST. art. X, § 24 (felony, malfeasance, or gross misconduct); ME. CONST. art. IV, pt. 1, § 8; art. IV, pt. 2, § 7; art. VI, § 4; art. IX, § 5 (misdemeanor in office); MD. CONST. art. III, § 26; art. IV, § 4 (no cause); MASS. CONST. pt. 2d, ch. I, § II, art. VIII; § III, art. VI (misconduct and maladministration; majority vote for conviction); MICH. CONST. art. XI, § 7 (corrupt conduct in office, crimes, or misdemeanors); MINN. CONST. art. VIII, §§ 1-2, (corrupt conduct in office, crimes, or misdemeanors); MISS. CONST. art. 4, §§ 49-50, 52 (treason, bribery, or any high crime or

misdemeanor; 2/3 vote for impeachment and conviction); MONT. CONST. art. V, § 13 (2/3 vote for impeachment by house for causes determined by legislature; 2/3 vote for conviction by tribunal selected by legislature); NEV. CONST. art. 7, §§ 1-2 (misdemeanor or malfeasance in office); N.H. CONST. pt. 2d, arts. 17, 38 (bribery, corruption, malpractice, or maladministration); N.J. CONST. art. VI, § VI, ¶ 4; art. VII, § III, ¶¶ 1-2 (misdemeanor); N.M. CONST. art. IV, §§ 35-36 (crimes, misdemeanors, and malfeasance); N.Y. CONST. art. VI, § 24 (trial of impeachment by President of Senate, senators and judges of court of appeals; no grounds specified); N.C. CONST. art. IV, § 4 (no standards); N.D. CONST. art. XI, §§ 8-10 (judicial officers other than county judges and justices of peace, for habitual intemperance, crimes, corrupt conduct, malfeasance, or misdemeanor in office); OHIO CONST. art. II, §§ 23-24 (misdemeanor in office); OKLA. CONST. art. VIII, §§ 1, 3-4 (willful neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude); PA. CONST. art. VI, §§ 4-6 (misbehavior in office); R.I. CONST. art. XI, §§ 1-3 (incapacity, felony, crime of moral turpitude, misfeasance, malfeasance, or violation of canons of judicial ethics); S.C. CONST. art. XV, §§ 1-2 (serious crimes or serious misconduct in office; 2/3 vote for impeachment and conviction); S.D. CONST. art. XVI, §§ 1-3 (judicial officers other than county judges, for drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office); TENN. CONST. art. V, §§ 1-2, 4 (“any crime in their official capacity which may require disqualification”; 2/3 vote for conviction); TEX. CONST. art. XV, §§ 1-3 (no standards); UTAH CONST. art. VI, §§ 17-19 (high crimes, misdemeanors, or malfeasance in office; 2/3 vote for impeachment and conviction); VT. CONST. ch. II, §§ 57, 58 (maladministration; 2/3 vote for impeachment and conviction); VA. CONST. art. IV, § 17 (malfeasance in office, corruption, neglect of duty, or other high crime or misdemeanor); WASH. CONST. art. V, §§ 1-2 (high crimes or misdemeanors or malfeasance in office); W. VA. CONST. art. IV, § 9 (maladministration, corruption, incompetency, gross immorality, neglect of duty, or any crime or misdemeanor); WIS. CONST. art. VII, § 1 (corrupt conduct in office or crimes or misdemeanors); WYO. CONST. art. 3, §§ 17-18 (high crimes and misdemeanors or malfeasance in office); *see also* COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES* 136-43 (1996-1997).

Alabama's constitution provides for the removal of justices of the supreme court by impeachment. ALA. CONST. art. VII, § 173. A constitutional amendment created a procedure for removal of judges by the supreme court and repealed the impeachment provisions as they related to judges. *Id.* amend. 317, § 5 (repealed). A subsequent amendment adopted a new article VI on the Judiciary and incorporated a judicial removal procedure, but it also repealed amendment 317. *Id.* amend. 328. In a few states, a court or a judicial tribunal tries impeachments from the legislature. *See, e.g.*, MO. CONST. art. VII, §§ 1-2; NEB. CONST. art. III, § 17; art. IV, § 5.

Several states provide for the removal of judges by the legislature through means other than or in addition to “impeachment.” *See, e.g.*, IND. CONST. art. 6, § 7; IND. CODE § 5-8-1-1 (crime, incapacity, or negligence; 2/3 vote for removal by joint resolution); NEV. CONST. art. 7, § 3 (any reasonable cause; in addition to impeachment; 2/3 vote of each house; no member of legislature may fill a vacancy created by removal); N.Y. CONST. art. VI, § 23 (court of appeals and supreme court judges; 2/3 vote of each house, for cause); N.C. CONST. art. IV, § 17(1) (removal for mental or physical capacity by joint resolution of 2/3 of each house); OHIO CONST. art. IV, § 17 (by concurrent resolution of 2/3 of each house, upon complaint); TENN. CONST. art. VI, § 6 (2/3 vote of each house); WIS. CONST. Art. VII, § 13 (by address of 2/3 of both houses); WASH.

arose in England and theoretically may be available against judges, Parliament has not impeached any official since 1805 or any judge since 1725.⁴¹ In Japan, impeachment is the sole means of removing judges for misconduct.⁴² Impeachment is also the exclusive means for the removal of judges in Argentina, a civil law country.⁴³

Another form of political removal is by "address." In England, Parliament may remove judges by an address to the Crown.⁴⁴ Although the legislation creating removal by address contains no limitations on Parliament's power,⁴⁵ in practice Parliament has adopted considerable procedural and substantive limitations on its power and in the last three centuries has removed only one judge by address.⁴⁶

Canada also provides for removal of judges by address,⁴⁷ as do Aus-

CONST. art. IV, § 9 (removal of judges of courts of record for incompetency, corruption, malfeasance, delinquency in office, or other sufficient cause, by 3/4 vote of each house; in addition to impeachment); *see also infra* note 49 and accompanying text.

⁴¹ *See* SHETREET, *supra* note 20, at 122 & n.13. Thomas, Lord Parker, later Lord Macclesfield, who served as Lord Chancellor from 1718-1725, was the last judicial officer to be impeached; he was impeached for corruption in 1725 after he had resigned his post. *Id.* at 125-28; 8 EDWARD FOSS, JUDGES OF ENGLAND 4-5, 48-50 (London 1864).

⁴² An Impeachment Committee consisting of twenty members of the lower house of the Diet may by a two-thirds vote initiate impeachment of a judge for grave violation or neglect of official duties or misconduct seriously affecting the integrity of the judge. An Impeachment Court consisting of seven members of the lower house and seven members of the upper house of the Diet then by a two-thirds vote may remove the judge. *See* Shroff, in 2 RESEARCH PAPERS, *supra* note 25, at 1581-83. Additionally, the Supreme Court or, in cases of subordinate judges, a high court (the next highest court) may remove judges who become physically or mentally incapacitated. *Id.* at 1583; *see infra* note 57 and accompanying text.

⁴³ *See* Shroff, in 2 RESEARCH PAPERS, *supra* note 25, at 1475-78 (impeachment by 2/3 vote of Chamber of Deputies; trial by Senate, in which 2/3 vote needed for conviction; detailed grounds spelled out in the Constitution). Lesser sanctions may be imposed by a judicial tribunal. *See infra* note 58 and accompanying text.

⁴⁴ The British Parliament adopted this method in 1701. Act of Settlement, 12 & 13 Will. 3, ch. 2, § 3 (1701), quoted *supra* note 21, and confirmed in 1760, Act of 1 George III, 1 Geo. 3, ch. 23 (1760) (Eng.), quoted *supra* note 21.

At the United States constitutional convention, John Dickinson of Delaware proposed allowing removal by address, but other delegates opposed that procedure, believing that it would interfere with judicial independence. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 536-37 (Ohio Univ. Press 1966) (1787) (debates of August 27, 1787) (reprint of Madison's Notes edited by Charles C. Tansill in H.R. DOC. 398, 69TH CONG., 1ST SESS., DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 109-745 (1927)).

⁴⁵ *See* Act of Settlement, 12 & 13 Will. 3, ch. 2, § 3 (1701) (Eng.); Act of 1 George III, 1 Geo. 3, ch. 23 (1760) (Eng.); *supra* note 21 (quoting both acts).

⁴⁶ SHETREET, *supra* note 20, at 104-08, 143.

⁴⁷ The Governour-General may remove a judge upon receiving an address from both

tralia, India, and Ireland.⁴⁸ About one-fifth of the American states have constitutional provisions for removal by the governor upon address or resolution from the legislature. Some of those states specify the grounds for removal, require a super-majority, or do both.⁴⁹ A few states allow the governor to retire a judge because of mental or physical disability.⁵⁰

houses of Parliament. It is unclear whether removal must be based on the absence of good behavior. See Shroff, in 2 RESEARCH PAPERS, *supra* note 25, at 1501-03; Slate, in 2 RESEARCH PAPERS, *supra* note 25, at 1427-30. Canada also has a Judicial Council composed of judges that may investigate complaints against federal judges and recommend their removal. Shroff, in 2 RESEARCH PAPERS *supra* note 25, at 1503-04; Slate, in 2 RESEARCH PAPERS *supra* note 25, at 1430-35.

⁴⁸ In Australia, the Governour-General may remove a federal judge upon receiving an address from both houses of Parliament based on proved misbehavior or incapacity. Comparable procedures apply to the judges of most of the states. See Shroff, in 2 RESEARCH PAPERS, *supra* note 25, at 1481-85; Slate, in 2 RESEARCH PAPERS, *supra* note 25, at 1417-22. In India, the President may remove federal and state judges for proved misbehavior or incapacity upon address based on resolutions of each house passed by a majority of total members and two-thirds of members present. Shroff, in 2 RESEARCH PAPERS, *supra* note 25, at 1557-58. In Ireland, resolutions of the houses of Parliament for removing a judge must be based on stated misbehavior or incapacity. *Id.* at 1563-66.

⁴⁹ See, e.g., ARK. CONST. art. 15, § 3 (for good cause; 2/3 vote of each house); CONN. CONST. art. 5th, §§ 2, 7 (2/3 vote of each house); ME. CONST. art. VI; § 4, art. IX, § 5 (causes of removal must be entered on the journal of the house originating the address); MD. CONST. art. IV, § 3 (circuit court judges may be retired for sickness or infirmity by 2/3 vote of each house of general assembly with consent of governor); § 4 (all judges removable by governor on address by 2/3 vote of both houses); MASS. CONST. pt. 2d, ch. III, art. I (governor with consent of executive council); MICH. CONST. art. VI, § 25 (for reasonable cause not sufficient for ground for impeachment; concurrent resolution of 2/3 of each house); MISS. CONST. art. 4, § 53 (for reasonable cause not sufficient for ground of impeachment; 2/3 vote of each house); N.H. CONST. pt. 2d, art. 73 (with consent of a council consisting of five persons elected to advise the governor; for reasonable cause that is not a sufficient ground for impeachment); S.C. CONST. art. XV, § 3 (for willful neglect of duty or other reasonable cause not sufficient for impeachment; 2/3 vote of each house); TEX. CONST. art. XV, § 8 (for wilful neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause not sufficient for impeachment [sic—constitution does not provides grounds for impeachment]; 2/3 vote of each house); see also N.Y. CONST. art. VI, § 23 (removal of judges other than court of appeals and supreme court judges by a 2/3 vote of the senate upon the recommendation of the governor).

⁵⁰ KAN. CONST. art. III, § 15 (governor may retire justice of the supreme court upon certification by the supreme court nominating commission indicating that the justice is so incapacitated as to be unable to perform adequately his duties); MASS. CONST. pt. 2d, ch. III, art. I (governor with consent of executive council may retire judicial officers on the grounds of their advanced age or mental or physical disability). Maryland allows a governor to remove a judge because of "conviction in a Court of Law, of incompetency, of wilful neglect of duty, misbehavior in office, or any other crime." MD. CONST. art. IV, § 4.

One type of political removal, the recall election, appears incompatible with judicial independence. Four states currently allow the electorate to recall a judge during her term.⁵¹ The threshold for holding a recall election is fairly high: typically there must be a petition by twelve to twenty-five percent of the number of those who voted for governor in the preceding general election.⁵² Thus, recall may not be a substantial threat to judicial independence.

The second way to promote judicial accountability is removal or discipline of judges by a tribunal composed primarily or entirely of judges. This method prevails in France,⁵³ Germany,⁵⁴ and many other civil law countries.⁵⁵ In Pakistan, a common law country, the sole means of

⁵¹ CAL. CONST. art. II, §§ 13-15 (special election within 60 to 80 days, or in certain circumstances 180 days, after certification, which requires the signatures of 12% of those who voted for an office-holder in the preceding general election and signatures from each of five counties with 1% of the vote for that office in county); N.D. CONST. art. III, § 10 (“[a]ny elected official,” which includes judges, subject to special recall election by petition of 25% of those who voted for governor in the preceding general election); ORE. CONST. art. II, § 18 (special election 35 days after filing of petition by 15% of those who voted for governor in preceding general election); WIS. CONST. art. XIII, § 12 (subject to special election six weeks after filing of petition by 25% of those who voted for governor in the preceding general election).

⁵² See *supra* note 51.

⁵³ The High Council of the Judiciary, composed of six judges, a member of the highest administrative court, and two citizens, may remove or discipline any judge. See Shroff, *in* 2 RESEARCH PAPERS, *supra* note 25, at 1514-16; Slate, *in* 2 RESEARCH PAPERS, *supra* note 25, at 1442-44.

⁵⁴ The Federal Constitutional Court may remove federal judges, including members of the Federal Constitutional Court, upon an accusation by two-thirds of the members of the federal legislature and a two-thirds vote of the members of the court, and a special branch of Germany’s highest ordinary federal court, the Federal Court of Justice, may discipline or remove federal judges in the ordinary courts. See Shroff, *in* 2 RESEARCH PAPERS, *supra* note 25, at 1527-33; Slate, *in* 2 RESEARCH PAPERS, *supra* note 25, at 1451-53.

⁵⁵ In Belgium, judges are subject to discipline by their supervisory courts and to removal by the Court of Cassation, the highest court. See Shroff, *in* 2 RESEARCH PAPERS, *supra* note 25, at 1490-91. In Brazil, a two-thirds vote of the appropriate court or a special judicial tribunal may remove or discipline a judge after the probationary period for specified grounds deemed reasons of public interest. See *id.* 1494-99. In Greece, only specified courts may dismiss a judge, judicial councils may discipline lower judges, and judges of certain higher courts are disciplined by the Supreme Disciplinary Council, which contains only a minority of judges. See *id.* at 1548-52. In Italy, the Superior Council of the Magistrature disciplines or removes judges; the Council consists of judges (two-thirds of the membership) elected by the judges, law professors or lawyers elected by Parliament (one-third of the membership), and the President of Italy, the Procurator General, and the Head of State. See *id.* at 1577-78. The Netherlands provides only for the dismissal or warning of a judge by the Supreme Court. See *id.* at 1611-13.

judicial accountability is removal of judges for misconduct or incapacity by the Supreme Judicial Council, which is composed of judges of the several courts.⁵⁶ In Japan, courts may remove a judge for mental or physical incapacity and may discipline but not remove a judge for misconduct.⁵⁷ In Argentina, a judicial tribunal may discipline, but may not remove, judges.⁵⁸

In the United States, under the Judicial Councils Reform and Judicial Conduct and Disability Act,⁵⁹ the judicial conference for each federal circuit may discipline judges.⁶⁰ Most scholars have agreed that Congress

In Poland, disciplinary courts and higher disciplinary courts conduct disciplinary and removal proceedings upon the recommendation of the National Judiciary Council. *See id.* at 1627-31. Sweden allows the removal or discipline of members of the Supreme Court or Supreme Administrative Court by the Supreme Court and removal or discipline of lower judges by the judge's judicial agency, subject to review by the State Disciplinary Board, a non-judicial body, with further review by a court of general jurisdiction. *See id.* at 1647-52. In Mexico, federal judges are subject to removal or discipline by the Council of the Federal Judiciary, which includes non-judges as two of the seven members. *See Vargas, supra* note 29, at 322-27; *see also* GLOS, *supra* note 4, at 29; Gerhard O.W. Mueller & Fr Le Poole Griffiths, *Judicial Fitness: A Comparative Study, Part II*, 52 JUDICATURE 238 (1969).

⁵⁶ *See* Shroff, in 2 RESEARCH PAPERS, *supra* note 25, at 1623-24.

⁵⁷ *See id.* at 1583-84. Removal for misconduct is done only by impeachment. *See supra* note 42 and accompanying text.

⁵⁸ *See* Shroff, in 2 RESEARCH PAPERS, *supra* note 25, at 1475-79. Judges may only be removed by impeachment. *See supra* note 43 and accompanying text.

⁵⁹ 28 U.S.C. § 372(c) (1994), enacted by Pub. L. No. 96-458, § 3(a), 94 Stat. 2035 (1980).

⁶⁰ *Id.* In each federal judicial circuit, the chief judge or a committee of federal judges must investigate complaints that a judge has engaged in conduct prejudicial to the administration of the business of the courts or is unable to discharge her duties because of mental or physical disability. Each circuit has a judicial council, which consists of the chief judge of the circuit and an equal number of court of appeals judges and district judges. 28 U.S.C. § 332 (1994). The council may impose sanctions against the judge subject to the complaint, short of removal, including certification of disability, request for retirement, temporary suspension of assignment of cases, or private or public censure. 28 U.S.C. § 372(c)(6) (1994). If a judge's conduct warrants removal, the council may forward a recommendation to that effect to the Judicial Conference of the United States, which consists of the Chief Justice of the United States Supreme Court, the chief judges of each judicial circuit, the chief judge of the Court of International Trade, and one district court judge from each judicial circuit. 28 U.S.C. § 331 (1994). The Judicial Conference of the United States may refer the matter to the House of Representatives for impeachment proceedings. 28 U.S.C. § 372(c)(7), (8) (1994). *See generally* NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, REPORT (1993); Charles D. Cole, *Judicial Independence in the United States Federal Courts*, 13 J. LEGAL PROF. 183, 196-200 (1988); Carol T. Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?*, 37 EMORY L.J. 45 (1988); John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity*

may not authorize a judicial body to remove federal judges.⁶¹

at Stake, 70 NOTRE DAME L. REV. 193 (1994) (arguing that more publicity in the judicial disciplinary process would enhance the federal judiciary's respect and independence); Lynn A. Baker, Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117 (1985); Drew E. Edwards, Comment, *Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act*, 75 CAL. L. REV. 1071 (1987).

This Act may not be used if the complaint relates to the merits of a judge's decision or to a procedural ruling. *Green v. Seymour*, 59 F.3d 1073 (10th Cir. 1995); *Duckworth v. Department of Navy*, 974 F.2d 1140 (9th Cir. 1992). One empirical study suggests that the operation of the Act has not infringed judicial independence. See Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 173-77 (1993). This study also recognizes that "[a] major benefit to both the public and the judiciary is that the Act presents a system of judicial accountability." *Id.* at 153.

Paula Abrams argued that the Act interferes with judicial independence. See Paula Abrams, *Spare the Rod and Spoil the Judge? Discipline of Federal Judges and the Separation of Powers*, 41 DEPAUL L. REV. 59 (1991). Although Abrams noted that the Act may allow some judicial interference, she did not explain how the Act interferes with a judge's ability to apply the law as the judge thinks appropriate. She stated only that a "judge under investigation pursuant to the Act may think twice before issuing a controversial opinion." *Id.* at 96-97. A judge who issues controversial decisions and who engages in misconduct could be subjected to discipline under the Act. Further, other judges could use the Act to attack non-conforming, misbehaving judges while ignoring conforming, misbehaving judges. To the extent that a judge is not misbehaving, however, the judge's freedom of judicial decisionmaking is not threatened. The Act would interfere with judicial independence only if it permitted judicial discipline in response to a judge's interpretation of the law or determination of the facts.

⁶¹ See Burbank, *supra* note 39, at 648-50; Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765, 776, 778-85 (1989); Kaufman, *supra* note 2, at 691-703; Kurland, *supra* note 39, at 668, 697-98; Shane, *supra* note 19, at 213-22; Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 138; see also *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 136-38, 141-43 (1970) (Douglas and Black, J.J., dissenting); NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, *supra* note 60, at 17-21.

A few scholars have argued that Congress may authorize the removal of judges convicted of serious crimes. See BERGER, *supra* note 39, at 131-80; Berger, *supra* note 21, at 1513, 1529-31; Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 882-83 (1930); Jon J. Gallo, Comment, *Removal of Federal Judges—New Alternatives to an Old Problem: Chandler v. Judicial Council of the Tenth Circuit*, 13 U.C.L.A. L. REV. 1385, 1396 (1966).

The arguments and authorities are reviewed in Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternative*, 68 TEX. L. REV. 1 (1989), and Simon, *supra* note 39 (concluding that impeachment is not the exclusive means of removing judges).

Most American states allow a judicial body, usually the state's highest court, and often only after investigation by a commission containing judges, lawyers, and non-lawyers, to retire judges involuntarily for disability or to discipline or remove judges for misconduct, including conduct prejudicial to the administration of justice.⁶² Many of these states also require removal of judges convicted of serious crimes and suspension of judges charged with such crimes.⁶³

A tension exists between the need to protect judges from outside interference with the judicial function and the need to hold judges accountable for bad behavior that is unrelated to their judicial function. Demands for accountability could provide an excuse to remove a judge for a particular decision. Accordingly, when removal is by a legislature, an executive, or an electorate, the grounds for removal must be sufficiently narrow and the procedures must be sufficiently stringent so that threat of removal does not intimidate judges or prevent them from deciding cases as they see fit.⁶⁴ If only judicial bodies may remove judges, the grounds and procedures need not be as narrow or as stringent. One would expect that judges responsible for judging their peers would be more sensitive to the need to preserve judicial independence,⁶⁵ just as one would expect that members of a legislature, an executive, or an electorate to be less sensitive, or even oblivious, to the need for judicial independence.⁶⁶

⁶² See generally BOOK OF THE STATES, *supra* note 40, at 136-43; Jeffrey M. Shaman, *State Judicial Conduct Organizations*, 76 KY. L.J. 811 (1987-88). In Georgia, a seven-person commission that consists of two judges, three lawyers, and two non-lawyers, may discipline, remove, or retire judges. GA. CONST. art. VI, § VII, paras. VI, VII (providing for removal, suspension, or other discipline by judicial qualifications commission for "willful misconduct in office, or for willful and persistent failure to perform the duties of office, or for habitual intemperance, or for conviction of a crime involving moral turpitude, or for conduct prejudicial to the administration of justice which brings the judicial office into disrepute").

⁶³ See Jeffrey M. Shaman, *Judicial Immunity from Civil and Criminal Liability*, 27 SAN DIEGO L. REV. 1, 20-22 (1990).

⁶⁴ For example, impeachment of federal judges is considered difficult to accomplish. See Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PA. L. REV. 333, 336-37 (1993); Gallo, *supra* note 61, at 1389.

⁶⁵ See, e.g., *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1508 (11th Cir. 1986) (allowing judicial colleagues to investigate and decide disciplinary actions "makes it likely that the rightful independence of the complained-against judge, especially in the area of decisionmaking, will be accorded maximum respect").

⁶⁶ See *infra* notes 78-89 and accompanying text.

c. *Reappointment of Judges with Limited Terms*

The limited terms of judges in most American states raise questions about their independence. In many states, some or all of the judges must stand for reelection in elections in which anyone may challenge an incumbent.⁶⁷ Many other states provide for retention elections, in which the electorate votes on whether to retain a judge.⁶⁸ In a few states, the governor reappoints judges with the consent of the state senate⁶⁹ or of

⁶⁷ ALA. CONST. amend. 328, enacting new art. VI, § 6.13; ARIZ. CONST. art. VI, §§ 12, 30, 38 (in counties having a population of less than 250,000, elections for judges of the superior court and the lower courts of record); ARK. CONST. art. VII, §§ 6, 17; CAL. CONST. art. VI, § 16 (unless voters of county choose a retention election, elections for judges of the superior court); FLA. CONST. art. V, § 10 (elections for judges of the circuit and county courts); GA. CONST. art. VI, § VII, para. 1; IDAHO CONST. art. V, §§ 6, 11; IND. CONST. art. 7, §§ 7, 11; KAN. CONST. art. 3, § 6 (elections of district court judges if legislature and voters of district so choose); KY. CONST. § 117 (nonpartisan basis); LA. CONST. art. V, § 22; MD. CONST. art. IV, § 3 (circuit court and court of general jurisdiction); MICH. CONST. art. VI, §§ 2, 8, 12 (nonpartisan elections as prescribed by law); MINN. CONST. art. VI, § 7; MISS. CONST. art. 6, §§ 145, 153; MO. CONST. art. V, § 25(b) (circuit court for circuits other than in city of St. Louis and Jackson County, in which voters choose judges in open elections); MONT. CONST. art. VII, § 8; NEV. CONST. art. 6, §§ 3, 5; N.Y. CONST. art. VI, §§ 6.c, 10.a-b, 12.b-c, 13.a (supreme court, county court, surrogate court, and family court, except in New York City, where judges are appointed by the mayor); N.C. CONST. art. IV, § 16; N.D. CONST. art. VI, §§ 7, 9; OHIO CONST. art. IV, § 6; OKLA. CONST. art. VII, §§ 3, 9 (nonpartisan elections); ORE. CONST. amended art. VII, § 1; S.D. CONST. art. V, § 7 (circuit court, by "nonpolitical election"); TENN. CONST. art. VI, §§ 3-4; TENN. CODE ANN. § 17-1-103 (1994) (trial courts); TEX. CONST. art. V, §§ 2, 4, 6-7, 15; WASH. CONST. art. IV, §§ 3, 5; W. VA. CONST. art. VIII, § 2 (legislature decides whether partisan or nonpartisan); WIS. CONST. art. VII, §§ 4-5, 7.

⁶⁸ ALASKA CONST. art. IV, § 6; ARIZ. CONST. art. VI, §§ 12, 30, 38 (elections for judges of all courts of record except superior court and lower courts of record in counties having a population of less than 250,000); CAL. CONST. art. VI, § 16 (elections for judges of the supreme court and court of appeals and, if decided by voters of county, superior court); COLO. CONST. art. VI, § 25 (excluding county court of Denver); DEL. CONST. art. IV, § 3; FLA. CONST. art. V, § 10 (supreme court and district court of appeal); ILL. CONST. art. VI, § 12; IND. CONST. art. 7, § 11 (supreme court and court of appeals); IOWA CONST. art. V, § 17; KAN. CONST. art. 3, §§ 5-6 (supreme court; district court if legislature and voters of district choose); MD. CONST. art. IV, § 5A (court of appeals and court of special appeals); MO. CONST. art. V, § 25 (supreme court; circuit court in city of St. Louis and Jackson County and in any other circuits in which voters vote to have judges appointed by governor); MONT. CONST. art. VII, § 8 (if no challenger, incumbent subject to retention vote); NEB. CONST. art. V, § 21; N.M. CONST. art. VI, § 33 (at least 57% affirmative vote); PA. CONST. art. V, § 15; S.D. CONST. art. V, § 7 (supreme court); TENN. CONST. art. VI, §§ 3-4; TENN. CODE ANN. § 17-4-115 (1994) (appellate courts); UTAH CONST. art. VIII, § 9; WYO. CONST. art. 5, § 4.

⁶⁹ *E.g.*, DEL. CONST. art. IV, § 3; ME. CONST. art. V, pt. 1st, § 8; art. VI, § 4; MD.

the entire legislature.⁷⁰ In South Carolina and Virginia, the legislature reappoints judges.⁷¹ Hawaii uses an unusual procedure: the judicial selection commission, of which no more than four of its nine members may be lawyers, decides whether to retain judges who were initially appointed by the governor.⁷² Finally, some states use different methods for different types of judges.⁷³

The reappointment process raises two questions. The first is normative: Should a reappointing authority's views—or a judge's perception of those views—influence a judge's decision in a particular case? Certainly, to the extent that laws reflect the views of political bodies—the legislature, the executive, or the electorate—those views are a proper source of authority. A judge should comply with them. If a judge makes a mistake in interpreting or applying those rules, political bodies can correct these mistakes by enacting new rules.⁷⁴ Political bodies, however, should not be allowed to exert their views by exacting retribution on a judge for a particular decision. If they do, they invade the judicial function and abandon the rule of law.⁷⁵

The second question is empirical: Do the views of a reappointing authority—or a judge's perception of those views—actually influence a judge's decision in a particular case? If a governor, a legislature, or an electorate disagrees with a judicial decision and, as a result, decides not

CONST. art. IV, § 41D (district court); N.Y. CONST. art. VI, §§ 2.e-f, 9 (court of appeals and court of claims).

⁷⁰ CONN. CONST. art. 5th, §§ 2-3 (appointment by legislature upon nomination of governor); VT. CONST. ch. II, §§ 32-34, 36 (governor appoints; judges who choose to continue are retained unless a majority of the members of the legislature disapprove; judges also hold office "during good behavior").

⁷¹ S.C. CONST. art. V, §§ 3, 8 (legislature appoints and reappoints by a joint vote); VA. CONST. art. VI, § 7 (legislature appoints and reappoints by a majority vote of each house).

⁷² HAW. CONST. art. VI, § 3.

⁷³ For example, judges of Maryland's court of appeals and of its court of special appeals face retention elections after their ten-year term. MD. CONST. art. IV, § 5A. Judges of Maryland's circuit court, its court of general jurisdiction, stand for reelection in open elections after fifteen-year terms. *Id.* § 3. Judges of Maryland's district court, its court of limited jurisdiction, must be reappointed by the governor and confirmed by the senate after a ten-year term. *Id.* § 41D.

⁷⁴ Even pronouncements of the United States Supreme Court interpreting the Constitution can be overturned by amendments to the Constitution, although admittedly this is a very difficult task.

⁷⁵ See Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate*, 59 CAL. L. REV. 809 (1986) (discussing different standards that an electorate could use to decide to vote not to retain a judge, in the context of the 1986 California Supreme Court retention election).

to retain a judge, then a reappointment requirement is incompatible with judicial independence.

Several factors may mitigate the dangers posed by the reappointment requirement. In the case of reappointment through election, few judges fail to be reelected.⁷⁶ Moreover, to the extent that a judge is subject to reappointment after a specified term, the judge has job security at least for that term. In addition, judges in America are generally experienced lawyers. Most judges can earn a good living if they are not reappointed. In fact, their prior judicial experience may enhance their earning potential.

These factors may lessen the pressure on a judge to depart from her view of the law because of a fear of not being reappointed.⁷⁷ Finally, no tenure system that has a measure of accountability can be totally consistent with judicial independence. Even the very difficult impeachment process occasionally has been used against federal judges in the United States in ways that appear to conflict with judicial independence.⁷⁸

⁷⁶ See PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 18 (1980) (commenting on retention elections); Lawrence Baum, *The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas*, 66 JUDICATURE 420, 424 (1983) (from 1962 to 1980, six percent of the elected, incumbent trial court judges in Ohio were defeated in open election for a successive term); William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 343-44 (1987) (in ten states studied, 1.2% of incumbent trial court judges were defeated in retention elections); see also Jack Ladinsky & Allan Silver, *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections*, 1967 WIS. L. REV. 128 (providing an excellent theoretical discussion and an empirical study of this phenomenon in Wisconsin). Cf. DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY 33-34, 36 (1995) (noting that none of the 32 Connecticut justices or the New Jersey supreme court justices who served from 1960 through 1980 were denied reappointment by the governor).

⁷⁷ The likelihood of remunerative employment may not exist in countries such as Japan that have a civil law tradition in which judges follow separate career paths and usually have no experience practicing law and do not have permanent tenure. See THE JAPANESE LEGAL SYSTEM, *supra* note 33, at 549-56, 558-62.

⁷⁸ The impeachment and narrow acquittal of Justice Samuel Chase in 1804 and 1805 is illustrative. Chase's experience showed the willingness of a formerly strong supporter of judicial independence, Thomas Jefferson, to attempt to remove a judge of a strongly different judicial perspective. Chase's impeachment and acquittal illustrate the precariousness of these standards in the hands of a popularly elected governing body. The House of Representatives impeached Chase under eight articles, none of which alleged criminal activity, most of which challenged legal rulings made by the Justice as a trial judge riding the circuit, and only one of which—an intemperate anti-republican political address to a grand jury in Baltimore, Maryland—came close to being improper judicial

Nevertheless, there is evidence that a reappointment requirement, and more particularly, a reelection requirement, chills judicial independence.⁷⁹ Myron Orfield conducted a study, based on a survey of prose-

conduct. 8 ANNALS OF CONG. 85-89 (1852) (Nov. 30, 1804); ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 60-61 (1992); 1 TRIAL OF SAMUEL CHASE 5-8 (Da Capo Press 1970) (1805). The United States Senate acquitted Chase by a mixed vote, finding him not guilty on five articles and guilty on three but by a margin of less than the necessary two-thirds of those present. 8 ANNALS OF CONG. 664-69 (1852) (Mar. 1, 1805); BUSHNELL, *supra*, at 84-85; 2 TRIAL OF SAMUEL CHASE, *supra*, at 484-93.

Because the impeachment failed to remove the Justice, it also set a precedent for a higher standard for removal. Nevertheless, other attempts have been made to use the impeachment process to influence a judge's ruling. Van Tassel, *supra* note 64, at 374-78, describes impeachment investigations against three federal judges, one of whom was impeached and removed, that may have been motivated by antagonism toward the judges' legal rulings.

The controversy concerning United States District Judge Harold Baer provides another example. Baer received strong criticism from local politicians and from 150 members of the House of Representatives for excluding certain evidence in a drug case. Ian Fisher, *Gingrich Asks Judge's Ouster for Ruling Out Drug Evidence*, N.Y. TIMES, Mar. 7, 1996, at B4; John M. Goshko, *Accusations of Coddling Criminals Aimed at Two Judges in New York*, WASH. POST, Mar. 14, 1996, at A3, available in 1996 WL 3068826; *N. Y. Judge, Citing Bias, Rejects Drug as Evidence*, BOSTON GLOBE, Jan. 26, 1996, at 25, available in 1996 WL 6847765. Further, President Clinton suggested that he might ask Judge Baer to resign, and then-United States Senate Majority Leader Robert Dole suggested that Baer be impeached. Both Clinton and Dole were criticized for interfering with a judge's ruling. Linda Greenhouse, *Judges as Political Issues: Clinton Move in New York Case Imperils Judicial Independence, Bar Leaders Say*, N.Y. TIMES, Mar. 23, 1996, at A1; *Judges Accuse White House of Intimidating Jurist*, BOSTON GLOBE, Mar. 29, 1996, at 19, available in 1996 WL 6855484; Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1; Don Van Natta, Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1. Judge Baer subsequently reversed his ruling. Don Van Natta, Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. TIMES, Apr. 2, 1996, at A1; Don Van Natta, Jr., *Drug Case Reversal: Judge's New Ruling Puzzles Experts Who Say Evidence Did Not Change*, N.Y. TIMES, Apr. 3, 1996, at B3; Editorial, *The Many Minds of Judge Baer*, WASH. TIMES, May 18, 1996, at D2, available in 1996 WL 2955224.

⁷⁹ See, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 BOSTON U. L. REV. 759, 784-89, 793-800 (1995) (providing examples of the effect of election requirements on judges' behavior in death penalty cases); Kaufman, *supra* note 2, at 683 n.14 (noting the reelection defeat of California Superior Court Judge Alfred Gitelson shortly after he ordered busing to desegregate the Los Angeles public school system).

In cautioning scholars against comparing the American ideal of judicial independence to the practices in the People's Republic of China, Jerome Cohen noted that unobtrusive political interference with American courts may be widespread. Cohen, *supra*

cutors, defense attorneys, and judges, that examined the operation in Chicago criminal trial courts of the rule requiring judges to exclude illegally obtained evidence.⁸⁰ Almost half of the respondents stated that judges sometimes fail to suppress evidence because of a fear that suppression would hurt the judge's chances in a retention election.⁸¹ More than half of the judges and public defenders participating in the study also believed that judges would suppress more evidence if the judges had life tenure or were insulated from public pressure.⁸²

A study of the attitudes of voters in the 1986 California Supreme Court retention election, in which Chief Justice Rose Bird and two liberal colleagues were defeated, reveals that the predominant reason for their defeat was the electorate's disagreement with a series of decisions on the death penalty and other criminal law issues.⁸³ Political groups, including the Tennessee Conservative Union, led the effort to defeat Justice Penny White of the Tennessee Supreme Court in August 1996. These political groups contributed to White's defeat by highlighting two concurring opinions that allegedly showed her to be soft on criminal defendants.⁸⁴

Moreover, the high retention rate for judges subject to reelection may prove only that these judges modify their behavior when deciding cases that may arouse the public's interest.⁸⁵ For example, Orfield reported

note 16, at 975. Cohen's observation about "clubhouse lawyers" representing the local political machine recalls the 1947 version of the movie *Miracle on 34th Street*, in which a New York Supreme Court judge must rule on whether Kris Kringle should be declared mentally incompetent because he claimed to be Santa Claus. A local political operative, Charlie, advised the judge to take a vacation so that another judge, one who was not up for reelection, could handle the case. Charlie later warned the judge that a ruling against Santa Claus would ruin the judge's chances at reelection. See *MIRACLE ON 34TH STREET* (Twentieth Century Fox 1947).

⁸⁰ See Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992).

⁸¹ *Id.* at 122, 153 (19 of 40 respondents expressed that belief, including five of the 12 judges, nine of 14 public defenders, and five of 14 prosecutors).

⁸² *Id.* at 123 & n.218, 154 (belief expressed by eight of 11 judges, ten of 14 public defenders, and two of 13 prosecutors).

⁸³ John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 353 (1987); see also Joseph R. Grodin, *Judicial Elections: The California Experience*, 70 JUDICATURE 365, 367 (1987) (presenting the reflections of one of the defeated judges).

⁸⁴ John Gibeaut, *Taking Aim*, 82 A.B.A. J., Nov. 1996, at 50, 51, 53-54; Tom Humphrey, *White Becomes 1st Appellate-Level Judge to Be Defeated in 'Yes-No' Vote; Massive Opposition to Death Penalty Vote Overcomes Support*, KNOXVILLE NEWS-SENTINEL, Aug. 2, 1996, at A1, available in 1996 WL 10584898.

⁸⁵ See Wold & Culver, *supra* note 83, at 351 (reporting a comment of a justice whose decisions may have been subconsciously affected by an upcoming retention election in 1982). Cf. PINELLO, *supra* note 76, at 66-67, 99-100, 131 (finding in a study

that many respondents to his survey noted the defeat in a retention election of a judge who dismissed charges against a professional wrestler accused of assaulting a female police officer.⁸⁶ In a survey of 919 judges who participated in retention elections in ten states in 1986, 1988, and 1990, 60.5% of the 645 judges who responded stated that the prospect of a retention election affected judicial behavior.⁸⁷ Although 11.9% of the respondents stated that retention elections motivated judges to do a good job and 5.7% said that they promoted improved judicial behavior, 27.6% believed that retention elections cause judges to be sensitive to public opinion, 15.4% responded that they caused judges to avoid controversial cases and rulings, and 5.1% responded that the elections prompted conservative sentencing.⁸⁸

Thus, lack of permanent tenure for judges in almost all American states creates doubt about the extent of their independence. The potential susceptibility to political pressures has serious implications for the quality of the judiciary and the rule of law in those states.⁸⁹

comparing opinions of the highest courts of six states that in criminal cases, judges appointed by the governor were more likely to favor the defendant's interests over those of the government than were elected judges and that elected judges were more likely than appointed judges to favor government interests over those of defendants, and in commercial cases, appointed judges ruled more frequently in favor of individuals and against businesses than did elected judges).

⁸⁶ Orfield, *supra* note 80, at 122 n.215; *see also* Hall & Aspin, *supra* note 76, at 347 (reporting that 58% of judges defeated in retention elections from 1942 to 1978 had been targeted for defeat) (using data prepared for their article, *Voter Rolloff in Judicial Retention Elections*, 24 SOC. SCI. J. 415 (1987)); Wold & Culver, *supra* note 83, at 349-51 (noting that the three defeated supreme court justices in the 1986 California Supreme Court retention elections had been targeted for defeat by Republican politicians, crime victims groups, state and local prosecutors, and law enforcement officials; major contributors to the campaigns to defeat those justices included oil and gas interests, agribusiness, auto dealers, and real estate interests; three judges who were not targeted won reelection by margins greater than 70%).

⁸⁷ Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312-13 (1994).

⁸⁸ *Id.* The responding judges reported other effects: Judges would be more accommodating to lawyers, jurors, and litigants (16.8%), would be nicer to lawyers before polls (8.9%), would carefully explain controversial rulings (4.1%), and would engage in defensive behavior in and out of court (9.8%). *Id.* Because a maximum of two responses were recorded for each judge, the total percentage for all responses is more than 100%.

⁸⁹ Alexander Hamilton expressed the concern well:

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made,

2. *Fixed and Adequate Compensation*

The most obvious affirmative institutional element that promotes long-term independence is compensation.⁹⁰ First, compensation must be fixed.⁹¹ Neither the legislature nor the executive may reward or punish

would in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

THE FEDERALIST, *supra* note 1, No. 78, at 495.

⁹⁰ See *id.*, No. 79, at 497: "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." The British Parliament also considered fixed salaries to be important for judicial independence. See *supra* note 21 (quoting Act of Settlement, 12 & 13 Will. 3, ch. 2, § 3 (1701) (Eng.); and Act of 1 George III, 1 Geo. 3, ch. 23 (1760) (Eng.)).

Adequate compensation must be addressed in the broader context of overall support for the judicial branch. Generous support for the court system and for the judicial office, through, for example, the provision of good courtroom and office facilities and proficient court personnel, may compensate for lower judicial salaries. On the other hand, a low level of support for the judiciary, such as poor offices and inadequate staffing, may necessitate higher judicial salaries. Cf. Bermant & Wheeler, *supra* note 13, at 848, 852, 860 (asserting that judges' concerns about growing federal jurisdiction and criminal and civil case loads may be jeopardizing the prestige and quality of the United States federal judiciary).

Unlike the other elements of judicial independence which are necessary for all judges, this element would not be necessary for judges who were independently wealthy. Nevertheless, a society should not, and probably could not, depend on having a sufficient number of independently wealthy individuals to fill the judiciary.

⁹¹ See, e.g., Lockwood, *supra* note 19, at 117 (quoting The Declaration of San Juan de Puerto Rico); McNeill, *supra* note 19, at 134 (listing, among several requirements, the "payment of salaries out of the consolidated fund"). The Compensation Clause in Section 1 of Article III of the United States Constitution, which requires that the judges "shall, at stated times, receive for their Services, a Compensation" along with the prohibition against diminution, implies a requirement for a fixed salary. See *supra* note 23 (quoting U.S. CONST. art. III, § 1).

Argentina's constitution requires that judges receive a fixed salary. Shroff, *in 2 RESEARCH PAPERS*, *supra* note 25, at 1474. In India, the salaries of judges of the Supreme Court are specified in the Constitution, subject to change by Parliament. INDIA CONST. arts 112(3)(d)(i), 125, 146; Shroff, *in 2 RESEARCH PAPERS*, *supra* note 25, at 1555. Mexico's constitution provides that judges' salaries must be adequate and non-re-nounceable and may not be reduced. MEX. CONST. arts. 94, 116 § III; Shroff, *in 2 RESEARCH PAPERS*, *supra* note 25, at 1603. In the Netherlands, salaries must be fixed by law and not determined by the government; *id.* at 1611; see also *infra* note 348, (noting

judges through salary manipulation in response to decisions in particular cases. A "merit pay" scheme would raise questions about impartiality⁹² and could threaten independent decisionmaking.

Second, salaries must be high enough to allow judges to live in reasonable comfort without resort to inappropriate sources of income, such as fees for practicing law on the side⁹³ or bribery. Moreover, salaries must be high enough to attract to the judiciary the more able and better qualified members of the legal profession.⁹⁴ Attracting able judges will help sustain a reasonably high respect for the judiciary.⁹⁵

Although the United States Constitution contains a specific prohibition against reduction of judicial salaries,⁹⁶ that prohibition is not a sep-

the passing of laws calling for adequate salaries for judges in Russia and Ukraine after the collapse of the Soviet Union.

⁹² See, e.g., *Connally v. Georgia*, 429 U.S. 245 (1977) (invalidating a search warrant issued pursuant to a state statute that compensated justices of the peace, who received no salary, five dollars for each search warrant issued but nothing for warrants denied); *Tumey v. Ohio*, 273 U.S. 510, 523, 531-35 (1927) (finding that trial by a mayor of a defendant charged with a violation of state prohibition laws violated due process guarantees of the Fourteenth Amendment because the mayor in his personal and elected, representative capacities had a direct interest in the outcome because, if the defendants were found guilty, the mayor received as additional compensation the costs of the proceeding and the village received a portion of the fines levied).

⁹³ For example, in the United States, federal judges may not practice law or work for business corporations. MODEL CODE OF JUDICIAL CONDUCT Canon 4, §§ D(3), G (1990). They may earn money by teaching, writing books, and giving speeches. *Id.* at Canon 4, § B. Congress has imposed limits, however, on these activities. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 601, 103 Stat. 1716, *codified at* 5 U.S.C. app. §§ 501-505 (1994).

⁹⁴ In opposing the addition of a prohibition against raising judicial salaries to the Compensation Clause of Article III of the United States Constitution, General Charles Cotesworth Pinckney remarked, "The importance of the Judiciary will require men of the first talents: large salaries will therefore be necessary, larger than the U.S. can allow in the first instance." MADISON, *supra* note 44, at 538 (debates of August 27, 1789).

⁹⁵ *But see* Paul E. Greenburg & James A. Haley, *The Role of the Compensation Structure in Enhancing Judicial Quality*, 15 J. LEGAL STUD. 417 (1986) (agreeing that salaries must be high enough but suggesting why they should not be too high).

⁹⁶ See *supra* note 23 (quoting U.S. CONST. art. III, § 1). Although Alexander Hamilton remarked on the possibility of fluctuations in the value of currency, THE FEDERALIST, *supra* note 1, No. 79, at 497, as Richard Epstein has observed, Hamilton did not address the problems that such fluctuations could pose for a judge's independence. Epstein, *supra* note 2, at 850 n.67. In *Adkins v. United States*, 556 F.2d 1028, 1045 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978), the United States Court of Claims rejected the plaintiff federal judges' claim that Congress's failure to enact more than a 5% salary increase for judges in a time of sustained high inflation, which had caused a 34% decrease in real wages over a six and one-half year period, violated the Compensation Clause. The court noted that the Compensation Clause was not designed to ensure a

arate requirement for judicial independence.⁹⁷ During inflationary times, protection against a salary reduction is meaningless when the buying power of a fixed salary is substantially reduced.⁹⁸ Conversely, during sustained deflation, a prohibition against salary diminution gives judges more protection than needed to insure independence.

3. *Minimum Qualifications*

Educational requirements must be sufficient to assure that judges are able to perform their jobs effectively.⁹⁹ On an elementary level, a legal

particular level of support for the judiciary but to prevent retaliatory or discriminatory attacks on the judiciary. *Id.* at 1044-45, 1048-49, 1054-57. To this extent, the Compensation Clause is valuable.

Argentina's constitution also prohibits the diminution of judges' compensation, ARG. CONST. art. 110 (Marcia W. Coward trans.); Shroff, *in* 2 RESEARCH PAPERS, *supra* note 25, at 1474, as does Ireland, IR. CONST. art. 35.5; Shroff, *in* 2 RESEARCH PAPERS, *supra* note 25, at 1562.

⁹⁷ Instead, it could be considered a very crude proxy for a guarantee of a fixed and adequate salary. However, *Adkins*, 556 F.2d at 1045-47, 1049-50, rejected this suggestion as the specific purpose of the Compensation Clause. *See generally* Redish, *supra* note 13, at 700-06 (discussing several interpretative issues in the Compensation Clause); Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 UCLA L. REV. 308, 316-18 (1976) (arguing that Congress has a moral, but not a legal, obligation to maintain the real economic value of judicial salaries).

⁹⁸ For example, the annual salary of an Associate Justice of the Supreme Court in 1789 was \$3,500; in 1903 it was \$12,500. HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 101ST CONG., CURRENT SALARY SCHEDULES OF FEDERAL OFFICERS AND EMPLOYEES TOGETHER WITH A HISTORY OF SALARY AND RETIREMENT ANNUITY ADJUSTMENTS 23 (Comm. Print 1990). The annual salary of a United States district judge in 1903 was \$6,000. *Id.* These salaries would certainly be considered inadequate today. *See generally* Rosenn, *supra* note 97 (analyzing changes in real economic value of compensation for federal judges from 1789 to 1975, including an increase in case loads and a decline in judicial income relative to growth in national income, and concluding that from 1969 to 1975 Congress breached a moral obligation to maintain the real economic value of judicial salaries).

⁹⁹ Perhaps because judicial independence arose in England long after the development of a highly trained legal profession, discussions of judicial independence in the United States generally do not specifically list minimum qualifications as a required element. *See, e.g., supra* notes 19, 38. The United States Constitution does not contain specific requirements for the qualification of federal judges. Nevertheless, the appointment process, specified in section 2 of Article 2 of the United States Constitution, effectively imposes minimum qualifications. *See, e.g., ABRAHAM, supra* note 27, at 50-62, 75-85. *But cf.* Ronald D. Rotunda, *Innovations Disguised as Traditions: A Historical Review of the Supreme Court Nominations Process*, 1995 U. ILL. L. REV. 123 (noting the cursory review of Supreme Court nominees by the United States Senate until the 20th century). As the Russian experience shows, *see infra* part II, in countries that have

system based on writings demands literate judges.¹⁰⁰ In any legal system, judges must also have sufficient education and knowledge to discern the law and to articulate the bases for a decision. In addition, an educational requirement allows the judges to command the respect of litigants and society.

Finally, the judges' education should inculcate them with many of the values of society and of the judicial system.¹⁰¹ A perception by society of too great a deviation from accepted bases for decisionmaking will generate pressure for greater control of the judiciary¹⁰² and result in diminished judicial independence.

4. *Immunity*

The United States Supreme Court and several commentators have opined that immunity from civil liability is necessary for judicial independence.¹⁰³ If it is necessary, it is only necessary to a limited extent.

a less developed legal system, specific minimum qualifications are necessary not only to produce reasonably good judges but to ensure their continued independence.

The limited terms of judges in many American states and the concomitant requirement that judges be reappointed by the governor or the legislature or that they be reelected may limit the overall quality of the judges in those states. Alexander Hamilton suggested that life tenure was necessary to attract individuals of integrity and ability to the judiciary. THE FEDERALIST, *supra* note 1, No. 78, at 496.

¹⁰⁰ Judges who cannot read the documents upon which the legal system operates would have to rely upon other individuals, inside or outside the court system, for information about their cases. Illiterate judges in essence would be delegating some of their decisionmaking function to these third parties without the ability to review their work.

¹⁰¹ See generally Charles Nesson, *The Evidence or the Event? On Judicial Proof and The Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1361-68, 1391-92 (1985) (discussing the role of a judge and a jury in evaluating societal values).

¹⁰² See, e.g., Cox, *supra* note 2, at 573-80 (summarizing the many—and mostly unsuccessful—attempts by Congress over the past 200 years to intimidate the Supreme Court because of its unpopular judicial decisions, including President Roosevelt's 1937 court-packing proposal).

¹⁰³ In *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871), the Court noted,

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 [to act upon the judge's conviction, *see supra* note 12], and destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.

Id. at 347; see also W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 114, at 816 & n.9, § 132, at 1056-59 (5th ed. 1984); Lockwood, *supra* note 19, at 117 (quoting The Declaration of San Juan de Puerto Rico); McNeill, *supra* note 19, at

First, civil, or even criminal, liability imposed on judges for reasons other than their judicial decisionmaking would not interfere with judicial independence. Second, civil liability even for their judicial decisionmaking may not interfere with their independence. Potential civil liability only subjects a judge's decisions to peer review rather than to the judgment of political bodies.¹⁰⁴

Third, in many cases, a judge knows that any ruling will displease at least one party. In other cases, she can foresee displeasing all participants. In either case, however, a judge without immunity can expect to be sued regardless of how she rules. For that reason, the threat of civil liability might not influence a judge's decision on which party prevails; it would affect only her decisionmaking process.¹⁰⁵ In these circumstances, broad protection against civil liability for the judiciary may be more important for the efficient administration of justice than for protecting judicial independence.¹⁰⁶ Immunity frees judges from the need to devote their time and resources to defending lawsuits or engaging in "defensive" judging.¹⁰⁷

Nevertheless, if one party—whether a private entity or the government—has more resources than another, the threat of liability could cause a judge to give the benefit of analytical doubt to a wealthier or more powerful party. A threat of civil liability in this case probably would affect the judge's decisionmaking. Because of this possibility, some form of protection from liability is a necessary element for judicial independence.¹⁰⁸

134 (listing, among several requirements, immunity from legal proceedings); Shaman, *supra* note 63, at 3-4; *infra* note 348 (noting the passage of laws calling for immunity for judges in Russia and Ukraine after the collapse of the Soviet Union).

¹⁰⁴ See, e.g., *supra* note 65.

¹⁰⁵ The threat of monetary liability may cause judges to proceed more cautiously and to take more time in justifying their results.

¹⁰⁶ See, e.g., J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879 (identifying finality of court decisions by channeling requests for review through a hierarchy of higher courts as an important policy reason for judicial immunity); Michael Robert King, Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549 (1978) (identifying nine policies for judicial immunity and arguing that they do not justify absolute immunity); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969) (arguing that the several policies supporting judicial immunity do not justify absolute immunity).

¹⁰⁷ The Supreme Court's lengthy discussion of judicial immunity in *Bradley* presents more of a rationale that judicial immunity promotes the efficient administration of the judicial system by protecting judges from "vexatious litigation." *Bradley*, 80 U.S. (13 Wall.) at 347-49, 354. The discussion seems to assume as self-evident that civil immunity is necessary to protect volitional decisionmaking.

¹⁰⁸ Cohen's definition of judicial independence specifically would exclude this ele-

5. *Other Factors*

Personal integrity and society's respect are necessary conditions for an independent judiciary. These conditions, however, are not separate *institutional* elements. The institutional elements discussed above, however, help create these conditions.

Guaranteed tenure enhances a judge's position in society. Holding judges accountable for their non-decisional activities helps to protect their position. Ample salaries and high qualification requirements attract judges of high ability and moral integrity. These judges help produce a judiciary and a judicial system that society and political bodies hold in high esteem. Respect for the judicial role creates, in turn, a tradition that protects the judiciary from interference from inappropriate outside sources.¹⁰⁹

On the other hand, poor salaries and low requirements will produce judges and a judicial system held in low esteem. In that case, strong formal protection against arbitrary removal or discipline most probably would be insufficient to guarantee independence.

Other factors may contribute to the respect that the judiciary commands from its members, from lawyers, and from society. One possibility is judicial discretion, which encompasses flexibility in sentencing, the power to decide the substantive rights of parties depending "on the equities of the case,"¹¹⁰ and the power to decide cases in the absence of an applicable code provision "in accordance with the rule which [the judge] would, were he the legislator, adopt."¹¹¹

ment. See *supra* note 16; see also K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOW. L.J. 95 (1995) (questioning the legitimacy of the current rule of judicial immunity for federal judges and criticizing it as broader than necessary to protect the judicial independence of federal judges).

¹⁰⁹ See generally SCHWARTZ, *supra* note 20, at 190-91 (discussing the low opinion of the judges who replaced the judges dismissed by James II).

¹¹⁰

[I]f the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and *based on the equities* of the case, orders otherwise.

11 U.S.C. § 552(b) (1996) (emphasis added).

¹¹¹ SCHWEIZERISCHES ZIVILGESETZBUCH [CODE CIVIL] art. 1 (1907) (Swiss Civil Code) reprinted in KONRAD ZWEIFERT & HEIN KOTZ, INTRODUCTION TO COMPARA-

Does discretionary power contribute to the esteem in which judges are held, or is it a product of that esteem? Implicit in this question is the assumption that esteem increases with greater discretionary power. Arguably, broad discretion may make judges more vulnerable to improper influences, and more limited discretion may serve to isolate judges from improper pressures. On the other hand, too little discretion may result in a loss of respect for the judiciary. Because rulemaking bodies cannot write rules that cover all possible situations or anticipate all possible applications of their rules, the absence of judicial discretion to resolve unanticipated cases in a sensible way may produce absurd results. Too many absurd results will lessen respect for the judiciary. Because the effect of discretion is inconclusive, the degree of discretion is not a necessary element of judicial independence.

Professor Jerome Cohen suggested that the degree of judicial independence exists on a continuum from “a completely unfettered judiciary to one that is completely subservient.”¹¹² In describing the relativity of judicial independence, he referred to several factors that preclude an absolute form of judicial independence. These factors include: (1) judicial dependence upon political bodies for appointment or advancement; (2) judicial dependence upon an executive to enforce decisions and upon a legislature to finance the judiciary; (3) the ability of political bodies to overrule judicial interpretations by constitutional amendment or future legislation; and (4) the ability of political bodies to increase the number of judges.¹¹³

Although judicial independence exists along a spectrum, the band is much narrower than Cohen suggested. None of the factors that Cohen mentioned (except judicial dependence on the legislature for funding) improperly affects the degree of judicial independence.¹¹⁴ The most problematic factor Cohen suggested is that judges may be promoted by political bodies because of their decisions. This factor is not an improper pressure. A government of laws is nevertheless run by individuals and therefore the risk that a judge’s decision could be influenced by the desire to be promoted cannot be eliminated. Even so, assuming adequate compensation for all judges, the prospect—good or ill—of future promo-

TIVE LAW 182 (Tony Weir trans., 2d rev. ed. 1992).

¹¹² Cohen, *supra* note 16, at 972.

¹¹³ *Id.* at 972-73.

¹¹⁴ Dependence upon the executive to enforce judicial decisions may affect how well the decisions of a judge are carried out, but it does not affect the process of reaching the decision. The ability of the political bodies to overrule judicial interpretations by constitutional amendment or future legislation and the ability of the political bodies to expand the number of judges are consistent with the rule of law and also do not interfere with the judge’s decisionmaking.

tion does not adversely affect a judge's current position. Given the vagaries of political life in every society, such a prospect may have little effect on how judges would decide particular cases.

One writer stated that a "logical concomitant to claims of 'judicial' independence must be . . . the presence of a climate of sophisticated professional opinion" and "a well-organized, well-educated and representative bar."¹¹⁵ Although these may be concomitant to the institutional elements discussed above, they are not necessary elements. In countries such as the United States and England, which draw judges from the bar, a well-educated bar helps to produce individuals with the necessary qualifications to be good judges. In civil law countries, however, judges generally do not come from the bar; rather, they are selected from a cadre of individuals who have chosen judicial administration as a separate career path.¹¹⁶ Although it may be difficult for Americans to imagine how an independent judiciary could develop in a society without lawyers, the absence of an organized bar, or a climate of sophisticated opinion, does not preclude judicial independence.

Another commentator suggested that "an essential ingredient for a creative independent judiciary [is] that the power distribution [is] at least able to tolerate, if not encourage, [judicial] participat[ion] in the process of law development."¹¹⁷ This statement misses the point. "Creative" independence may require tolerance of participation, but independence requires only noninterference with a judge's mental processes. To the extent that "participation" means more, it is unnecessary for judicial independence. Therefore, participation in lawmaking is not an element of judicial independence.¹¹⁸

C. Separation of Powers

Judicial independence is often associated with separation-of-powers theory. This theory, which is a product of the Enlightenment, and particularly of Montesquieu,¹¹⁹ is an important part of American jurispru-

¹¹⁵ Edward McWhinney, Comment, 32 CAN. B. REV. 94, 101 (1954).

¹¹⁶ See GLOS, *supra* note 4, at 28-29; ZWEIGERT & KOTZ, *supra* note 111, at 128-29.

¹¹⁷ Samuel I. Shuman, *Philosophy and the Concept of Judicial Independence*, 8 WAYNE L. REV. 363, 376 (1962).

¹¹⁸ See *supra* note 14 and accompanying text.

¹¹⁹ CHARLES DE MONTESQUIEU, THE SPIRIT OF LAWS, bk. XI, ch. 6, paras. 1-2 (Thomas Nugent trans., J.V. Prichard ed., 1952) (1748):

In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

. . . By the third, [the prince or magistrate] punishes criminals, or determines

dence.¹²⁰ Separation of powers, however, relates to judicial independence only in the narrow sense of separating the judicial decisionmaking function from other government operations.¹²¹ Judicial independence presupposes a system in which individual judges, or a group of judges, comprise a tribunal that exercises judicial powers. If political bodies decided specific cases or directed judges on how to decide specific cases, there is neither a separation of function nor judicial independence.¹²² Thus, to suggest that separation of function is an element of judicial independence is merely to state a tautology.¹²³

Separation of powers in its broader and more general sense—the American sense—of separate and co-equal departments is also not a necessary element for judicial independence. A separate and equal judicial department is but one type of governmental organization. The early eighteenth-century concept of the separation of powers did not clearly separate the judiciary from the executive branch.¹²⁴ The idea of the ju-

the disputes that arise between individuals. The latter we shall call the judiciary power, and the other [the second power] simply the executive.

¹²⁰ See, e.g., *THE FEDERALIST*, *supra* note 1, No. 78, at 491; 1 BLACKSTONE, *supra* note 21, at *259-70.

¹²¹ See A.W. Bradley, *The Sovereignty of Parliament—in Perpetuity?*, in *THE CHANGING CONSTITUTION* 79, 81 (Jeffrey Jowell & Dawn Oliver eds., 3d ed. 1994). Montesquieu noted the importance of separation of function. MONTESQUIEU, *supra* note 119, bk. XI, ch. 6, para. 5: “Again, there is no liberty, if the judiciary power be not separated from the legislative and executive.” Alexander Hamilton quotes this passage in *THE FEDERALIST*, *supra* note 1, No. 78, at 496. See also MONTESQUIEU, *supra* note 119, bk. VI, chs. 5, 6; 1 BLACKSTONE, *supra* note 21, at *259-70.

¹²² China’s experience during the last 50 years illustrates the confusion between judicial independence and separation of function. Neither China’s 1975 Constitution nor its 1978 Constitution contains any references to independent courts. China’s 1954 Constitution (the people’s courts “shall conduct adjudication independently and shall be subject only to the law”) and its 1982 Constitution (the people’s courts shall “exercise judicial power independently, in accordance with the provisions of the law”) incorporates a limited concept of independent courts. See Cohen, *supra* note 16, at 971; Hikota Koguchi, *Some Observations About “Judicial Independence” in Post-Mao China*, 7 B.C. THIRD WORLD L.J. 195, 196-97 (1987); Margaret Y.K. Woo, *Adjudication Supervision and Judicial Independence in the P.R.C.*, 39 AM. J. COMP. L. 95, 95 (1991). Even this limited formal separation of function was ignored; judicial independence as defined in this Article did not exist under these constitutions. See Cohen, *supra* note 16, at 985-1006; Koguchi, *supra*, at 200-02; Woo, *supra*, at 118-19.

¹²³ Of course, formal separation of function may be present without judicial independence. See *supra* text accompanying note 6.

¹²⁴ For example, John Locke separated government into the legislative power, the executive power (executing laws made by the legislative power), and the federative power (conducting foreign relations). JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 382-84 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690) (ch. XII of the Second Treatise). Blackstone distinguished between the legislative power, which he considered

diciary as a separate branch of government developed independent of, and subsequent to, the development of judicial independence.¹²⁵

Moreover, the idea that the federal judicial branch in the United States should have administrative independence—control over its physical facilities, its personnel, and its budgetary submissions to Congress—is a twentieth-century phenomenon.¹²⁶ Although administrative independence may enhance the judiciary's power, it is not a prerequisite for judicial independence. It is only essential that political bodies not use their administrative control, or any other governmental powers, to retaliate against individual judges for their decisions.¹²⁷

Finally, the doctrine of judicial review, which is a court's ability to override unconstitutional legislative acts and which is closely associated with separation of powers, is also distinct from judicial independence.¹²⁸ Although judicial independence and judicial review devel-

the sovereign power, and the executive power of the laws, which resided in the Monarchy. He divided the legislative power of the eighteenth-century English government among the King, the House of Lords, and the House of Commons. 1 BLACKSTONE, *supra* note 21, at *49-51 (writing in 1765).

¹²⁵ The idea of the judiciary as a separate branch developed after England confirmed the independence of the judiciary in the Act of Settlement of 1701 and the 1760 Act of George III, *see supra* note 21, and did not clearly emerge until shortly before the Federal Constitution. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 80-86 (1985); M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 54 (1967); Calabresi & Larsen, *supra* note 21, at 1096-97, 1128. Montesquieu identified the judicial power as a separate power in 1748. *See* MONTESQUIEU, *supra* note 119, bk. XI, ch. 6 ("Of the three powers above mentioned, the judiciary is in some measure next to nothing: there remain, therefor, only two."). He did not, however, attach a special role to an independent judiciary. *Id.* at bk. XI, ch. 6, para. 13 ("The judiciary power ought not to be given to a standing senate; it should be exercised by persons taken from the body of the people at certain times of the year, . . . in order to erect a tribunal that should last only so long as necessity requires."); *see also* McDONALD, *supra*, at 85; VILE, *supra*, at 88-91.

¹²⁶ *See* Bermant & Wheeler, *supra* note 13, at 854-55. Except to the extent that it may affect the actual working conditions of judges, *see supra* note 90 and accompanying text, the degree of support for a criminal or civil litigation system is a question of the degree of services that a government decides to provide to its citizens and not a question of the independence of the judges. Of course, to the extent that a political system guarantees certain rights to individuals to be enforced by judges, the doctrine of separation of powers or its subdoctrine, inherent powers, may require that the judiciary be able to command the political bodies to appropriate moneys for the judicial system. *See* Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993) (using the term "judicial independence" to connote administrative independence).

¹²⁷ *See* R.D. Nicholson, *Judicial Independence and Accountability: Can They Co-exist?*, 67 AUSTL. L.J. 404, 409-10 (1993).

¹²⁸ Professor Garvey noted that judicial independence for federal judges is particu-

oped together in late eighteenth-century America,¹²⁹ the power of judicial review is not necessary for judicial independence.¹³⁰ For example, England has neither American-styled separation of powers nor judicial review, but it does have an independent judiciary.¹³¹

To establish and maintain judicial independence, a society must guarantee judges a fixed tenure (subject only to limited exceptions to deal with misconduct or incapacity), provide fixed and adequate compensation, require minimum qualifications, and limit civil liability for judicial decisionmaking. Federal judges in America and judges in England and many other countries are independent because they have these institutional protections. The next Part of this Article analyzes the introduction

larly important because they engage in judicial review; increased control of federal judges by the executive or legislative branches of government would affect the ability of courts to perform that function. John H. Garvey, *Foreword: Judicial Discipline and Impeachment*, 76 KY. L.J. 633, 636-37 (1987-88). His views echo Alexander Hamilton's discussion in THE FEDERALIST, *supra* note 1, No. 78, at 491-94. The value of judicial independence, however, transcends its importance in the American system as a principal corollary to the separation of powers and judicial review.

¹²⁹ See Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1044-55 (1987); Ziskind, *supra* note 61, at 138-47.

¹³⁰ Indeed, the American doctrines of separation of powers and judicial review create a threat to judicial independence. To the tension between judicial independence and judicial accountability, these doctrines add another tension: that between the presumably majoritarian impulses of the political bodies on specific issues and constitutional provisions that conflict with those impulses. American judges—especially federal judges—make rulings that may conflict with the views of a democratic majority on issues like freedom of speech, separation of church and state, the exclusion of illegally obtained evidence from criminal trials, the imposition of the death penalty, abortion, and civil rights. A democratic majority frustrated with those rulings may seek ways to limit a judiciary seen as an intrusive and undemocratic law-maker. To the extent that a political system gives judges a greater lawmaking role, as in adjudicating broadly worded constitutional rights, then that system must provide a stronger safeguard for judicial independence to preserve the impartial adjudication of individual decisions. See, e.g., Gerhard Casper, *The Judiciary Act of 1789 and Judicial Independence*, in *Origins of the Federal Judiciary* 281 (Maeva Marcus ed., 1992) (discussing the attempts to resolve the tensions between separation of powers, judicial review, and an independent judiciary in the early days of the United States); Garvey, *supra* note 128; Kaufman, *supra* note 2, at 681 (suggesting that the often unstated desire to hold judges politically accountable is behind the growing interest in disciplining unfit federal judges).

¹³¹ See Bradley, *supra* note 121, at 79, 81-85, 105-07. The judiciary in England also has faced the questions of the appropriate allocation of powers to judges and the amount of administrative control the judiciary should have as an institution. See ROBERT STEVENS, *THE INDEPENDENCE OF THE JUDICIARY* 163-84 (1993) (discussing the development of these questions by examining the history of the Lord Chancellor's Office and Department since the 1880s).

of these elements into Tsarist Russia and their viability during its final fifty years.

II. THE RUSSIAN EXPERIENCE WITH JUDICIAL INDEPENDENCE

The Judicial Reform of 1864 radically changed Russia's judicial system in a very short time. A central part of the Reform was the principle of judicial independence. This Part describes the pre-Reform judicial system in Russia and the judicial system created by the Reform. It then examines the formal provisions of the Judicial Reform that established an independent judiciary and analyzes the degree to which the operation of the new judicial system sustained the judicial independence that the reformers had intended.

A. *The Pre-Reform Russian System*

An extended analysis of the Russian judicial system before the Judicial Reform of 1864 is unnecessary because all writers agree on that system's defects.¹³² One Russian author concluded an article on the pre-Reform court system with this summary:

Thus, inherent in our old courts of the period of the *Svod Zakonov* [Code of Laws, 1833] were the following organizational deficiencies:

- 1) the principle of social class as the basis for a system of justice;
- 2) the low intellectual and moral level of the personnel of the court;
- 3) the beggarly salary scale of the department of the minister of justice which engendered excessive bribery in absolutely every judicial district;
- 4) the slavish dependence of the courts on the administration;
- 5) the practical weakness of the procurator's supervision;
- 6) the endless diversity and great number of judicial instances [courts of original jurisdiction];
- 7) the excessive red tape, with the abundance of procedural forms;
- 8) the absence of oral testimony in open court;

¹³² V.N. Bochkarev, *Doreformennyi Sud* [The Pre-Reform Court], in 1 SUDEBNAYA REFORMA [THE JUDICIAL REFORM] 205 (N.V. Davydov & N.N. Polyansky eds., 1915).

- 9) the predominance of clerical secrecy;
- 10) the inquisitional character of the proceedings based on the theory of formal proof; [and]
- 11) the aimless cruelty of the punitive system.¹³³

Samuel Kucherov, a Russian lawyer under the Judicial Reform, Professor Harold Berman, and others have reiterated these characteristics.¹³⁴ Berman also noted the chronic failure of Russian rulers in the pre-Reform era to establish a sensible and systematic organization of the Tsar's decrees and those of the "legislative" bodies.¹³⁵ Accordingly, judges and others had difficulty simply finding the law.

The pre-Reform court system precluded development of an independent judiciary, and the lack of an independent judiciary compounded the system's other defects. Before the Reform, judges had no guaranteed tenure. Until 1775, judges were part of the general administrative system, and their tenure was no different from that of other administrative officials.¹³⁶ After the

¹³³ *Id.* at 239. All translations are mine unless otherwise indicated. In transliterating Russian words that appear in this Article from the Russian Cyrillic alphabet to the English alphabet, I followed the British Standards Institutions system of transliteration, see TERENCE WADE, A COMPREHENSIVE RUSSIAN GRAMMAR 1-2 (1992), with modifications. I eliminated diacritical marks and the soft sign (the *myagkii znak*) and used "y" instead of "yi" or "ii" in the ending of proper names, (e.g., "Speransky" instead of "Speranskii"). I also used the modern equivalents for the several obsolete Cyrillic letters that appear in the titles of books written in the pre-1917 Russian Cyrillic alphabet but did not modernize the spellings in those titles (e.g., "-ago" appears instead of "-ogo").

¹³⁴ HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R. 211-12 (rev. ed. 1963); SAMUEL KUCHEROV, COURTS, LAWYERS AND TRIALS UNDER THE LAST THREE TSARS 1-20 (1953); RICHARD S. WORTMAN, THE DEVELOPMENT OF A RUSSIAN LEGAL CONSCIOUSNESS 10-26, 237-42 (1976). Professor Berman also traced the development of the Russian judicial system from its earliest times. BERMAN, *supra*, at 187-225; see also W.E. BUTLER, SOVIET LAW 17-22 (2d ed. 1988); RIASANOVSKY, *supra* note 8, at 376; P. Gronsky, *The Period of the Great Reforms*, in 3 PAUL MILIUKOV, HISTORY OF RUSSIA 6, 36 (Charles L. Markmann trans., 1969) (French ed. 1932).

¹³⁵ BERMAN, *supra* note 134, at 205-10. In a period of 115 years from the reign of Peter the Great (1682-1725), ten commissions were formed to codify and collect the laws. None of these commissions succeeded in doing so. In 1830, however, Mikhail Speransky, who had been an important adviser to Alexander I (1801-1825) but who fell out of favor because of his modern views, published the *Polnoe Sobranie* [complete collection] of the laws of the Russian Empire. This was a chronological collection, in 42 volumes, of laws passed since 1649. Speransky then produced the *Svod Zakonov* [Code of Laws] of 1833, the first code of laws since the 1649 *Ulozhenie* [Code]. Berman commends the *Svod Zakonov* as a unique document in legal history. BERMAN, *supra* note 134, at 209.

¹³⁶ WORTMAN, *supra* note 134, at 13; Richard S. Wortman, *Judicial Personnel and the Court Reform of 1864*, 3 CAN. SLAVIC STUDIES 224 (1969); see also RIASANOVSKY, *supra* note 8, at 262.

formal separation of the judicial administration from the general administration by reforms attempted in 1775 and in the early 1800s, most judicial offices were filled with noblemen who had been elected for three-year terms,¹³⁷ and central and local non-judicial officials continued to exercise control over the judges.¹³⁸ The Third Division of the Tsar's chancellery, the Tsar's political police, generally supervised the judiciary.¹³⁹

Compensation of pre-Reform judges was so low that judges and their secretaries resorted to bribery to survive.¹⁴⁰ Bribery had been common in Russian society. Before Peter the Great (1682-1725), the judicial system ran on the principle of *kormleniya*¹⁴¹ [feedings], by which judges' compensation was fees from litigants.¹⁴² Even after the formal abolition of *kormleniya*, bribery was so pervasive that lower-level officials often bribed higher-level officials. In a telling example of the pervasiveness of bribery, Count Panin, Minister of Justice from 1841 to 1862, once bribed a subordinate in order to facilitate the delivery of a deed.¹⁴³

The educational level of pre-Reform judges was inadequate. Judges rarely had any legal education. A system of higher education that included a law faculty was not established until the last half of the eighteenth century, and the availability of legal education remained meager until the 1830s.¹⁴⁴ The short judicial tenure of most judges, which prevented them from acquiring significant practical knowledge, contributed to their low educational level.¹⁴⁵ The absence of a system of private law and an organized private bar added to the problem.¹⁴⁶ Thus, until the nineteenth century, there was no opportunity for practical or theoretical legal training.

Nicholas I (1825-1855) started the first sustained effort to provide trained judicial personnel,¹⁴⁷ and he achieved some success. For example, in 1840, only six of one hundred secretaries of the St. Petersburg branch of

¹³⁷ See KUCHEROV, *supra* note 134, at 1-2, for a more detailed breakdown of which judges were elected (almost all) and which were appointed.

¹³⁸ WORTMAN, *supra* note 134, at 13-14, 36-37, 81.

¹³⁹ KUCHEROV, *supra* note 134, at 8.

¹⁴⁰ BERMAN, *supra* note 134, at 211.

¹⁴¹ See RIASANOVSKY, *supra* note 8, at 192, 232. For a description of the role of bribery in the Russian administrative system from the earliest times, see GEORGE L. YANEY, *THE SYSTEMIZATION OF RUSSIAN GOVERNMENT: SOCIAL EVOLUTION IN THE DOMESTIC ADMINISTRATION OF IMPERIAL RUSSIA, 1711-1905*, at 27-28, 32-35 (1973).

¹⁴² BERMAN, *supra* note 134, at 201.

¹⁴³ KUCHEROV, *supra* note 134, at 5. For other examples, see YANEY, *supra* note 141, at 27 n.34, 34 n.42.

¹⁴⁴ WORTMAN, *supra* note 134, at 26-33, 37-41, 45-50.

¹⁴⁵ *Id.* at 80-82.

¹⁴⁶ Professor Berman ascribed the failure of Peter the Great's and Catherine the Great's attempted reforms to the lack of a "decent system of private law on which to build." BERMAN, *supra* note 134, at 203-04.

¹⁴⁷ WORTMAN, *supra* note 134, at 43-50.

the Senate, Russia's highest judicial body, had any higher education. Ten years later, fifty of the eighty secretaries in the judicial section of the St. Petersburg branch had received some higher education.¹⁴⁸ At the lower judicial levels, however, judges remained unschooled in the law, and many judges were either illiterate or almost illiterate.¹⁴⁹ The low educational level of judges matched the low respect accorded them and the courts.

The judicial procedure compounded the lack of respect for both the courts and the judges. All evidence and pleadings had to be reduced to writing before evaluation by a judge. Frequently, a secretary, a low-ranking civil servant prepared or evaluated all of the papers and recommended dispositions of cases to the judges.¹⁵⁰ The secretary controlled the outcome of a case and often wrote the court's opinions.¹⁵¹ Illiterate judges and judges who lacked legal education could not effectively review these opinions or control the secretaries.

The judges of pre-Reform Russia also had very little discretion. Rigid principles of formal evidence guided all dispositions. The only perfect evidence was matching statements by multiple individuals. In a criminal case, the best evidence was the confession of an accused. When conflicting statements were presented to a court, the law dictated which statements prevailed: a man's over a woman's, a nobleman's over a commoner's, an educated man's over an uneducated man's, and a clergyman's over a layman's.¹⁵² This evidentiary system also diminished Russian society's respect for its judges and its courts.

Other aspects of the pre-Reform Russian judicial system distinguished it from contemporary Western common law or civil law systems. The court system, which included many courts of original jurisdiction, was very complex.¹⁵³ Taking oral testimony from witnesses as well as collecting other evidence was closed to the public and to opposing parties. Thus, the excesses of corrupt officials and the integrity of honest judges went unexposed. Further, there was no organized bar to provide standards of legal conduct or to supervise litigants' representatives, who may not have been trained lawyers. All of these shortcomings, in a nation undergoing social, political, and economic change, prompted the Judicial Reform of 1864.

¹⁴⁸ Wortman, *supra* note 136, at 226; *see also* WORTMAN, *supra* note 134, at 66-71, 75-78, 220-22 (describing the rising educational attainment of judicial personnel throughout the higher levels of judicial administration under Nicholas I).

¹⁴⁹ KUCHEROV, *supra* note 134, at 3; WORTMAN, *supra* note 134, at 82-88.

¹⁵⁰ KUCHEROV, *supra* note 134, at 3.

¹⁵¹ *Id.* at 3.

¹⁵² *Id.* at 2.

¹⁵³ *Id.* at 2.

B. *Significant Features of the Judicial Reform of 1864*

During the reign of Nicholas I, who attempted to isolate Russia from the changes affecting other European countries, the deficiencies of the old court system and the need for judicial reform became increasingly apparent. Accordingly, Nicholas I turned his attention to reforming the existing judicial system. Under the direction of a group of bureaucrats with limited legal education and training, reform efforts from the 1830s through the 1850s sought to improve the existing system rather than to change it. For this reason, these efforts resembled numerous, earlier, failed attempts at judicial reform.¹⁵⁴

Russia's foreign policy initiative regarding Turkey, however, and the looming disintegration of the Ottoman Empire became significant catalysts to meaningful judicial reform. These events culminated in the Crimean War, in which a coalition of British, French, Austrian, and Turkish forces defeated the Russian military in 1855 after two years of fighting.¹⁵⁵ The Russian defeat dramatically exposed the weaknesses of the Russian political, economic, and social structures. These weaknesses included a backward social and economic organization in which approximately half of the Russian people, the serfs, were considered chattel owned by a small number of noble landowners;¹⁵⁶ the corrupt, inefficient, and ineffective governmental structure, including the general bureaucracy, the military, and the judicial system; and an absolutist monarchy in which citizens could participate in governing only by courting favor with the Tsar and those who had previously gained the Tsar's confidence.

Although Tsar Alexander II (1855-1881), who succeeded Nicholas I, would not consider moving toward a form of constitutional monarchy, he initiated and adopted several reforms—the Great Reforms—to address deficiencies in Russia's governance and organization. The first Great Reform was the emancipation of the serfs in February 1861.¹⁵⁷ Shortly thereaf-

¹⁵⁴ WORTMAN, *supra* note 134, at 158-65, 245-49. For the most complete English account of the preliminary work, the personnel, and the progress of the Judicial Reform up to the institution of the Judicial Statutes, see *id.* and Wortman, *supra* note 136. See also KUCHEROV, *supra* note 134 (providing valuable information on early attempts at reform).

¹⁵⁵ RIASANOVSKY, *supra* note 8, at 336-40.

¹⁵⁶ *Id.* at 341-47. Riasanovsky estimated that in 1858 serfs constituted about 45% of the total population of more than 67 million in Russia, while noblemen numbered approximately 30,000. *Id.* at 345, 369, 373. *But see* Peter Czap, Jr., *Peasant-Class Courts and Peasant Customary Justice in Russia, 1861-1912*, 1 J. SOC. HIST. 149, 149 n.1 (1967) (estimating that serfs constituted almost 65% of the population).

¹⁵⁷ RIASANOVSKY, *supra* note 8, at 369-74. In addition to the emancipation of the serfs in 1861 and the Judicial Reform in 1864, the Great Reforms included the reform

ter,¹⁵⁸ Tsar Alexander II turned over the work of reforming the judicial system to a group of younger men in the chancellery of the State Council, a quasi-legislative body that prepared laws for the Tsar to promulgate.¹⁵⁹ As a result of Nicholas I's prior decision to promote legal training, most of these chancellery members had some legal education.¹⁶⁰ In 1862, this group prepared the Basic Principles of the Reform of the Courts, an outline for reform that the Tsar endorsed.¹⁶¹ From this outline, the reformers prepared the Judicial Statutes,¹⁶² which the State Council approved and which the Tsar promulgated on November 20, 1864.¹⁶³

A Soviet writer described the dramatic changes the Judicial Reform

of local government with the establishment of the *zemstvo* system in 1864, the reorganization of municipal government in 1870, and the reorganization of the military in 1874. RIASANOVSKY, *supra* note 8, at 374-78. Another important reform was reform of the military justice system in 1867. See William C. Fuller, Jr., *Civilians in Russian Military Courts, 1881-1904*, 41 RUSSIAN REV. 288, 289-90, 297-305 (1982); Aurele J. Violette, *Judicial Reform in the Russian Navy during the 'Era of Great Reforms': The Reform Act of 1867 and the Abolition of Corporal Punishment*, 56 SLAVONIC & E. EUR. REV. 586 (1978).

¹⁵⁸ In addition to the growing recognition of the deficiencies in the judicial system itself, several authors have suggested that a great impetus to the Judicial Reform was the emancipation of the serfs in 1861 by Alexander II. See GRIGORY A. DZHANSHEV, *EPOKHA VELIKIKH REFORM [THE EPOCH OF THE GREAT REFORMS]* 399 (1907); KUCHEROV, *supra* note 134, at 21-22.

¹⁵⁹ WORTMAN, *supra* note 134, at 258. Alexander I first created the State Council in 1810. See HEIDE W. WHELAN, *ALEXANDER III AND THE STATE COUNCIL: BUREAUCRACY AND COUNTER-REFORM IN LATE IMPERIAL RUSSIA* 38-47 (1982); see also *infra* notes 253, 279, 331.

¹⁶⁰ WORTMAN, *supra* note 134, at 258-59.

¹⁶¹ *Id.* at 164-65, 247-59.

¹⁶² *Sudebnye Ustavy 20 Noyabrya 1864 Goda [The Judicial Statutes of November 20, 1864]*. The Judicial Statutes consist of four separate statutes: *Uchrezhdenie Sudebnykh Ustanovlenii [Statutes of Judicial Institutions, hereinafter Stat. Jud. Inst.]*; *Ustav Ugolovnogo Sudoproizvodstva [Statute of Criminal Procedure, hereinafter Stat. Crim. Proc.]*; *Ustav Grazhdanskago Sudoproizvodstva [Statute of Civil Procedure, hereinafter Stat. Civ. Proc.]*; and *Ustav v Nakazaniyakh, Nalagaemykh Mirovymi Sudyami [Statute of Punishments to be Applied by Justices of the Peace]*.

¹⁶³ From 1699 until the Bolshevik revolution in 1917, the Russian calendar was based on the Julian calendar rather than the Gregorian calendar, which Pope Gregory XIII created in 1582 and which had been adopted in the West by the end of the seventeenth century. In the nineteenth century, the Russian calendar was 12 days behind the Western calendar, and in the early twentieth century, it was 13 days behind. Thus, November 20, 1864 in Russia (sometimes designated "old style" or (O.S.)), was December 2, 1864 ("new style" or (N.S.)) in the West. The Soviet government adopted the Gregorian calendar on February 1, 1918, which became February 14, 1918. See Gronsky, *supra* note 134, at 38; 6 THE MODERN ENCYCLOPEDIA OF RUSSIAN AND SOVIET HISTORY 89-90 (Joseph L. Wieczynski ed., 1978). In this Article, dates for events in Russia before 1918 are given in the old style.

instituted:

The judicial reform put an end to the [class nature] of the structure of the judicial system; isolated the courts from the system of administrative organs; proclaimed the independence of the judicial power, the irremovability of the judges, the orality, publicity and controversiality [adversarial nature] of the judicial procedure; introduced the jury; and guaranteed law for the [defendant] and others.¹⁶⁴

One of the major elements of the Judicial Reform was the express separation of the judicial function from other governmental functions. Article 1 of the Basic Principles states: "The judicial authority is separate from the executive, administrative, and legislative."¹⁶⁵ The Judicial Statutes established a separate hierarchy of courts¹⁶⁶ in the Ministry of Justice. The Statutes cre-

¹⁶⁴ B.V. VILENSKY, *SUDEBNAYA REFORMA I KONTRREFORMA V ROSSII* [JUDICIAL REFORM AND COUNTERREFORM IN RUSSIA] 335 (1969). See generally BERMAN, *supra* note 134, at 213-20 (providing a short description of the Judicial Reform); KUCHEROV, *supra* note 134 (offering the most detailed description of the Judicial Reform); W. BRUCE LINCOLN, *THE GREAT REFORMS: AUTOCRACY, BUREAUCRACY, AND THE POLITICS OF CHANGE IN IMPERIAL RUSSIA* 105-17, 162-63, 188-89 (1990) (providing a general description of the reform); WILLIAM G. WAGNER, *MARRIAGE, PROPERTY, AND LAW IN LATE IMPERIAL RUSSIA* 1-58, 206-23, 337-83 (1994) (providing a general description of the reform and a detailed analysis of how the new court system dealt with evolving issues of marriage and property in late-nineteenth and early twentieth-century Russia).

Though the form of the jury court was somewhat more limited in Russia than in Europe and North America, the Russian court nevertheless embodied the fundamental principles of Western jurisprudence: an independent court, an oral and public legal process, the equality of all citizens before the court, and public involvement in the administration of justice. Jury courts in Russia decided three-fourths of all recorded criminal cases.

Alexander K. Afanas'ev, *Jurors and Jury Trials in Imperial Russia, 1866-1885* (Willard Sunderland trans.), in *RUSSIA'S GREAT REFORMS, 1855-1881*, at 214 (Ben Eklof et al. eds., 1994); see John W. Atwell, Jr, *Judicial Reform of 1864*, in 15 *THE MODERN ENCYCLOPEDIA OF RUSSIAN AND SOVIET HISTORY*, *supra* note 163, at 146-50; Gronsky, *supra* note 134, at 35-40; ADAM B. ULAM, *RUSSIA'S FAILED REVOLUTIONS* 123 (1981) ("After 1864 the judiciary, unlike that in the Soviet Union, would for the most part be genuinely independent of the political authority, and even under darkest reaction the Russian Bar would remain notable for its high professional standards and liberal spirit.").

¹⁶⁵ VILENSKY, *supra* note 164, at 335. For another translation, see KUCHEROV, *supra* note 134, at 33.

¹⁶⁶ Stat. Jud. Inst, *supra* note 162, at art. 1 ("The judicial power belongs to justices of the peace, general sessions of justices of the peace, circuit courts, judicial tribunals [*Sudebnaya Palata*], and the Ruling Senate, in its capacity as a court of cassation.").

ated in the Senate, which Peter the Great had established as the highest administrative and judicial body of the Empire,¹⁶⁷ the Civil and Criminal Cassation Departments to supervise the courts.¹⁶⁸ They also gave to the Minister of Justice supervision over non-judicial personnel as well as the power to recommend judicial appointments.¹⁶⁹

The Judicial Statutes established two types of courts. One type, the justices of the peace,¹⁷⁰ which were similar to those of the English system, had jurisdiction over minor civil and criminal matters.¹⁷¹ A litigant could appeal to the general sessions of Justices of the Peace¹⁷² and could make a final appeal to the Cassation Departments of the Senate.¹⁷³ The other type, the courts of general jurisdiction, consisted of circuit courts, intermediate courts (the *Sudebnaya Palata* [Judicial Chamber]), and the Cassation Departments of the Senate.¹⁷⁴ The circuit courts, which had jurisdiction over several districts (*uezdy*) within a province (*guberniya*),¹⁷⁵ were courts of

For another translation, see 3 A SOURCE BOOK FOR RUSSIAN HISTORY FROM EARLY TIMES TO 1917, at 614 (George Vernadsky et al. eds., 1972) [hereinafter SOURCE BOOK].

¹⁶⁷ See YANEY, *supra* note 141, at 28, 63-65.

¹⁶⁸ See, e.g., Stat. Jud. Inst., *supra* note 162, at arts. 1, 114, 249; KUCHEROV, *supra* note 134, at 43-44. The Senate also had three other nonjudicial departments. These were the First Department, which chiefly served as a referee among governmental agencies, see *infra* note 238 and accompanying text, and also heard complaints from citizens about decisions of the government; the Second Department, which dealt with peasant affairs; and the Department of Heraldry. Marc Szeftel, *The Form of Government of the Russian Empire Prior to the Constitutional Reforms of 1905-06*, in ESSAYS IN RUSSIAN AND SOVIET HISTORY 105, 109, 112 (John S. Curtiss ed., 1965).

¹⁶⁹ See, e.g., Stat. Jud. Inst., *supra* note 162, at arts. 216, 249-50.

¹⁷⁰ *Id.* at arts. 1, 3, 12.

¹⁷¹ See KUCHEROV, *supra* note 134, at 87-91.

¹⁷² See, e.g., Stat. Civ. Proc., *supra* note 162, at arts. 162-69.

¹⁷³ See, e.g., *id.* at art. 189.

¹⁷⁴ Stat. Jud. Inst., *supra* note 162, at arts. 1, 3, 5, 77, 110, 114; see KUCHEROV, *supra* note 134, at 43-44.

¹⁷⁵ Stat. Jud. Inst., *supra* note 162, at art. 77. Catherine the Great (1775-1796) reorganized the local administration of the Russian Empire into 50 *gubernii* [provinces]. RIASANOVSKY, *supra* note 8, at 261-62; YANEY, *supra* note 141, at 54 n.17, 68-74. The *gubernii* established by Catherine (which did not include Poland and the Duchy of Finland) generally remained until 1917. As the Russian Empire expanded during the 1800s in Bessarabia, the Caucasus, Kazakhstan, Central Asia, and the far east, the number of *gubernii* grew to 60 by 1914. G.N. Golikov, *Russian Empire, Administrative-Territorial Division of*, in 52 THE MODERN ENCYCLOPEDIA OF RUSSIAN AND SOVIET HISTORY, *supra* note 163, at 159-62. Each *guberniya* contained 4 to 15 *uezdy* [districts]. *Id.* In addition, between 1849 and 1914, smaller and generally more remote areas of the Empire not yet incorporated into the *gubernii* were organized into 20 administrative units, each called an *oblast* [region]. *Id.* See generally 2 ANATOLE LEROY-BEAULIEU, THE EMPIRE OF THE TSARS AND THE RUSSIANS 87-89 (Zenaide A. Ragozin trans., 3d Fr. ed.

first impression.¹⁷⁶ The intermediate court functioned as both an appellate court and as a court of first impression.¹⁷⁷ Each intermediate court, of which there were eventually fourteen, had jurisdiction over a circuit covering several provinces and regions.¹⁷⁸ The Civil Cassation Department and the Criminal Cassation Department were the highest courts.¹⁷⁹

The Judicial Reform corrected the defects of the pre-Reform system. The Judicial Statutes introduced the jury in criminal cases.¹⁸⁰ The judicial power extended to all social classes and to all cases¹⁸¹ with limited excep-

1898).

¹⁷⁶ See KUCHEROV, *supra* note 134, at 43-44, 49.

¹⁷⁷ *Id.*

¹⁷⁸ Stat. Jud. Inst., *supra* note 162, at art. 110. Although the government did not immediately extend the Reform to all of Russia, it quickly implemented the Reform in the most important and populous area: central European Russia from St. Petersburg in the north to the Black Sea in the south. The St. Petersburg circuit, the Moscow circuit, and the Tiflis circuit (named after the city now known as Tbilisi), which covered provinces in the Caucasus, were established in 1866; the Kharkov circuit, in 1867; the Odessa circuit in 1869, the Kazan circuit in 1870; and the Saratov circuit in 1871. VILENSKY, *supra* note 164, at 202-04, 208-09. It was introduced in the 1870s and fully implemented by 1883 in the Kiev circuit, which covered nine western provinces, including western Kiev and the Byelorussian provinces. *Id.* at 205-08. The Reform was implemented in Poland (the Warsaw circuit) beginning in 1875, *id.* at 210-14, and, delayed by local opposition, in the Baltic provinces (the Vilna circuit) in 1889. *Id.* at 214-16. In 1896, the reform reached the Archangel province in the far north and the provinces of Siberia (the Irkutsk circuit) in the far east; in 1898, it reached the southeastern provinces in Kazakhstan, incorporated into the Russian Empire during 1805 to 1855 (the Omsk circuit), and Central Asia, incorporated into the Russian Empire during 1853 to 1885 (the Tashkent circuit). *Id.* at 216-18; see also ALLAN F. CHEW, AN ATLAS OF RUSSIAN HISTORY: ELEVEN CENTURIES OF CHANGING BORDERS 76-78 (1967); WAGNER, *supra* note 164, at 47. The court systems in the Baltic provinces, Poland, the Caucasus, Archangel, Siberia, and Central Asia varied somewhat from that in European Russia, but the changes mostly affected the justices of the peace. See Stat. Jud. Inst., *supra* note 162, at arts. 430-61 (introducing special provisions and including all of the Caucasus in 1883); arts. 462-555 (adding Poland in 1875); arts. 556-605 (adding the Baltic provinces in 1889); arts. 606-23 (adding Archangel in 1896); arts. 624-47² (adding Siberia in 1896); arts. 648-72² (adding Central Asia in 1898), *codified as amended in 4 SVOD ZAKONOV ROSSIJSKOI IMPERII [CODE OF LAWS OF THE RUSSIAN EMPIRE] v. 16, bk. 1, at 789-820 (1913) (unofficial compilation) [hereinafter SVOD ZAKONOV 1913].* The SVOD ZAKONOV 1913 represented a codification project that was completed but was not officially adopted. See BERMAN, *supra* note 134, at 215-16.

¹⁷⁹ Stat. Jud. Inst., *supra* note 162, at arts. 1, 3, 5, 114.

¹⁸⁰ See EUGENE HUSKEY, RUSSIAN LAWYERS AND THE SOVIET STATE 17 (1986); KUCHEROV, *supra* note 134, at 51-71; John W. Atwell, Jr., *The Russian Jury*, 53 SLAVONIC & E. EUR. REV. 44 (1975).

¹⁸¹ Stat. Jud. Inst., *supra* note 162, at art. 2 ("The judicial power of the institutions described in the preceding article [article 1, see *supra* note 166] applies to persons of all classes and in all matters, both civil and criminal.").

tions.¹⁸² All proceedings were oral, were supplemented by written briefs, and were made in an open court to which the public was admitted.¹⁸³ The Statutes established examining magistrates to conduct investigations preliminary to indictments.¹⁸⁴ Furthermore, the Statutes created an organized Russian bar¹⁸⁵ and gave it a virtual monopoly on representation. Trials were adversarial, although the judges, who sat in panels of three, could intervene to a certain degree.¹⁸⁶ Judicial deliberations were secret, but judges wrote and issued opinions.¹⁸⁷ Finally, the Senate had the power to reverse decrees and to quash proceedings.¹⁸⁸

¹⁸² See *infra* notes 189-97 and accompanying text.

¹⁸³ See KUCHEROV, *supra* note 134, at 36-40.

¹⁸⁴ See *id.* at 38-43.

¹⁸⁵ For a more detailed description of the structure and operation of the pre-Soviet Russian bar, see HUSKEY, *supra* note 180, at 11-33, and KUCHEROV, *supra* note 134, at 122-96. The Judicial Statutes established completion of a university-level legal education and five years experience in the legal system as prerequisites for bar membership. Stat. Jud. Inst., *supra* note 162, at art. 353. The Statutes also provided for a governing council for the members of the bar in each of Russia's fourteen judicial circuits and a general meeting of the bar in those regions. *Id.* at arts. 354-406. These latter provisions were not completely implemented until several decades after the Judicial Statutes were enacted. See HUSKEY, *supra* note 180, at 24. The governing councils for Moscow and St. Petersburg were set up in 1866, and the governing council for the Kharkov region was established in 1874. *Id.* Thereafter, there was a moratorium on establishing such councils until 1904. *Id.* In the circuits without governing councils, however, the members of the bar formed their own committees that generally were recognized by the regional courts. *Id.* These lawyers were known as *prisyazhnye poverennye* ("sworn advocates"). *Id.* at 12-13.

In 1874, as a partial reaction against the liberalism of the Judicial Reform, the government recognized a second group of lawyers, the *chastnye poverennye* ("private advocates"). *Id.* at 13-14. Private advocates did not need to meet any general educational or experience prerequisites. *Id.* at 15. Admission to practice before a court was controlled by the specific court. *Id.* Unlike sworn advocates, who could practice in any Russian court, private advocates could practice only before the courts in which they were certified. *Id.* at 14. The government apparently intended that private advocates would counterbalance the independent bar. *Id.* at 14. Huskey noted that the private advocates remained fractionalized and, after the Bolshevik revolution, were more malleable to the policies of the Soviet government. *Id.* at 20-21.

¹⁸⁶ See KUCHEROV, *supra* note 134, at 40-43, 49-50.

¹⁸⁷ See *id.* at 36-40, 49-50.

¹⁸⁸ See *id.* at 44-49. Unlike the appellate courts of the United States and England, the Cassation Departments of the Senate operated as a court of cassation along the lines of the civil law appellate courts. A court of cassation (from the French word *casser* [to quash]) has authority to quash a judgment of a lower court and send the case back to that court or to another court for reconsideration. See generally JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 39-41 (1985); Joseph Dainow, *The Constitutional and Judicial Organization of France and Germany and Some Comparisons of the Civil Law and Common Law Systems*, 37 *IND. L.J.* 1, 13-15 (1961). The Civil Cassation Department of

The benefits of this new judicial system, however, did not extend to all matters. First, the Statutes of Judicial Institutions contained a footnote explaining that ecclesiastical courts, military courts, commercial courts, peasant courts, and courts for indigenous, non-Russian peoples were subject to different regulations.¹⁸⁹ Of these exceptions, the most significant were the *volost* [peasant] courts. The statute that emancipated the serfs established these courts to adjudicate, using customary law, controversies between former serfs.¹⁹⁰ Thus, the formal legal system did not address the most common legal problems of a significant number of Russians.¹⁹¹

This exclusion remained controversial during the remainder of the Russian Empire.¹⁹² Some believed that this exclusion was only a temporary measure necessitated by the presumed backwardness of the peasant population.¹⁹³ Others maintained that the unique culture of the Russian peasantry necessitated a more "Russian" legal system than the Western-style system implemented by the Judicial Reform.¹⁹⁴ This view pervaded the government even after the industrialization of the cities and the modernization in the countryside that took place during the late nineteenth century and the

the Senate, however, took a more active role in the development of the law than courts of cassation in other civil law countries. See WAGNER, *supra* note 164, at 41-47. In certain cases, the Senate also acted as a court of original jurisdiction. KUCHEROV, *supra* note 134, at 49.

¹⁸⁹ Stat. Jud. Inst., *supra* note 162, at note to art. 2; see KUCHEROV, *supra* note 134, at 35-36, 50. Commercial courts had been established in 1832 in Moscow, St. Petersburg, and Odessa. See *Ustav Sudoproizvodstva Torgovago* [Statute of Commercial Procedure], art. 1, *codified as amended in 3 SVOD ZAKONOV 1913*, *supra* note 178, v. 11, pt. 2, at 2331. In 1867, the military courts were reformed. See Fuller, *supra* note 157, at 289-90, 297-305; Violette, *supra* note 157, at 595-97.

¹⁹⁰ See generally Czap, *supra* note 156; C.A. Frierson, *Rural Justice in Public Opinion: The Volost' Court Debate 1861-1912*, 64 SLAVONIC & E. EUR. REV. 526 (1986). Significantly, however, the designers of the *volost* court recognized the importance of separating judicial functions from administrative functions. See *id.* at 528. Originally the *volost* court was intended to be a judicial body separate from the local administrative bodies. See *id.* In 1889, the government eliminated this separation when it created in the rural areas the *zemskie nachalniki* [land captains] as combined administrative and judicial representatives of the government and subjected the *volost* courts to their control. This change accompanied the abolition of the justices of the peace in the countryside in European Russia. See *infra* note 269 and accompanying text. The government separated the *volost* courts from the land captains in 1912. *Id.* at 544.

¹⁹¹ The Reform did not, however, exclude the peasants from the formal legal system. The peasants were subject to the jurisdiction of the regular courts to the same extent as other Russians, see *supra* note 181, and they regularly sat on juries, see Atwell, *supra* note 180, at 50-52.

¹⁹² See Frierson, *supra* note 190, at 526.

¹⁹³ See *id.* at 529.

¹⁹⁴ See generally *id.* at 534.

early twentieth century.¹⁹⁵

Second, the note to Article 1 of the Statute of Criminal Procedure presaged another important limitation on the full reach of the Reform. The note explains: "Unrelated to the judicial prosecution are those measures established according to law taken by police or other administrative authorities for the prevention and interruption of crimes and misdemeanors against order."¹⁹⁶ This reservation allowed the government to deal with many problems without resorting to the courts.¹⁹⁷ As a safety valve for an autocratic government, it also may have decreased the need for governmental pressure upon the courts.

C. *Judicial Independence Under the Reform*

The reformers specifically designed the Judicial Statutes to provide for an independent judiciary. The Proclamation of Alexander II stated that one of the purposes of the Judicial Reform was to "give [the judicial power] the appropriate independence."¹⁹⁸ Desiring to create a judicial system that would benefit Russia,¹⁹⁹ the reformers built into the Judicial Statutes all

¹⁹⁵ See *id. passim*.

¹⁹⁶ Stat. Crim. Proc., *supra* note 162, at note to art. 1. Article 1 essentially states that no one may be punished without a court judgment. *Id.* at art. 1. An analogous exception, though of less importance, is attached to article 1 of the Statute of Civil Procedure. Stat. Civ. Pro., *supra* note 162, at art 1.

¹⁹⁷ See *infra* note 336 and accompanying text.

¹⁹⁸ Foreword to the Judicial Statutes, *supra* note 162. For a translation of the proclamation, see KUCHEROV, *supra* note 134, at 26, and GRONSKY, *supra* note 134, at 37-38. The proclamation used the word "*samostoyatel'nost'*" for "independence." This Russian word (literally, "stand-on-your-own-ness") has a connotation of "self-dependent" or "self-sufficient." Later Russian writings on the judicial system, however, most frequently use the word "*nezavisimost'*" (literally, "non-dependence") for "independence," as in the expression "*sudebnaya nezavisimost'* [judicial independence]." See, e.g., A.V. ZAVADSKY, NESMENYAEMOST SUDI I EGO NEZAVISIMOST [THE IRREMOVABILITY OF THE JUDGE AND HIS INDEPENDENCE] (Kazan 1903); cf. NICHOLAS P. PRISCHEPENKO, RUSSIAN-ENGLISH LAW DICTIONARY 61 (1969) (listing "*nezavisimost' sudei*," rather than "*samostoyatel'nost'*," for the concept of judicial independence). But see the quote at *infra* note 199, in which both words appear. The word "*nezavisimost'*" has a connotation of "sovereignty," as in "independent" or "sovereign" state. Of course, the Tsar would not want to use a word that has a connotation of sovereignty.

¹⁹⁹ The idea of an independent judiciary received an enthusiastic indorsement.

Legality [*zakonost'*] and right [*pravo*] become a reality only in that social milieu where there is a true court and where the court is an independent [*nezavisimaya*] and self-sufficient [*samostoyatel'naya*] force An independent and self-sufficient court elevates and ennobles the social milieu for through it this quality of independence and self-sufficiency communicates itself little by little to all aspects of the national life.

the institutional elements necessary to ensure judicial independence.²⁰⁰ The Statutes established life tenure and narrow procedures for disciplining and removing judges. They established good salaries and sufficiently high educational requirements, and they gave limited protection to judges from civil liability. The ensuing half century provided a strong test for these elements. Although some writers disagree,²⁰¹ considerable evidence demonstrates that the post-Reform, pre-Soviet Russian judiciary possessed substantial independence.

1. *Guarantees of Tenure*

On the recommendation of the Minister of Justice, the Tsar appointed all judges of the regular lower courts,²⁰² and, by Imperial Decree, he appointed members of the Senate.²⁰³ The Senate's Departments of Cassation supervised all judicial institutions, and the *Sudebnaya Palata* supervised the circuit courts, the judges, and the members of the bar in its respective region.²⁰⁴ Judges had protection from arbitrary removal.²⁰⁵ Specifically, Article 243 of the Statutes of Judicial Institutions provided that

DZHANSHEV, *supra* note 158, at 432 (quoting an article in the MOSKOVSKIE VEDOMOSTI (THE MOSCOW NEWS), No. 86 at 2 (1866)); *see also* VILENSKY, *supra* note 164, at 336 (quoting the journal of the combined departments of the chancellery that had prepared the Judicial Statutes, which extolled the benefits of separating the judicial power from the administrative).

²⁰⁰ Judicial independence did not extend to the justices of the peace. The *zemstvo*, the local administrative governing body, elected justices of the peace from among the people of a district for a three year term. Justices were not required to possess any higher education, but they had to have at least a secondary education, have passed an equivalency examination, or have three years experience in a post with duties that enabled them to acquire some knowledge of judicial procedure. Stat. Jud. Inst., *supra* note 162, at arts. 19, 23, 24, *partially translated in* 3 SOURCE BOOK, *supra* note 166, at 615. The guarantees of judicial independence also did not extend to examining magistrates. Although examining magistrates were considered part of the judicial system and had some of the same safeguards as judges, they conducted their investigations under the supervision of a procurator, whose position is similar to that of a prosecutor. The procurator could force the magistrates either to present an indictment or to resign. Thus, the magistrates possessed limited independence. *See id.* art. 6, *translated in* 3 SOURCE BOOK, *supra* note 166, at 614-15 (providing that examining magistrates are attached to the courts for the purpose of investigating crimes and offenses).

²⁰¹ *See infra* notes 226-28, 328 and accompanying text.

²⁰² Stat. Jud. Inst., *supra* note 162, at art. 212; *see* SOURCE BOOK, *supra* note 166, at 615 (providing an English translation).

²⁰³ Stat. Jud. Inst., *supra* note 162, at art. 216; *see* SOURCE BOOK, *supra* note 166, at 615 (providing an English translation).

²⁰⁴ Stat. Jud. Inst., *supra* note 162, at arts. 249-50.

²⁰⁵ *Id.* at art. 243.

[c]hairmen, assistant chairmen and [other] members of the judiciary may neither be discharged except on their request, nor transferred from one locality to another without their consent. It is permissible to relieve them temporarily of their duties only in the event that they are brought to trial, and they are subject to final dismissal or suspension from duty only by decision of a criminal court.²⁰⁶

This significant protection remained viable. Kucherov and other scholars offered examples. In 1867, for example, Tsar Alexander II ordered the removal of a judge in the Civil Cassation Department of the Senate for delivering a speech that the Tsar considered to be too liberal.²⁰⁷ When the Minister of Justice attempted to carry out the Tsar's order, he discovered that the judge could not be removed because of Article 243's provision for removal only by a criminal court. Although the Tsar was unhappy with this legal proscription, he acquiesced.²⁰⁸

Another, more significant example involves the 1878 trial of Vera Zasulich in the St. Petersburg circuit court. Zasulich was a revolutionary who had been charged with attempting to murder the Governor of St. Petersburg.²⁰⁹ Visiting the Governor on the pretext of presenting a petition, Zasulich shot and wounded him.²¹⁰ The Chairman of the St. Petersburg circuit court, A.F. Koni, who presided at the trial, allowed the defense to summon witnesses who described the events that had motivated Zasulich to shoot the Governor.²¹¹ Although the facts clearly established Zasulich's guilt, the jury acquitted her; the impressions the witnesses made on the jury were thought to be the determining factor.²¹²

Before the trial, the Minister of Justice had pressured Koni to render the government "special services" to ensure a guilty verdict. Koni, however, rebuffed these efforts.²¹³ After the trial, the Minister of Justice attempted to force Koni to resign.²¹⁴ Koni refused, and the Minister of Justice could

²⁰⁶ This translation is taken from 3 SOURCE BOOK, *supra* note 166, at 615.

²⁰⁷ KUCHEROV, *supra* note 134, at 34-35 (citing 1 V. MESHCHERSKY, MOI VOSPOMINANIE [MY MEMOIRS] 429-30 (undated)); WORTMAN, *supra* note 134, at 276.

²⁰⁸ KUCHEROV, *supra* note 134, at 34-35 (citing 1 MESHCHERSKY, *supra* note 207, at 429-30; WORTMAN, *supra* note 134, at 276.

²⁰⁹ KUCHEROV, *supra* note 134, at 214-25. Zasulich was motivated by an account of the unjustified flogging of a prisoner and fellow revolutionary who had failed to remove his hat when he passed the Governor while the latter was inspecting the prison. *Id.*

²¹⁰ *Id.* at 214.

²¹¹ *Id.* at 217-21.

²¹² *Id.* at 221-23.

²¹³ *Id.* at 215.

²¹⁴ *Id.* at 224.

not remove him.²¹⁵ Though many members of society disapproved of Koni's role in this case,²¹⁶ this episode did not prevent Koni from having a long and distinguished career in the judicial system.²¹⁷ The government, which was dissatisfied with the result of the case, enacted laws to withdraw political crimes and crimes against state officials from the jurisdiction of the regular courts.²¹⁸

The effective operation of an independent court encouraged some members of the government and of society to call for abolition of judicial independence.²¹⁹ The first serious attempt to do so resulted in the Law of May 20, 1885.²²⁰ This Law created the Highest Disciplinary Council of the Ruling Senate.²²¹ It also amended Articles 243 and 295 and added Articles 295¹ and 295² to the Statutes of Judicial Institutions,²²² which broadened

²¹⁵ *Id.* at 223-25; WORTMAN, *supra* note 134, at 283.

²¹⁶ Koni described the trial and its aftermath in *Vospominaniya o Dele Very Zasulich* [*Reminiscences on the Vera Zasulich Affair*], in 2 ANATOLY F. KONI, SOBRANIE SOCHINENII V VOSMI TOMAKH [COLLECTED WORKS IN EIGHT VOLUMES] 24-252 (1966) [hereinafter SOBRANIE SOCHINENII].

²¹⁷ Koni continued to serve as Chairman of the St. Petersburg circuit court for four years. In 1881, he left the circuit court to become Chairman of the civil division of the *Sudebnaya Palata* in Kharkov, which was a significant promotion. In 1885, Tsar Alexander III (1881-1894) promoted him to Chief Procurator at the Criminal Department of Cassation of the Senate (somewhat comparable to, but broader than, a Solicitor General of the United States for criminal matters in the United States Supreme Court) despite the opposition of one of the Tsar's closest advisors, K.P. Pobedonostsev, overprocurator of the Holy Synod of the Russian Orthodox church. Later, in 1891, Tsar Alexander III elevated Koni to the Senate. DZHANSHEV, *supra* note 158, at 841; Anatoly F. Koni, *Triumviry* [*Triumvirs*], in 2 SOBRANIE SOCHINENII, *supra* note 216, at 253, 259; KUCHEROV, *supra* note 134, at 224-25.

²¹⁸ See *infra* note 336 and accompanying text.

²¹⁹ PETER A. ZAIONCHKOVSKY, THE RUSSIAN AUTOCRACY UNDER ALEXANDER III 137-40 (David R. Jones trans., Academic Int'l Press 1976) (translated and edited version of ROSSIIKOE SAMODERZHAVIE V KONTSE XIX STOLETIYA [THE RUSSIAN AUTOCRACY AT THE END OF THE 19TH CENTURY] (1970)).

²²⁰ WHELAN, *supra* note 159, at 159-67; ZAIONCHKOVSKY, *supra* note 219, at 137-44.

²²¹ Stat. Jud. Inst., *supra* note 162, at art. 119⁴, as added by the Law of May 20, 1885, *codified in* 4 SVOD ZAKONOV 1913, *supra* note 178, v. 16, bk. 1, at 745-46.

²²² Stat. Jud. Inst., *supra* note 162, at arts. 243 (as amended), 295 (as amended), 295¹, 295², *codified in* 4 SVOD ZAKONOV 1913, *supra* note 178, v. 16, bk. 1, at 762, 768-69. Article 243 as amended provides that

[c]hairmen, deputy chairmen and the [other] members of the judiciary may neither be discharged except on their request, nor transferred from one locality to another without their consent with the exception of the cases stated in articles 228-230, 295, 295² and 296. It is permissible to relieve them temporarily of their duties only in the event that they are brought to trial (art. 295¹), and they are subject to final dismissal or suspension from duty only by a decision of a criminal court.

Stat. Jud. Inst., *supra* note 162, at art. 243 (as amended), *codified in* 4 SVOD ZAKONOV 1913, *supra* note 178, v. 16, bk. 1, at 762 (additions shown as double-underline). Arti-

the grounds and the means for removal or discipline of judges. Revised Article 295 provided that the Highest Disciplinary Council could remove a judge who had been sentenced in a criminal proceeding for a crime unrelated to his judicial duties, even if the criminal penalty did not require removal from office.²²³ New Article 295² provided that the Council could remove judges who had committed certain blameworthy acts that were incompatible with judicial office.²²⁴ The Council could also involuntarily transfer a judge from one jurisdiction to another, in the same judicial office, for failure to discharge his duties "quietly" and impartially.²²⁵

Some writers have cited the Law of May 20, 1885 as an example of a general subjugation of the judiciary. A Soviet writer explained, with great exaggeration, "In the period of reaction, . . . the judicial reform and the enumerated higher principles of the organization and activities of the new court were twisted by vital changes; the judicial counter reform in fact annihilated these institutions."²²⁶ Myakotin, a Russian scholar and emigre, wrote, "In 1885 the principle of judicial independence and permanency of tenure was abolished in fact: the minister of justice was empowered to call on any

cles 228, 229, and 230 referenced in article 243 authorized the removal of judges who without good cause failed to report for service within a specified time of being appointed (a minimum of 30 days, with extensions based on the distance to the jurisdiction to which the judge had been appointed) or who were absent from service for more than one year because of illness. The general assembly of the court to which the judge had been appointed decided the question of removal. Stat. Jud. Inst., *supra* note 162, at art. 228, 229, 230, *codified in* 4 SVOD ZAKONOV 1913, *supra* note 178, v. 16, bk. 1, at 759-60.

²²³ Stat. Jud. Inst., *supra* note 162, at art. 295, as amended by Law of May 20, 1885, *codified in* 4 SVOD ZAKONOV 1913, *supra* note 178, v. 16, bk. 1, at 768-69. The Council acted after demanding an explanation from the judge. Under Article 295¹, the Council could suspend temporarily from service a judge who was the subject of investigation or brought to trial for serious charges, pending the outcome of those proceedings. *Id.* at art. 295¹, as added by Law of May 20, 1885, *codified in* 4 SVOD ZAKONOV 1913 *supra* note 178, v. 16, bk. 1, at 769.

²²⁴ Stat. Jud. Inst., *supra* note 162, at art. 295², as added by Law of May 20, 1885, *codified in* 4 SVOD ZAKONOV 1913, *supra* note 178, v. 16, bk. 1, at 769. The Minister of Justice was responsible for referring these matters to the Council. The grounds of removal were limited to the following: (1) dereliction in the performance of duties, either because of the significance or the repetition of the dereliction, demonstrating unfitness for office or manifesting disregard for the duties; or (2) commission, outside of judicial service, of offensively immoral or reprehensible acts, even if not criminal, that are incompatible with the judicial office and, if publicly known, would deprive the judge of the trust and respect necessary for the judicial office. *Id.*

²²⁵ *Id.* (providing for the transfer of a judge, upon referral from the Minister of Justice, if the judge acted in a way that gave substantial grounds to doubt the subsequent "quiet" [*spokoinyi*] and impartial discharge of his duties and had declined an offer to transfer to another jurisdiction).

²²⁶ VILENSKY, *supra* note 164, at 335.

judge at any time to defend his work; in certain cases the minister could resort to such disciplinary measures as transfer or dismissal."²²⁷ Berman, presumably referring to this law, described its impact in milder terms:

In 1885 restrictions were placed on the independence of the judges; the judges of the lower courts were made more dependent on the president of the appellate court and on the Minister of Justice, and any judge could now be dismissed by a disciplinary board not only for negligence in the performance of his duties but also for offenses against morality or otherwise blameworthy activity.²²⁸

Kucherov, a strong believer in judicial independence, attached no special significance to the Law.²²⁹ August Levenstim, a judge of the *Sudebnaya Palata* for the Kharkov circuit, described in greater detail the Law's provisions.²³⁰ He reported that from 1885 to 1902 the Law was used only once in the Kharkov circuit.²³¹ Heide Whelan, who described in detail the Law's enactment,²³² concluded that the Law did not significantly lessen individual independence.²³³ Peter Zaionchkovsky stated that a review of the Council's records from 1886 to 1892 revealed the removal of only two judges in the entire Empire.²³⁴ He concluded that this Law did not adversely affect judicial tenure.²³⁵

²²⁷ V. Myakotin, *Alexander III*, in 3 MILIUKOV 119, 133-34; see also Isaac A. Hourwich, *The Russian Judiciary*, 7 POL. SCI. Q. 672 (1892). Hourwich erroneously stated, "Finally, in 1886, a ukase of the Czar, repealing the fixed tenure of the judges, swept away the last semblance of judicial independence, and made the courts obedient tools in the hands of the government." *Id.* at 677. Hourwich's article, which contains other misstatements and exaggerations, is primarily a critique of the Russian criminal justice system, and despite its title, has very little discussion of judges other than examples of unjust decisions.

²²⁸ BERMAN, *supra* note 134, at 214.

²²⁹ KUCHEROV, *supra* note 134, at 43.

²³⁰ AVGUST A. LEVENSTIM, OCHERK DEYATELNOSTI SYDEBNYKH UCHREZHDENII KHARKOVSKAGO OKRUGA 1867-1902 [ESSAY ON THE ACTIVITIES OF THE JUDICIAL INSTITUTIONS OF THE KHARKOV CIRCUIT 1867-1902] 71 (1903).

²³¹ *Id.* at 71 n.1. The Kharkov circuit initially covered the provinces of Kharkov, Kursk, Voronezh, Orlovsk, and several districts of the provinces of Tambovsk and Ekaterinoslovsk, and included seven million people. In the next few years, it grew to include the provinces of Poltava and Chernigovsk and several districts in other provinces. *Id.* at 7-8; VILENSKY, *supra* note 164, at 203-04. It continued to grow, and by 1902, it covered seven provinces and several districts and regions, and it included 16 million people. LEVENSTIM, *supra* note 230, at 8-9.

²³² WHELAN, *supra* note 159, at 160-67; see *infra* text accompanying notes 249-57.

²³³ *Id.* at 166-67.

²³⁴ ZAIONCHKOVSKY, *supra* note 219, at 144.

²³⁵ *Id.* at 144. For a partial English translation of some of the sections, see *id.* at 142-

William Wagner cited a feature of the Highest Disciplinary Council as evidence that this Law substantially affected judicial independence.²³⁶ The Council contained twelve members, ten Senators from the Cassation Departments of the Senate—judges with life tenure—and two Senators from the First Department.²³⁷ The First Department served as an administrative court to decide disputes about the legality of the actions and policies of governmental agencies.²³⁸ These two Senators were not judges with life tenure.²³⁹ Nevertheless, their presence on the Council would not present a substantial threat of governmental influence over judicial discipline.²⁴⁰

The Law of May 20, 1885 did not destroy or substantially weaken judicial independence. Despite the motivations of those who sought the changes,²⁴¹ the changes effected by the Law did no more than make judges more accountable. Combined with life tenure, the anti-removal provisions of the original Article 243 were particularly strong.²⁴² The Law of May 20, 1885

43.

²³⁶ See, e.g., William G. Wagner, *Tsarist Legal Policies at the End of the Nineteenth Century: A Study of Inconsistencies*, 54 SLAVONIC & E. EUR. REV. 371, 375-76 (1976).

²³⁷ Under the new Article 119⁴ of the Statute of Judicial Institutions, added by the Law of May 20, 1885, the Council consisted of four Senators appointed annually from the Cassation Departments of the Senate by the Tsar, the presiding officers of the Civil and Criminal Cassation Departments of the Senate, and all of the Senators on the Joint Council of the First and Cassation Departments of the Senate. Stat. Jud. Inst., *supra* note 162, at art. 119⁴, added by the Law of May 20, 1885, *codified in* 4 SVOD ZAKONOV 1913, *supra* note 178, v. 16, bk. 1, at 746-47. Under Article 119¹, added by a law adopted on May 14, 1885, the Joint Council consisted of two Senators each from the First Department, the Civil Cassation Department, and the Criminal Cassation Department. Stat. Jud. Inst., *supra* note 160, at art. 119¹, added by the Law of May 14, 1885, *codified in* 4 SVOD ZAKONOV 1913, *supra* note 178, v. 16, bk. 1, at 745-46.

²³⁸ YANEY, *supra* note 141, at 250, 259-60.

²³⁹ Interestingly, Article 119¹ declared that the Joint Council was organized “as part of the Cassation Departments [*v sostave Kassatsionnykh Departamentov Pravitelstvuyushchago Senata obrazuetsya Coedinennoe Pristutstvie Pervago i Kassatsionnyikh Departamentov Senata*].” Stat. Jud. Inst., *supra* note 160, at art. 119¹, added by the Law of May 14, 1885, *codified in* 4 SVOD ZAKONOV 1913, *supra* note 178, v. 16, bk. 1, at 745-46. The Cassation Departments formed the highest judicial body and the Senators of the Cassation Departments were judges protected by the restrictions on removal in Article 243. It is not clear to what extent the quoted provision created or implied protections for the Senators appointed from the First Department.

²⁴⁰ The presence of individuals who are not judges resembles the judicial discipline commissions of France, *see supra* note 53, Greece (where judges are a minority on the Supreme Disciplinary Council), Italy, and Mexico, *see supra* note 55, or the American state of Georgia, *see supra* note 62 (where the majority are not judges).

²⁴¹ *See infra* text accompanying notes 249-57.

²⁴² Judges with life tenure who could be removed only upon conviction of a crime and could not be removed by the Russian political bodies (the Tsar and his representative in the bureaucracy), *see supra* note 206, had stronger tenure protections than do

allowed another body, comprised primarily of judges, to discipline judges; it did not abrogate judicial independence.²⁴³

The social and political contexts in which the Law was enacted and the specific bureaucratic maneuvering that led to its enactment confirm, rather than refute, the viability of judicial independence in Russia under the Judicial Reform. First, the Law of May 20, 1885 was a manifestation of the general political reaction under Alexander III and was a response to the terrorist attacks against the establishment.²⁴⁴ Conservatives led many attacks upon various aspects of the Judicial Reform. Several influential advisors to Tsar Alexander III, including K.P. Pobedonostsev, overprocurator of the Holy Synod of the Russian Orthodox Church; D.A. Tolstoi, minister of interior from 1882 to 1889; M.N. Katkov, editor of *Moskovskie Vedomosti* [*The Moscow News*]; and V.P. Meshchersky, editor-publisher of *Grazhdanin* [*Citizen*],²⁴⁵ participated in the attacks. Further, abrogation of the Judicial Statutes had been among Alexander III's primary goals from the beginning of his reign.²⁴⁶

The impetus for the counter-reform was not only political. An ideological schism existed between Russians who were willing to import Western institutions and ideas to modernize their country and Russians who looked to intrinsically Russian institutions, including the autocracy of a benevolent tsar, to solve Russia's problems.²⁴⁷ Those who looked to Russia's past for a solution to Russia's problems soon disapproved of the Reform. The basic premises of the Judicial Reform were Western, and, therefore, not in tune with the values of a significant portion of Russian society.²⁴⁸

Nevertheless, despite opposition from significant portions of the tsarist government and Russian society, the many members of the government who supported judicial independence successfully thwarted the desires of Alexander III and the conservative critics.²⁴⁹ Aware of conservatives' unhappiness with the independent judiciary, and at the urging of Pobedonostsev, Minister of Justice Nabokov developed and proposed to the State Council²⁵⁰ in 1884 an amendment to the Judicial Statutes that would have enabled a judi-

United States federal judges, who have life tenure but who can be impeached by a political body, *see supra* notes 23, 39 and accompanying text.

²⁴³ *See supra* notes 53-56, 62 and accompanying text.

²⁴⁴ *See* WHELAN, *supra* note 159, at 101-02. These attacks included the assassination of the "Great Reformer," Alexander II, in 1881. RIASANOVSKY, *supra* note 8, at 383-84, 391-92.

²⁴⁵ KUCHEROV, *supra* note 134, at 101; WHELAN, *supra* note 159, at 59-79, 160-67.

²⁴⁶ WHELAN, *supra* note 159, at 159-60.

²⁴⁷ BERMAN, *supra* note 134, at 220-24; RIASANOVSKY, *supra* note 8, at 362-65.

²⁴⁸ *See* BERMAN, *supra* note 134, at 221-22.

²⁴⁹ WHELAN, *supra* note 159, at 159-67; ZAIONCHKOVSKY, *supra* note 219, at 140-44.

²⁵⁰ The State Council acted as a quasi-legislative body that prepared legislation to be adopted by the Tsar. *See supra* note 159.

cial disciplinary council to discipline and remove judges.²⁵¹ The State Council, which had many members with legal training and experience in the courts, initially rejected the proposal because of concern about encroaching upon judges' permanent tenure.²⁵² The following year, however, several departments of the State Council that had considered the proposed statute reversed their positions, revised the proposed statute, and brought it before the general assembly of the State Council for final consideration.²⁵³

Under the practice that had developed in the State Council, final approval of the legislation normally would be routine. Counter-reformers who were members of the Council, however, proposed several amendments, including an amendment requiring that the judicial disciplinary council be composed of individuals from outside the judicial department.²⁵⁴ This proposed change created a storm of controversy in the State Council. The Council refused to accept the changes and recommended the unamended legislation to Tsar Alexander III.²⁵⁵

Tsar Alexander III was not bound to accept legislation that the Council proposed. He could issue any law in the form of an *ukaz* (decree), guide legislation through another channel, such as the Council of Ministers, or have a member of the State Council write a minority report that he would adopt.²⁵⁶ He utilized this power infrequently, however, and he chose not to do so in the case of the amendments to the Judicial Statutes. Accordingly, although the legislation did not accomplish his goal of eliminating or curbing judicial independence, the Tsar acquiesced in the State Council's recommendation and on May 20, 1885 enacted the Council's proposal.²⁵⁷

That the Tsar chose not to abrogate the judiciary's independence, notwithstanding his very strong views that its independence infringed his imperial power and contributed to other problems, shows that after only twenty years the concept of judicial independence had become ingrained in the governmental structure and in society. According to Heidi Whelan, many members of the educated public and of the Tsar's bureaucracy believed that an independent judiciary was essential to a civilized, modern society—an ideal to which Russia should aspire.²⁵⁸ Sergei Witte, who attempted to modernize the Russian economy as the Minister of Finance under both Alexander III and his successor Nicholas II (1894-1917), wrote, “[I]n a cultured state it is impossible, really, to mix administrative and judicial powers; the judiciary should be independent.”²⁵⁹

²⁵¹ WHELAN, *supra* note 159, at 161; ZAIONCHKOVSKY, *supra* note 219, at 141-42.

²⁵² WHELAN, *supra* note 159, at 161-62; ZAIONCHKOVSKY, *supra* note 219, at 141-42.

²⁵³ WHELAN, *supra* note 159, at 162-64; ZAIONCHKOVSKY, *supra* note 219, at 142-43.

²⁵⁴ WHELAN, *supra* note 159, at 164-65; ZAIONCHKOVSKY, *supra* note 219, at 142-43.

²⁵⁵ WHELAN, *supra* note 159, at 165; ZAIONCHKOVSKY, *supra* note 219, at 144.

²⁵⁶ WHELAN, *supra* note 159, at 165-66.

²⁵⁷ *Id.* at 165; ZAIONCHKOVSKY, *supra* note 219, at 144.

²⁵⁸ WHELAN, *supra* note 159, at 168, 171.

²⁵⁹ *Id.* at 168 (quoting 1 SERGEI WITTE, VOSPOMINANIYA [MEMOIRS] 299 (1960)).

Unhappy with the State Council's apparent inability to abolish or limit the judiciary's independence, Tsar Alexander III required Minister of Justice Nabokov to resign in 1885.²⁶⁰ Nabokov's successor, Manasein, also failed to initiate action to eliminate judicial tenure, and the Tsar also forced him to resign.²⁶¹ In 1894, Alexander III appointed N.N. Muravev as Minister of Justice.²⁶² This appointment led to the second significant attack on judicial tenure.

Soon after his appointment, Muravev prepared a report, which the Tsar approved, that requested formation of a commission to reform the Judicial Statutes.²⁶³ Among the topics discussed in the report were abrogation of judicial independence, elimination of permanent tenure, and empowerment of the government to appoint and remove judicial personnel and to direct judicial activities according to the government's interests.²⁶⁴ Although Tsar Alexander III died soon after Muravev prepared his report, the commission quickly began its work.²⁶⁵ Nevertheless, five years later, the commission approved legislation that fell short of the report's goals.²⁶⁶

The legislation proposed a new court system that divided the circuit court into county and city sections, created a new district judge subordinate to the circuit court, made minor changes to the jury system, and weakened—but did not abrogate—the principle of life tenure.²⁶⁷ This legislation was never enacted, however, because of disagreements between the Ministries of Finance and Interior, which included differing views on judicial administration in the vast Russian countryside that fell beyond the realm of the regular courts.²⁶⁸

As part of his efforts to assert greater control over both the government and society, Alexander III had promulgated the law of July 12, 1889, which abolished the justices of the peace throughout most of European Russia's countryside.²⁶⁹ The justices' duties were turned over to *zemskie nachalniki*

But see infra note 281 and accompanying text.

²⁶⁰ WHELAN, *supra* note 159, at 167.

²⁶¹ *Id.* at 167-69; ZAIONCHKOVSKY, *supra* note 219, at 144-48, 150-51.

²⁶² WHELAN, *supra* note 159, at 169; ZAIONCHKOVSKY, *supra* note 219, at 151.

²⁶³ ZAIONCHKOVSKY, *supra* note 219, at 151-52; Theodore Taranovski, *The Aborted Counter-Reform: Muravev Commission and the Judicial Statutes of 1864*, 29 JAH-RBÜCHER FÜR GESCHICHTE OSTEUROPA (n.s.) 161, 165-68 (1981).

²⁶⁴ WHELAN, *supra* note 159, at 169 & 232 n.28 (citing and quoting in part MINISTERSTVO IUSTITSII ZA 100 LET. ISTORICHESKII OCHERK [THE MINISTRY OF JUSTICE AFTER 100 YEARS. HISTORICAL NOTES] 220-30 (1902)); ZAIONCHKOVSKY, *supra* note 219, at 152-53.

²⁶⁵ See Taranovski, *supra* note 263, at 167-69.

²⁶⁶ See *id.* at 169-78.

²⁶⁷ The new district judge was not to be protected by Article 243 of the Statutes of Judicial Institutions. See *id.* at 175-76.

²⁶⁸ *Id.* at 178-83.

²⁶⁹ See WHELAN, *supra* note 159, at 180-87; ZAIONCHKOVSKY, *supra* note 219, at

[land captains], administrative representatives of the government who now performed both judicial and administrative functions.²⁷⁰

The land captains proved to be unsatisfactory in many ways. Many officials in the Ministry of Justice wanted to abolish the land captains and to reinstate a system like that of the justices of the peace, in which judicial functions would be separate from administrative functions.²⁷¹ Some members of Muravev's commission wished to address this issue in the legislation that the commission prepared from 1894 to 1899, but Muravev and other commission members quashed the attempt.²⁷² When the Muravev commission submitted its proposed legislation to the different ministries for review, however, factions from both the left and the right attacked the proposal.²⁷³

The Ministry of Finance, which was charged with attempting to modernize Russia's economy, had become a focal point of nineteenth-century liberalism in the Russian bureaucracy and had replaced the Ministry of Justice as the center of bureaucratic liberalism. The Ministry of Finance criticized the commission's report because it did not abolish the *volost* courts²⁷⁴ for peasants and the land captains.²⁷⁵ It also criticized changing the court system that the Judicial Reform had established.²⁷⁶ The Ministry of Interior, the home of the land captains, objected to the Ministry of Finance's views concerning the *volost* courts and the land captains.²⁷⁷ The Ministry of Interior also criticized the establishment of an additional, lower-level district judge in the rural areas, and it fretted that more changes had not been made in the jury system.²⁷⁸

Although these conflicting views could not be reconciled, Muravev presented the draft legislation to the State Council in 1901.²⁷⁹ It languished through numerous debates in the State Council's various departments for several years. The proposed legislation was finally returned to the Ministry of Justice in 1905.²⁸⁰ Thus, the Muravev commission's grand assault on

238-42; see also KUCHEROV, *supra* note 134, at 90; Thomas S. Pearson, *Russian Law and Rural Justice: Activity and Problems of the Russian Justices of the Peace, 1865-1889*, 32 JAHRBÜCHER FÜR GESCHICHTE OSTEUPAS (n.s.) 52-71 (1984). The system of justices of the peace was preserved in the major cities, including St. Petersburg, Moscow, Kharkov, and Odessa. KUCHEROV, *supra* note 134, at 91. The government reestablished the justices of the peace in 1912. *Id.*; Frierson, *supra* note 190, at 543-44.

²⁷⁰ Frierson, *supra* note 190, at 538-39.

²⁷¹ Taranovski, *supra* note 263, at 171.

²⁷² *Id.*

²⁷³ *Id.* at 179.

²⁷⁴ See *supra* note 190 and accompanying text.

²⁷⁵ Taranovski, *supra* note 263, at 178-79.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 179.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 180.

²⁸⁰ *Id.* at 180-83.

judicial tenure ended with no change in the Judicial Statutes.

One final but brief attack on the tenure of judges of the regular courts occurred during the deliberations on the constitution adopted in 1906.²⁸¹ The growing political unrest in Russia that led to the Revolution of 1905 caused Tsar Nicholas II to agree to establish a legislative body, the Duma, and to adopt a constitution that took some steps toward the rule of law. During the deliberations on the second draft of this constitution, Sergei Witte, then prime minister, prepared an amendment to the article concerning appointment and removal of ministers and heads of administrative agencies that would have empowered the Tsar to remove judges of the regular courts. Although a majority of the Council of Ministers in the Tsar's government supported this position, a minority opposed it, and the Tsar rejected it. The final constitution left intact the provisions of the Judicial Reform that created an independent judiciary.²⁸²

Although the government may have at times successfully pressured judges to reach a particular decision, the dearth of references to such instances suggests that those occasions were rare.²⁸³ The evidence demonstrates that judges enjoyed real protection from arbitrary removal and discipline, and therefore that permanent tenure, a very necessary element for judicial independence, was viable in pre-Soviet Russia.

2. *Compensation*

The Statutes of Judicial Institutions specifically established a salary scale.²⁸⁴ Salary comparisons indicate that the level of compensation was

²⁸¹ HOWARD D. MEHLINGER & JOHN M. THOMPSON, *COUNT WITTE AND THE TSARIST GOVERNMENT IN THE 1905 REVOLUTION* 301, 306, 338 (1972); MARC SZEFTEL, *THE RUSSIAN CONSTITUTION OF APRIL 23, 1906*, at 56-57, 65-66, 131-32, 133-34 (1976); SERGEI WITTE, *MEMOIRS* 351, 353-54 (Abraham Yarmolinski ed. & trans., 1921).

²⁸² See *supra* note 281.

²⁸³ KUCHEROV, *supra* note 134, at 308-09 (quoting a speech made in 1909 by a member of the Third Duma (established under the Constitution of 1906) that accused the Minister of Justice of threatening and removing recalcitrant judges during the government's counter-revolutionary campaign of 1905 to 1906).

²⁸⁴ See *Stat. Jud. Inst.*, *supra* note 162, at art. 238 & app. I (classes of positions and classifications for pensions and embroidery omitted):

high.²⁸⁵ The available evidence also suggests that the salary scale remained more than adequate throughout the last fifty years of the pre-Soviet era. Samuel Kucherov enthusiastically reported that during the period of the Judicial Reform there was not one "important" case or scandal that involved bribery.²⁸⁶ He attributed this fact to adequate salaries and to the publicity the proceedings attracted.²⁸⁷ He also cited a survey by Lazarenko which indicated that among Russian, German, Austrian, and Italian judges, the Russian judges received the highest salaries.²⁸⁸

Av gust Levenstim had a different view:

[T]he material position of the judges does not correspond with either the quantity or the importance of the work which they are executing. The salary fixed by the Statutes of Judi-

Designation of positions I. Judicial ranks	Rate of annual salary in silver rubles			
	salary	living allowance	apartments	total
Senators of the Cassation Departments of the Senate	3000	2000	2000	7000
Of these, additional pay for presiding: over the general session of the Cassation Departments	-	-	-	2000
over the Departments	-	-	-	1000
Senior Chairman, <i>Sudebnaya Palata</i>	3000	1500	1500	6000
Chairman, Dept. of <i>Sudebnaya Palata</i>	3000	1000	1000	5000
Chairman, Circuit Court	2500	1000	1000	4500
Deputy Chairman, Circuit Court	2000	750	750	3500
Member, <i>Sudebnaya Palata</i>	2000	750	750	3500
Member, Circuit Court	1200	500	500	2200

²⁸⁵ See *infra* notes 295, 297 and accompanying text.

²⁸⁶ KUCHEROV, *supra* note 134, at 92.

²⁸⁷ *Id.* at 92-94.

²⁸⁸ *Id.* at 93 (citing A.N. Lazarenko, *Ocherk Osnovnykh Nachal Sudoustroystv Rossii i Glavneishikh Zapodno-Evropeiskikh Gosudarstv* [Survey of the Basic Features of the Judicial System of Russia and the Major Western European Countries], in 1 SUDEBNIYE USTAVY 20 NOYABRYA 1864 GODA ZA PYATDESyat LET [THE JUDICIAL STATUTES OF NOVEMBER 20, 1864 AFTER 50 YEARS] 450 (1914)).

cial Institutions was recognized as brilliant in the 60's but at the present time [1903], when the cost of everything goes up, it is now paltry.²⁸⁹

Levenstim complained about rising prices and increasing workloads,²⁹⁰ and he noted that pensions were so meager that "the judges, hoary with age, have to remain in service despite the fact that the work exceeds their strength."²⁹¹

There is a substantial basis for Levenstim's complaints about pensions. The pensions were established in 1852 and had not been revised as of 1903, when he made his observations.²⁹² Thus, all members of the bureaucracy, both judicial and non-judicial, held their jobs as long as possible to continue receiving their salaries.²⁹³

Levenstim's other complaints, however, do not support the conclusion that judges received inadequate compensation.²⁹⁴ Other sources suggest that the judiciary did very well compared to other members of society. Initially, the salary of the lowest ranking judge was more than ten times Russia's per capita income.²⁹⁵ By 1911, the annual judicial salaries had been increased by 1000 rubles for Senators and senior chairmen of the *Sudebnaya Palata*, 600 rubles for a chairman of a department of the *Sudebnaya Palata*, 200 rubles for a chairman of the circuit court, 700 rubles for a deputy chairman of a circuit court and a member of the *Sudebnaya Palata*, and 1000 rubles for a member of a circuit court. The latter also received an additional 100 rubles more for living allowances and apartments.²⁹⁶ Thus, every member of the regular judiciary received a salary of

²⁸⁹ LEVENSTIM, *supra* note 230, at 66.

²⁹⁰ *Id.* at 66-70.

²⁹¹ *Id.* at 70. Levenstim summarized his conclusions:

When the Judicial Statutes were established, the creators of those statutes hoped to place the judges into an independent position, to secure their material well being, and to give them work in such quantity so that they could manage their work well Regretfully, this design was not carried out to a sufficient degree, and with the years the difference between the intention of the founders of the Judicial Statutes and reality becomes sharper and sharper.

Id. at 65.

²⁹² WHELAN, *supra* note 159, at 153; Szeftel, *supra* note 168, at 111 n.2.

²⁹³ WHELAN, *supra* note 159, at 153.

²⁹⁴ Although Levenstim noted that beginning in 1884 the government granted a number of salary increases for members of the circuit court, he did not provide the size of the increases. LEVENSTIM, *supra* note 230, at 69.

²⁹⁵ In 1861, the annual per capita income in Russia was 71 rubles. PAUL R. GREGORY, *RUSSIAN NATIONAL INCOME 1885-1913*, at 155-56 (1982).

²⁹⁶ Appendix V to Article 238, set forth in 4 *SVOD ZAKONOV 1913*, *supra* note 178, v. 16, bk. 1 at 824, provides as follows (classes of positions and classifications for pensions and embroidery omitted):

more than 2200 rubles and, when combined with living allowances, had incomes between 3300 and 8000 rubles. This level of compensation put judges in the upper range of the top 1% of the population.²⁹⁷ Although the

Description of the rates of salary, classes of positions, the classifications for the purposes of pension and embroidery on the uniform, of the ranks of the judicial department.

Designation of positions I. Judicial ranks	Rate of annual salary in silver rubles			
	salary	living allowance	apartments	total
Senators of the Cassation Departments of the Senate	4000	2000	2000	8000
Of these, additional pay for presiding over [certain sessions or the Departments]	-	-	-	1000
Senior Chairman, <i>Sudebnaya Palata</i>	4000	1500	1500	7000
Chairman, Dept. of <i>Sudebnaya Palata</i>	3600	1000	1000	5600
Chairman, Circuit Court	3300	1000	1000	5300
Deputy Chairman, Circuit Court	2700	750	750	4200
Member, <i>Sudebnaya Palata</i>	2700	750	750	4200
Member, Circuit Court	2200	550	550	3300

²⁹⁷ *Id.* For example, in 1905, less than one percent of families had an annual income greater than 1000 rubles. *Id.* at 147. By 1910, this percentage had increased to 1.5%. *Id.* Only 0.31% of families had an annual income between 2000 and 5000 rubles (the range for the lower level of judges, *see supra* note 296), and another 0.08% had an annual income between 5000 and 10,000 rubles (the range for the higher level judges, *see supra* note 296). PETER GATRELL, *THE TSARIST ECONOMY 1850-1917*, at 242 n.14 (1986) (citing N. Pokrovsky, *O Podokhodnom Naloge [On the Income Tax]*, *VESTNIK FINANSOV [THE FINANCIAL HERALD]* No. 29, at 93-103 (1915)). Moreover, the average industrial wage in the Russian Empire in 1913 was 284 rubles. In the metalworking and machine building industry, the average was 400 rubles a year, and in St. Petersburg, the average in that industry was 600 rubles. *Id.* at 94.

Whelan stated that at the end of the nineteenth century, approximately one-fifth of the civil servants in the Empire received more than 1000 rubles in annual salary, and only 2000 received between 5000 and 10,000 rubles in annual salary. WHELAN, *supra* note 159, at 155. Further, Whelan's reports on lawyer's salaries indicate that the judiciary's financial position was at a level capable of supporting independence. Two

increases for judges other than members of the circuit court did not keep up with the post-1864 inflation rate²⁹⁸ or with the increase in per capita income,²⁹⁹ salaries and expense allowances for the judiciary remained very high compared to the income of the general population.

3. *Qualifications*

The Judicial Statutes set educational requirements not only for judges but also for other higher-ranking non-judicial personnel, the examining magistrates, procurators, and secretaries of the courts. Article 202 required that judges and these other personnel possess a certificate issued by a university or other institution of higher learning demonstrating pursuit of a course in jurisprudence, pass an examination in jurisprudence, or demonstrate legal knowledge in another official manner.³⁰⁰

The Statutes also specified other minimum qualifications for appointments.³⁰¹ Consistent with the bureaucratic tradition of civil law countries,³⁰² the Statutes established a system for advancement.³⁰³ For example, a non-judicial member of the judicial department could be appointed as a circuit court judge only if he had served a minimum of three years at a rank no lower than secretary of a circuit court.³⁰⁴ A lawyer could be ap-

thousand nine hundred lawyers averaged between 2000 and 5000 rubles in annual income, only 770 earned between 5000 and 10,000 rubles, and 98 earned more than 10,000 rubles a year. *Id.* These were the better paid lawyers, as there were more than 4,000 lawyers in Russia in 1897 (calculated using Huskey's estimate that in 1897 there was one lawyer for every 29,800 people, HUSKEY, *supra* note 180, at 18, and Riasanovsky's estimate that in 1897 Russia's population was approximately 125 million, RIASANOVSKY, *supra* note 8, at 431).

²⁹⁸ By several measures, inflation in Russia or in parts thereof increased approximately from 10% to 67% from 1867 to 1913. Much of the increase occurred between 1867 and 1880. Thereafter, Russia experienced deflation for 15 years, and then more inflation from 1895 to 1913. PAUL R. GREGORY, *BEFORE COMMAND: AN ECONOMIC HISTORY OF RUSSIA FROM EMANCIPATION TO THE FIRST FIVE-YEAR PLAN* 64 (1994).

²⁹⁹ From 1861 to 1913, annual per capita income rose from 71 to 119 rubles, a 68% increase. GREGORY, *supra* note 295, at 155-56.

³⁰⁰ Stat. Jud. Inst., *supra* note 162, at art. 202. For an English translation, see 3 SOURCE BOOK, *supra* note 166, at 615.

³⁰¹ Stat. Jud. Inst., *supra* note 162, at art. 201 (disqualifying from service those who had been convicted of crimes, expelled from service or declared a bankrupt).

³⁰² GLOS, *supra* note 4, at 28-29.

³⁰³ Stat. Jud. Inst., *supra* note 162, at arts. 202-08.

³⁰⁴ *Id.* at art. 203. Similarly, a chairman or deputy chairman of a circuit court and a member of a *Sudebnaya Palata* had to have served three years as a member of, or procurator for, a circuit court. *Id.* at art. 206. A chairman of a *Sudebnaya Palata* had to have served three years as a member of, or procurator for, a *Sudebnaya Palata* or as a chairman of a circuit court. *Id.* at art. 207. A Senator of the Cassation Departments of

pointed as a circuit court judge only if he had been a sworn attorney, but not a private attorney,³⁰⁵ for ten years, and had received a certificate from the council of sworn attorneys or from the judicial body with which he worked that attested to his faithful performance of his duties.³⁰⁶ These requirements ensured appointment of personnel who had been trained in the law and whose training had received official recognition.

The available evidence indicates that the educational attainment of members of the new judicial system rose sharply after the enactment of the Reform.³⁰⁷ For example, by 1870 nearly 80% of the judges in the courts in the new circuits of St. Petersburg, Moscow, Kharkov, and Odessa had completed higher education.³⁰⁸ In 1870, all of the judges in the Criminal and Civil Cassation Departments of the Senate were trained legal officials.³⁰⁹ By 1890, 94% of the 196 judges of the intermediate courts, the *Sudebnaya Palata*, and 88% of the 964 judges in the circuit courts had specialized legal training.³¹⁰ By 1910, 98% of the 326 judges of the *Sudebnaya Palata* and 96% of the 1416 judges in the circuit courts had specialized legal training.³¹¹

4. *Judicial Immunity*

Little information is available on the liability of judges for their decisions. The Judicial Statutes did contain a provision that allowed a losing litigant in a criminal or civil case to seek damages from a judge. Requests for permission to collect damages for erroneous or biased actions of a member of a circuit court were filed with the *Sudebnaya Palata*; similar requests for damages against judges of higher courts were presented to the Senate.³¹² If the reviewing body determined that a request might be sustained, it would forward the request to the judge against whom the claim had been made for an explanation.³¹³ After the reviewing body received an explanation, or after the time for receiving an explanation had expired, the review-

the Senate had to have served three years as an Over-Procurator or Deputy Over-Procurator for the Senate or as a chairman or member of, or procurator for, a *Sudebnaya Palata*. *Id.* at art. 208.

³⁰⁵ See *supra* note 185 and accompanying text.

³⁰⁶ Stat. Jud. Inst., *supra* note 162, at art. 204.

³⁰⁷ In addition, despite creating a chronic shortage in the number of lawyers, the Judicial Reform provided the foundation for the development of a competent legal profession. See HUSKEY, *supra* note 180, at 11-33.

³⁰⁸ WORTMAN, *supra* note 134, at 263-64.

³⁰⁹ *Id.*

³¹⁰ WAGNER, *supra* note 164, at 18.

³¹¹ *Id.* at 19.

³¹² Stat. Civ. Proc., *supra* note 162, at art. 1331.

³¹³ *Id.* at art. 1333.

ing body would decide whether a request for damages could be sustained.³¹⁴ If it did so decide, it would designate a circuit court in which the petitioner could file a claim for recovery of damages.³¹⁵ The claimant would then follow the general rules for recovering damages from governmental officials.³¹⁶

The Judicial Statutes do not specify the circumstances under which the *Sudebnaya Palata* or the Senate would allow recovery of damages. That a superior judicial body first passed on a request before initiation of a suit probably provided some insulation against liability.³¹⁷ Further, I have not found in the relevant literature any reference to threats to judicial independence posed by potential exposure to liability. Levenstim, for example, who described the operations of the courts in the Kharkov circuit in some detail and who complained of inadequate judicial salaries and pensions, did not mention any threat to judges from civil liability.

It is difficult to draw conclusions about the existence or extent of judicial immunity. The absence of comment regarding civil liability, however, suggests that the requirement that a superior body of judges initially pass on requests to file claims for damages afforded limited immunity sufficient to protect judicial independence.

5. *Respect*

Many writers have recognized the respect that pre-Soviet Russian judges earned. Berman acknowledged that “[i]t is a tribute to the integrity of the Russian judges of the late nineteenth and early twentieth centuries, but not to the Russian legal system, that special steps were taken to reduce their power: extending the grounds for removability, for example, and also making temporary judicial appointments.”³¹⁸ Kucherov stressed the integrity

³¹⁴ *Id.* at art. 1334.

³¹⁵ *Id.* at art. 1335.

³¹⁶ *Id.* at art. 1336.

³¹⁷ *See infra* note 65.

³¹⁸ BERMAN, *supra* note 134, at 218. Berman’s assertion that extending the grounds of removability reduced the judges’ power is incorrect. *See supra* notes 221-57 and accompanying text (describing the “special step” of extending the ground of removability). Berman’s reference to the practice of “temporary judicial appointments” as a means by which the government may reduce the “power” of the judges is also incorrect. Berman must have been referring to the practice, instituted in the late 1860s by Konstantin Pahlen, the Minister of Justice from 1867 to 1878, of using temporary appointment of investigating magistrates as a means of ensuring greater control over the prosecution of crimes against the State. *See* WITTE, *supra* note 281, at 353-54; WORTMAN, *supra* note 134, at 278. Although showing a disregard for the development of the rule of law, this action did not infringe the independence of the judges of the regular courts.

and dedication of Russian jurists and lawyers.³¹⁹ The elements of judicial independence contributed to the esteem in which the majority of Russian society held its jurists and lawyers. In addition, their position in the social and political structure of society was unique. Judges and lawyers enjoyed greater freedom of discussion than that enjoyed by most citizens. The legal profession offered an opportunity for relatively unrestricted intellectual development and attracted, on the whole, the best of Russia's educated population.³²⁰ The attraction of intellectual freedom both produced and contributed to judicial independence.

Although judges had very limited power to reduce punishment, they had some discretion in their decisionmaking. Judges had a duty to decide cases not only in accordance with the strict meaning of the law but "in the case of incompleteness, vagueness, or contradictions of the laws," in accordance with the "general sense of the laws."³²¹ Whether this limited discretion aided judicial independence is unclear. In theory, however, discretionary authority could increase the sense of responsibility that a judge would feel toward decisionmaking.

Judicial discretion, however, could have become an instrument of intimidation. Article 13 of the Statute of Criminal Procedure provided that a judge could not fail to decide a case because of "incompleteness, vagueness, or contradictions of the laws."³²² A failure to decide for those reasons constituted an "illegal non-use of power."³²³ Similarly, Article 10 of the Statute of Civil Procedure prohibited such failure as a "failure in justice."³²⁴ These Articles, therefore, could have been a vehicle for persecution of judges. Application of both Articles would offer valuable insight into the role that discretion played in judicial independence. Neither Kucherov nor Levenstim,

³¹⁹ KUCHEROV, *supra* note 134. *But see* WORTMAN, *supra* note 134, at 288 (suggesting that the respect for the judiciary had declined by the first decade of the 1900s but not providing extensive or strong evidence of this decline).

³²⁰ HUSKEY, *supra* note 180, at 22-23, 26-28; RIASANOVSKY, *supra* note 8, at 377; WORTMAN, *supra* note 134, at 269-70. Their other choices were restricted to government service, the army, the censored press, or to the idle, bored, potentially revolutionary intelligentsia.

³²¹ Stat. Crim. Proc., *supra* note 162, at art. 12; Stat. Civ. Proc., *supra* note 162, at art. 9.

³²² Stat. Crim. Proc., *supra* note 162, at art. 13 ("Failure to decide a matter under the pretense of incompleteness, vagueness, or contradiction in the laws is prohibited. Those who violate this rule shall be held accountable for an illegal non-use of power.").

³²³ *Id.* Penalty for such a crime was removal from one's position, dismissal from service, or imprisonment. Ulozhenie o Nakazaniyakh Ugolovnykh i Ispravitelnykh [Code of Criminal and Correctional Punishments] arts. 341-43, *codified as amended in* 4 SVOD ZAKONOV 1913, *supra* note 178, v. 15, at 403.

³²⁴ Stat. Civ. Proc., *supra* note 162, at art. 10 ("Failure to decide a matter under the pretense of incompleteness, vagueness, defects or contradiction in the laws is prohibited. Those who violate this rule shall be held accountable for a repudiation of justice.").

nor other contemporary writers, however,³²⁵ discuss instances in which either Article was invoked against a judge.³²⁶

D. *Other Attacks on the Judicial Reform*

As evidence of a lack of judicial independence in pre-Soviet Russia, some writers have cited the provision in the Law of July 12, 1889 that replaced the justices of the peace with the land captains in European Russia's countryside.³²⁷ Vilensky cited this measure to support his conclusion that "Tsarism completely put an end to the principle of the independence of the court."³²⁸

Vilensky's conclusion is unwarranted. Although the Law certainly interfered with the independence of many justices of the peace—it abolished them in most of the European Russian countryside—it did not affect the regular courts. Further, the Judicial Reform's framers did not intend to give justices of the peace the type of independence that they conferred on judges of the regular courts.³²⁹ Moreover, the contrast between the enactment process of the Law of July 12, 1889 and that of the Law of May 20, 1885, which implemented a judicial disciplinary procedure,³³⁰ supports the significance of judicial independence.

The Law of July 12, 1889, designed to establish the *zemskie nachalniki*, proceeded normally through the State Council. In the course of moving through the departments of the State Council, however, the proposed Law developed considerable opposition, and, ultimately, a large majority of the State Council disapproved it.³³¹ Nevertheless, in contrast to his acquiescence to the State Council on the 1885 Law, Tsar Alexander III directed the State Council to adopt the minority's version of the proposed Law. He also went further. Although neither the majority nor the minority proposed abolition of the justices of the peace, he directed the State Council to add a provision abolishing the justices of the peace in the countryside.³³²

Alexander III's actions regarding this Law significantly departed from

³²⁵ E.g., DZHANSHEV, *supra* note 158; ZAVADSKY, *supra* note 198.

³²⁶ A review of the records of the tsarist Ministry of Justice would shed more light on this subject.

³²⁷ See *supra* note 269 and accompanying text.

³²⁸ VILENSKY, *supra* note 164, at 338.

³²⁹ Stat. Jud. Inst., *supra* note 162, at art. 23 ("Both honorary and district justices of the peace are elected for a period of three years.") (translation from 3 SOURCE BOOK, *supra* note 166, at 615); see also *supra* note 200.

³³⁰ See *supra* note 253 and accompanying text.

³³¹ WHELAN *supra* note 159, at 175-80; ZAIONCHKOVSKY, *supra* note 219, at 223-38. The vote was 39 (for) to 13 (against). *Id.* at 238.

³³² WHELAN, *supra* note 159, at 180; ZAIONCHKOVSKY, *supra* note 219, at 238-39.

the normal legislative process.³³³ Nevertheless, as supreme ruler, he was entitled to direct the State Council to draft a law to his liking. In this case, he felt no constraints on his decision to abolish the justices of the peace. Yet, despite his strong and long-held desire to abolish the tenure of the regular judges, in 1885, he accepted a statute that preserved judicial tenure.³³⁴

Another major development that paralleled the criticism of an independent judiciary was the removal of political crimes and crimes against state officials from the judicial system's jurisdiction.³³⁵ The most notorious of these laws was the Law of August 14, 1881, entitled "Rules relating to measures for the preservation of national order and public tranquility."³³⁶ This law empowered certain local officials³³⁷ to withdraw cases from the local courts and to assign them either to the military courts or to the administrative processes.³³⁸

Two writers have cited this measure as proof of the government's interference with the independence of the courts.³³⁹ Their criticism is misplaced. Certainly, the government's use of this measure³⁴⁰ is incompatible with the rule of law.³⁴¹ A procedure by which cases can be removed from civilian courts, however, did not affect judicial independence. If the measures denied judges the ability to resolve all disputes, it would have made

³³³ WHELAN, *supra* note 159, at 180-83.

³³⁴ See *supra* note 257 and accompanying text.

³³⁵ See, e.g., KUCHEROV, *supra* 134, at 80 n.1, 202-04, 211 (discussing laws enacted on May 9, 1878 and August 14, 1881); VILENSKY, *supra* note 164, at 309-35 (describing laws enacted May 19, 1871, June 7, 1872, May 9, 1878, August 9, 1878, April 8, 1879, and August 14, 1881); Atwell, *supra* note 180, at 54.

³³⁶ 2 READINGS IN RUSSIAN HISTORY 472-74 (Warren B. Walsh ed., 1963). This law was enacted six months after the assassination of Alexander II.

³³⁷ *Id.* at 472 (noting that governors, generals, and municipal police chiefs possessed withdrawal power). Local officials were empowered in areas designated to be in a "state of reinforced [and extraordinary] safeguard"; these areas were eventually expanded so that almost all of Russia was covered. Law of Aug. 14, 1881 § 5.

³³⁸ 2 READINGS IN RUSSIAN HISTORY, *supra* note 336, at 472. The operations of this law are described in Donald Rawson, *The Death Penalty in Late Tsarist Russia: An Investigation of Judicial Procedures*, 11 RUSSIAN HIS. 29, 41-46 (1984); Fuller, *supra* note 157, at 291-93.

³³⁹ VILENSKY, *supra* note 164, at 336-37; George Kennan, *Reaction in Russia*, 80 CENTURY 925, 926-28 (1910).

³⁴⁰ Kennan, *supra* note 339, at 926-31 (vividly describing the effect of this law).

³⁴¹ KUCHEROV, *supra* note 134, at 207-09 (quoting V. A. Maklakov, an eminent Russian lawyer and member of the Russian Duma, who argued in a speech in the Duma in 1907 that using extra-legal means to fight the revolutionaries then attacking the state would eventually destroy the very foundations of the state, the courts and the law). As Kucherov noted, this law clearly violated the principles of separation of functions, in that it gave judicial functions to administrative officials. *Id.* at 211-12.

the judges irrelevant. In that situation, the issue of independence would be moot. The Law of August 14, 1881, however, did not make the judges of the regular courts irrelevant. Although the Law may have decreased the scope of the judiciary's power, it did not lessen judicial independence for most litigated disputes.³⁴²

Conservative government officials also led an unsuccessful attack on the jury system.³⁴³ These officials and many educated Russians became disillusioned with the jury because of a perception that juries were too lenient.³⁴⁴ Nevertheless, despite much criticism and the initial designs of the Muravev commission, which studied "reforming" the Judicial Reform from 1894 to 1899, the jury remained an important part of the judicial system.³⁴⁵

III. CONCLUSION

Judicial independence requires four institutional elements: (1) fixed tenure, with narrowly tailored provisions for discipline or removal of judges; (2) fixed and adequate compensation; (3) minimum qualifications; and (4) limited immunity from civil liability. The Russian Judicial Reform of 1864 had these elements. It established permanent judicial tenure subject to limited exceptions for accountability. Despite the efforts of significant members of Russian society and the government, the tenure protections remained virtually intact. Judges received sufficient income, met sufficient educational standards, and had some protection from civil liability for their decisions. The judges of post-Reform, pre-Soviet Russia earned the respect of Russian society.

³⁴² See Marc Szeftel, *Personal Inviolability in the Legislation of the Russian Absolute Monarch*, 17 AM. SLAVIC & E. EUR. REV. 1 (1958). Comparing the law of 1881 and other emergency measures for dealing with political crimes with the operation of the Statute of Criminal Procedure under the Judicial Reform, Szeftel stated:

Thus, two legal worlds appeared, side by side, in Russia: the world of non-political law, and the world of political discretion. The due process of law, and the individual's freedoms, were recognized in the former, and the respect for them was prevalent in it; the world of political administrative discretion stood outside of those freedoms, and in it, arbitrariness was prevalent.

Id. at 24; see also WAGNER, *supra* note 164, at 206-23, 337-83; William G. Wagner, *The Civil Cassation Department of the Senate as an Instrument of Progressive Reform in Post-Emancipation Russia: The Case of Property and Inheritance Law*, 42 SLAVIC REV. 36, 36-37, 44-59 (1983) (examining how the highest civil court in Russia became an important instrument of reform in one important area of the law).

³⁴³ Atwell, *supra* note 180, at 53-57; Taranovski, *supra* note 263, at 168.

³⁴⁴ Atwell, *supra* note 180, at 53-57. The acquittal of Vera Zaslulich was a prominent example. See *supra* note 212 and accompanying text,

³⁴⁵ KUCHEROV, *supra* note 134, at 81-82; Atwell, *supra* note 180, at 57-59; Taranovski, *supra* note 263, at 176.

The actions taken to reduce the reach of the Judicial Reform did not materially affect the independence of the regular courts. The unchecked power of the Tsar, who could change the Judicial Statutes, remained the greatest threat to judicial independence. That Alexander III and Nicholas II did not limit the independence of the judiciary, despite pressure to do so, illustrates the independent judiciary's value to Imperial Russia.

The Russian experience with its judiciary during the last fifty years of the Tsarist Empire demonstrates that a culture lacking the most basic characteristics of a system based on the rule of law can effectively establish an independent judiciary in a relatively short time. Although the Judicial Reform could not solve every problem in nineteenth century Russia,³⁴⁶ Russia's experience with establishing an independent judiciary suggests two lessons: First, any society that desires to implement a government based on the rule of law must adopt a judicial system based on an independent judiciary, and second, any society may establish and maintain an independent judiciary if it guarantees tenure (with limited provisions for accountability), provides adequate compensation, requires minimum qualifications, and ensures limited civil immunity.

It is unfortunate that the last Tsars did not fulfill the promise of the rule of law that was implicit in the Judicial Reform and an independent judiciary. If they had, a significant number of Russians might not have lost faith in their government's ability to solve the country's social problems. That loss, as much as any other factor, contributed to the not-so-inevitable collapse of the pre-Soviet Russian society.³⁴⁷ It remains to be seen whether post-Soviet Russia can fulfill that promise of a government based on the rule of law.³⁴⁸

³⁴⁶ See BERMAN, *supra* note 134, at 220.

³⁴⁷ Shortly after the Bolsheviks seized power in 1917, the new communist government promulgated a Decree on the Courts (No. 1) on December 7, 1917 (new style; November 24, 1917, old style) abolishing the judicial system established by the Judicial Reform. See KUCHEROV, *supra* note 134, at 314; VLADIMIR TEREBILOV, *THE SOVIET COURT* 9 (Murad Saifulin trans., 1986) (offering a Soviet view of the Pre-Soviet and Soviet legal system).

³⁴⁸ Since the collapse of the Soviet Union in 1991, the Russian Federation and the Ukrainian Republic (also formerly part of the Tsarist Russian Empire and the Soviet Union) have taken steps to create an independent judiciary. CONST. RUS. FED. art. 120 (Vladimir V. Belyakov & Walter J. Raymond eds., 1994) ("Judges shall be independent and subject only to the Constitution of the Russian Federation and federal law."); see Mikhail S. Paleev, *The Establishment of an Independent Judiciary in Russia*, 1 PARKER SCH. J. E. EUR. L. 647 (1994) (noting the passage of laws providing for tenure in office, procedures for removal, immunity from liability for judicial decisions for judges, and funding for judges' salaries and the court system); Lisa Halustick, Note, *Judicial Reform in Ukraine: Legislative Efforts to Promote an Independent Judiciary*, 1 PARKER SCH. J. E. EUR. L. 663 (1994) (noting the passage of laws providing for minimum qualifications, tenure, procedures for removal, immunity from liability for judicial deci-

sions, and funding for judges' salaries and the court system). As both Paleev and Halustick noted, whether an independent judiciary will develop in Russia and the Ukraine remains to be seen. *See also* Molly Warner Lien, *Red Star Trek: Seeking a Role for Constitutional Law in Soviet Disunion*, 30 STAN. J. INT'L L. 41 (1994) (analyzing the tenuous historical basis for the development in Russia of a law-based state, including an independent judiciary, despite the promise of the current Russian Constitution).