Quis Custodiet Ipsos Custodes?

A Historical and Philosophical Analysis of Judicial Independence in the US and the UK

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ABSTRACT

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The doctrine of judicial independence and impartiality is a critical pillar of democratic society. In an era of public mistrust in the media and government information and increasing cynicism on the rise, the public's trust in their judiciary is more important than ever. As world leaders, the UK looked to these trends and implemented ground-breaking reform within its judicial system to strengthen the independence of its judiciary, shielding it from any sort of political influence; the US, however, did not and continues to embrace its hybrid confirmation process and proudly political judges. The notion that both of these systems are fully equipped to protect the cornerstone that is judicial independence despite their differences is a difficult one to grasp when one looks on the surface.

This dissertation undertook an analysis of the historical developments that led to the form of both judicial systems today and incorporated academic, philosophical, and political discussions that took place throughout history regarding the impartiality and independence of both judiciaries in order to identify the differences that allow such disparate systems to purport to uphold the same doctrine. It was found that the doctrine of Parliamentary sovereignty in the UK does not allow for any sort of political activity in the judiciary whereas in the US, the doctrine of judicial review not only allows political activity, but demands political transparency. The differences in these constitutional developments can be supported in the jurisprudential teachings of their universities dating back centuries. It is this paper's assertion that each implementation model of judicial independence is uniquely tailored for each country's constitutional traditions and demonstrates that even a politicized, hybrid appointment system can still uphold the independence and impartiality of the judiciary so long as the process supports the role that the judiciary is expected to play in their government.

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Introduction

The differences between the judiciaries in the US and the UK can be summed up as thus:* There was a small court with a Feminist in the chamber of the Supreme Court of the United States; there was a slightly larger court with a Feminist in the chamber of the Supreme Court of the United Kingdom. In both countries it was clearer than crystal to the politicians and academics of the State that things in general were settled forever. The UK entertained herself with such achievements as criticising the efforts of its Feminist in encouraging girls to follow in her ambitious footsteps, calling Lady Hale's 'girly swots' an unwise foray into the spotlight that threatens the holy balance between law and politics.[1] In the US, there was scarcely a line between the sacred principles to justify such official berating.[2] Clothing bearing "I dissent" and the likeness of Justice Ginsberg were displayed on shirts, bags, and pins, and daring pages of feminist political thought were penned for all ages.[3] In the midst of them both, a fraternal anxiety for the power vested in these courts and the impartiality and independence of its members spans across the Atlantic as the people look to the courts as the last line of defence for a world fraught with pessimism and populism.

The doctrine of judicial independence and impartiality is a crucial fixture in democracy and a vital tenant to the rule of law.[4] Without the rule of law, there is no true

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* The following paragraph is a parody of the style of the first chapter of Charles Dickens' classic novel "*A Tale of Two Cities*" in order to illustrate the juxtaposition of the UK and US's perception of their supreme court justices engaging in perceived political activities which is a continuous theme that is analyzed and discussed throughout this dissertation; Dickens C, *A Tale Of Two Cities* (IDG Books Worldwide 2000).

[1] Dean T, 'Judges In The Dock: The Inside Story Of The Battle For Britain's Courts' (*Prospectmagazine.co.uk*, 2020) https://www.prospectmagazine.co.uk/magazine/judges-in-the-dock-battle-britain-courts-boris-johnson-prorogation-supreme-court-hale-miller-constitution.

[2] ibid.

[3] ibid.

[4] Philips N, 'Judicial Independence And Accountability: A View From The Supreme Court' (UCL Constitution Unit, 2011) Launch of Research Project on the Politics of Judicial Independenc

democracy.[5] If judges can be bought, intimidated, or otherwise influenced, there can be no clarity and no trust in the state. According to Lord Philip, the rule of law is:

> the bedrock of a democratic society…the rule of law requires that the courts have jurisdiction to scrutinize the actions of government to ensure they are lawful…[and] the citizen must be able to challenge the legitimacy of executive action before an independent judiciary… personally independent… and institutionally independent.[6]

In a 2018 speech, Lord Hodge outlined his ten pillars of judicial independence, which stands to be the most comprehensive overview of the doctrine of judicial independence this author has come across, with the last three being concerned with the duties a judge must undertake to protect judicial independence: 1) Role Recognition, which is the recognition that there are decisions of policy that are the sole domain of the elected branches, saying that "judges are not and should not be players in a political process. Were they to be so, their impartiality would be lost"[7], further warning of the enthusiasm with which judges are giving speeches clarifying that while "judges may legitimately advise on proposals relating to the justice system and matters of technical law reform..,[they] must avoid unnecessary political controversy"[8]; 2) Judicial Performance and Moral Authority, saying that "judges must be true to their judicial oath and act impartially and honestly"[9] reiterating that judges depend on maintaining public trust which must be earned every day; 3) Maintenance of Political and Public Understanding, claiming that if elements in the media portray a "caricature of the judiciary"[10] and if those with responsibility for the administration of justice do not correct misunderstandings, there is a clear danger to judicial independence.[11]

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[5] Supra note 4.
[6] ibid.
[7] Hodge P, 'Preserving Judicial Independence In An Age Of Populism' (North Strathclyde Sheriffdom Conference, Paisely, 2018).
[8] ibid.
[9] ibid.
[10] Supra note 7.
[11] ibid.

The modern concept of judicial independence did not begin to take form until the Settlement Act of 1701. The Settlement Act was a response to the judicial tyranny under the Stuart dynasty in 1600s Great Britain. The Stuart dynasty was notorious for manipulating the judiciary to produce favorable results for the Crown's illegal acts.[12] However, when the issue of who would ascend the throne arose, the Settlement Act was drafted which included a provision to ensure that judges' commissions were valid "*quamidu se bene gesserint*" (during good behavior) stipulating that only Parliament has the authority to remove a judge and to make their salaries "ascertained and established" to remove the possibility of any future Monarch from using the same intimidation tactics used by the Stuarts.[13] This rather small provision would become the Act's defining feature as the first assurance of judicial independence. In spite of this enactment, it was not long before the Crown attempted to flex its power over the judiciary again, but this time in the colonies.

The colonies of Great Britain carried with them the British legal tradition. In the American colonies, the Royal Governors, hand-picked by the Crown, had the authority to erect and dismiss courts as they saw fit. Justices appointed to serve in the colonies served "at the pleasure of the Crown" and, as Professor Rakove describes it, "courts were often viewed more as active agents of royal power than as impartial institutions mediating between state and subject".[14] These courts came to be called "prerogative courts" as they largely existed to exercise the Crown's prerogative, forcing many colonies to place their faith in a fair and just trial in independent juries. Thus, when the colonists reached their breaking point, it was their lack of faith that justice would be delivered that ultimately drove them to revolution.[15] The

[12] Hostettler J, *Sir Edward Coke: A Force For Freedom* (Barry Rose Law Publishers 1997).
[13] Browning A, *English Historical Documents, 1660 - 1713* (A Browning, Eyre & SPottiswoode 1953).
[14] Rakove J, 'The Original Justifications For Judicial Independence', *Fair and Independent Courts* (2006).
[15] ibid.

question of judicial independence during the incarnation of the current Constitution and judicial system in the United States of America was a lasting struggle in the early days of the new country with countless debates and essays written with regard to the scope of the judiciary and how the judiciary ought to be selected.[16]

Today, the systems in place differ greatly between the United States and the United Kingdom. In the UK, judges are appointed by the Judicial Appointments Commission which states that "candidates are selected on merit, through fair and open competition". The JAC provides a clear outline of the selection process, precise qualifications and characteristics judges are expected to have, and ensures a system meant to insulate the process from any political influence whatsoever.[17] The selection process for justices to sit on the Supreme Court is equally transparent and is provided for in the Constitutional Reform Act 2005 which included provisions to politically insulate the Supreme Court.[18]

In the US, despite the importance judicial independence and integrity played in the founding of the country, the appointment process is far from transparent.[19] Federal justices are nominated by the President and confirmed by the Senate, with Supreme Court justices' confirmation hearings being subjected to intense public scrutiny and media coverage. The Constitution sets forth no specific requirements on the qualifications a judge is expected to have. Rather, the President and members of Congress when confirming appointments, instead, rely on their own informal criteria which is never revealed to the public.[20] The

[16] Pittman C, 'The Emancipated Judiciary In America: Its Colonial And Constitutional History' (1951) 37 American Bar Association Journal.
[17] 'Judicial Appointments Commission' (*GOV.UK*, 2020) https://judicialappointments.digital/.
[18] Constitutional Reform Act 2005, Sections 25-31, Schedule 8.
[19] This dissertation will maintain strict focus on the federal judiciary as it is the most directly comparable to the system in the UK. The patchwork of laws and procedures for judicial appointments (some being strict appointments and others being public elections requiring a judge to campaign as a politician) among the individual US states are not conducive to a direct comparison against the UK.
[20] "FAQs: Federal Judges" (*United States Courts*) https://www.uscourts.gov/faqs-federal-judges; hilariously, one does not even have to have practiced law in any capacity, or even have a law degree, to be nominated by the President.

selection processes of Supreme Court justices in the US are famously accompanied by media circuses and are so politically charged, that Presidents and the Legislature alike are morbidly hopeful that a Supreme Court seat becomes vacant during their administrations to fill it with someone of their particular party.[21]

Despite the directly conflicting processes of the UK and the US, the conversations surrounding the concept of judicial independence have not varied greatly between legal scholars of both nations.[22] In fact, there is significant overlap between the schools of thoughts of the two countries, namely an inclination towards legal positivism, perhaps owed to the fact that both countries shared many of the same legal philosophers and their common ancestry lends to similar thoughts.[23] However, in spite of legal positivism being the dominant school of jurisprudential thought across both nations, the US boasts a uniquely American movement called "American legal realism" that dominated legal education in the US for decades.[24]

Along with this deviation, the Americans also rejected the idea of Parliamentary Sovereignty that typically goes along with legal positivist writings.[25] The convention of Parliamentary Sovereignty is the cornerstone of the Constitution of the UK and traces its lineage back to the provisions of the Magna Carta.[26] It is defined by A.V. Dicey as being that

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[21] Scherer N, *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process* (Stanford University Press 2005); there has in fact been a great deal of focus on the age and health of Supreme Court justices- some people even jokingly volunteer to give any organs Ruth Bader Ginsberg needs to prevent her death during the Trump administration (McCluskey M, "Ruth Bader Ginsburg's Supporters Are Offering Her Their Ribs" (*Time* November 8, 2018) https://time.com/5449074/ruth-bader-ginsburg-broken-ribs/).

[22] As will be demonstrated in the later sections of this dissertation.

[23] This will be discussed in the later sections of this dissertation.

[24] Leiter B, "American Legal Realism" in W Edmundson and M Goldings (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2003).

[25] As will be discussed in section III of this dissertation.

[26] Clause 40 in the Magna Carta reads: "*nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam*" – "We will not sell, or deny, or delay right or justice to anyone" with the provision "we will not sell…justice to anyone" interpreted as a guarantee against bribery of judges and court officials; "The Magna Carta Project" (*Magna Carta Project - 1215 Magna Carta - Clause 40*) http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_40.

principle that Parliament is the supreme law in the UK and no other institution carries the ability to override Parliament.[27] During the early years of the United States, it was the Founding Father's intention to prevent any branch of the tripartite from having such power and thus, with the decision in *Marbury v Madison*[28] in 1801, installed the convention of judicial review which allows the United States Supreme Court to declare any law passed by Congress, either state or federal, unconstitutional and carries with it the power to strike the law down.[29]

Judicial independence is a critical component of any democratic society that claims it upholds the rule of law.[30] Without judicial impartiality and independence from external influences, whether personal or institutional, public trust in their governments and judicial systems cannot be expected to be maintained. Therefore, it is crucial that the system in which a government selects those to be the metaphorical guardians of justice is designed to ensure public trust in the integrity of their judiciary. While on the surface, the juxtaposed judicial appointments systems of the UK and the US seem to lead to a confusion of how two dissimilar systems can purport to achieve the same ends, the reasons for how both systems can do precisely what they claim are hidden in their constitutions and accompanying legal philosophies.

This dissertation will begin with a historical recounting of the two systems, followed by a discussion and comparison of modern thoughts and debate regarding judicial independence and how both nations purport to uphold the doctrine within their unique systems, and will finally integrate the previous discussions into an analysis of how legal positivism lends itself to the convention of Parliamentary sovereignty whereas legal realism

[27] Dicey, A.V. *The Law of the Constitution* (1885).
[28] *Marbury v Madison* [1803] 5 US 137.
[29] ibid.
[30] Supra note 4.

lends itself to judicial review. In doing so, this dissertation seeks to answer the question of how such conflicting systems can both purport to be impartial and independent so as to maintain judicial integrity in a time where misleading information runs rampant, causing the general public is to lose faith in the integrity of their governments and institutions.

I. The Evolution of the Judicial Selection Processes in the UK and the US, from 1701 to Modern Day

A. The Judicial System in the UK

The system of judicial appointments in the UK remained largely unchanged from the Act of Settlement in 1701. Appointments were a matter of practice and convention, not written law. The Supreme Court of Judicature Act 1873[31], the Appellate Jurisdiction Act of 1875[32], and the Supreme Court of Judicature (Consolidation) Act 1925[33] all stated that judges were to be appointed 'in the same manner as heretofore'.[34] The same manner as heretofore referred to the process of judicial appointments carried out by the Lord Chancellor to be finally confirmed by the Monarch. The Lord Chancellor wore many hats, so to speak, acting as Cabinet Minister, Speaker of the House of Lords, and sat as a judge and heard cases as part of the judiciary. His position furthermore had no security of tenure and his office was closely monitored by the Prime Minister. The Lord Chancellor was supported by a Permanent Secretary and a Judicial Appointments Group when engaging in his duty to appoint justices. Officially, the Judicial Appointments Group gave all information relevant to the appointments process to the Lord Chancellor who then adopted the following principles when selecting a candidate: merit, part time service as a pre-requisite of appointment to full time office, and the views and opinions sourced from sitting judges and senior practitioners. Appointments for certain justices such as those sitting on the Court of Appeal and Heads of Divisions were strictly by invitation only.[35] If the appointment was to fill a seat on the High Court bench or a higher court, the Lord Chancellor and the Prime Minister recommended a

[31] Supreme Court of Judicature Act 1873.
[32] Appellate Jurisdiction Act 1875.
[33] Supreme Court of Judicature (Consolidation) Act 1873.
[34] Shetreet S, *Judges on Trial* (North-Holland Pub Co 1976).
[35] Zhan H, *The process of appointment of judges in some foreign countries: The United Kingdom* 2000 (The Process of Appointment of Judges in Some Foreign Countries).

qualified person together to the Monarch with slightly different criteria: the breadth of legal knowledge and experience, skillset and abilities, and personal qualities.[36]

The Lord Chancellor's office proved to be quite problematic given the many roles the Lord Chancellor played in all three branches of government and the unsecured position with close watch from the Prime Minister. In spite of a seemingly threatening potential of corruption, many supported this system for centuries. According to Robert Stevens, the Lord Chancellor is "a custodian of judicial independence".[37] The Lord Chancellor's "ministerial squeamishness about becoming entangled in any issues that might be perceived…as threatening judicial independence has protected the courts from both…Treasury driven budgetary discipline and from public/parliamentary accountability".[38] Stevens goes on to further establish the Lord Chancellor as firmly supportive of the judiciary and fighting against factors that are widely known to contribute to the erosion of judicial independence such as manipulation of salary and unwelcome media or parliamentary attention.[39] The coming controversies regarding the role of Lord Chancellor will be discussed below with the reforms of the UK.

B. The Judicial System in the US

In the meantime, with the UK content with its system from 1701, the author would like to draw attention to the parallel developments of the United States judiciary beginning with their status as Royal Colonies in the late 1770s. In the American colonies, King George III made tenure for judges in the colonies entirely dependent upon royal pleasure, claiming that "the state of learning on the colonies was so low that it was difficult that men could be

[36] Stevens R, *The High Court – Guide for Applicant* (Application for Appointment As Justice of the High Court, the Lord Chancellor's Department) 2000.
[37] ibid.
[38] ibid.
[39] Stevens R, *The Independence of the Judiciary: the View from the Lord Chancellors Office* (Clarendon Press 1997).

found competent to administer the judicial offices".[40] As mentioned in the introductory section, this resulted in the courts acting as hands of the King and the colonists did not trust the courts to engage in any real sort of justice, preferring instead to place their trust in a jury of their peers and locally elected magistrates.[41] When the time came for the Founding Fathers of America to draw up a new Constitution and lay the groundwork for their judiciary, many looked to Baron Montesquieu's 1748 work, *The Spirit of the Laws*, which set out a modern, tripartite theory of the separation of powers and a system of checks and balances to ensure none of the tripartite amassed so much power as to dominate the government.[42]

While drafting their new judiciary, tension and debate surrounded discussions regarding the scope of the judiciary. Thomas Jefferson and the other Anti Federalists[43] grappled with both Article III of the proposed US Constitution and what became the Federal Judiciary Act of 1789. The broad wording of Article III in the Constitution was not accepted by the Anti Federalists.[44] The Federal Judiciary Act of 1789 acted as a battle ground between the Federalists and Anti Federalists and a sort of pre-requisite to the passing of Article III of the Constitution[45] and is regarded as "probably the most important and most satisfactory Act

[40]Cox A, "The Independence of the Judiciary: History and Purposes" (1996) 585 University of Daytona Law Review 545.
[41] Supra note 16.
[42] Montesquieu Clde S, Neumann FL and Nugent T, *The Spirit of the Laws* (Hafner Publishing Company 1949).
[43] Federalists and Anti Federalists were the first political parties of the US. Federalists believed that establishing a large national government was necessary to achieve a perfect union of states and that by expanding the sphere of influence, individual and minority rights would be better protected. Anti-Federalists on the other hand, generally opposed any sort of large national government and opposed the passing of the current Constitution as well. They believed that a republican government could only work on a small scale and so favored strong, independent state governments with minimal oversight from the national government. They can be loosely tied to the current dominant parties of the US today with Federalists aligning most similarly to the Democratic party and Anti-Federalists aligning to the Republican party; "Bill of Rights Institute" (*Bill of Rights Institute*) https://billofrightsinstitute.org/.
[44] Warren, Charles "New Light on the History of the Federal Judiciary Act of 1789. Harvard Law Review, Vol. 37, No. 1 (Nov 1923) pp 49-132.
[45] ibid.

ever passed by Congress"[46] in that it was the greatest compromise that completely satisfied no one. The terms within were designed purely to ensure the votes of those who insisted that the Federal Courts should be given the absolute minimum power and jurisdiction.[47]

With regard to the concept of judicial independence, however, the Federalists and Anti-Federalists could agree. James Madison, an Anti-Federalist, saw the judiciary as having a critical role in preventing legislative and executive abuses of power and emphasized the importance of judicial independence in this function.[48] Alexander Hamilton, a Federalist, expressed his agreement in Federalist Essay No.78 while going on to say that he believed that complete independence is "peculiarly essential in a limited constitution" where the only mechanisms where limitations on legislature and executive could be preserved were found in the courts. Hamilton further wrote that beyond simply checking power imbalances in the other branches, judicial independence protected against the threat of public opinion that can undermine the legitimacy of the government as a whole.[49]

It is clear that the early struggle to keep the federal judiciary as small as possible was a means to ensure safety from the judicial corruption they experienced under English rule. In a letter to James Madison in 1800, Jefferson expressed concern that "appointments in the nature of freehold render it difficult to undo what is done"[50] and elaborated further in another

[46] Justice Brown (1911); citing Miller J in *United States v Holiday*, 3 Wall (US) 407 (1865) in an address to the American Bar Association.
[47] Joseph H Nicholson of Maryland, a leading Anti-Federalist, said of the jurisdictions "…in a government like ours, extending over a large tract of country, and composed of sovereign states, independent of each other…it was rightly judged that its judicial powers should not extend to any other cases of judicial cognizance than those which might be deemed somewhat of a general nature, and whose importance might affect the general character or general welfare of the Nation"; Nicholson J, "7th Congress, 1st Session" (1802).
[48] "Letter from James Madison to Caleb Wallace," , *The Writings of James Madison, comprising his Public Papers and his Private Correspondence, including his numerous letters and documents now for the first time printed,* vol 9 (GP Putnam's Sons 1900).
[49] Hamilton A, The Federalist No. 78 (Clinton Rossiter 1999).
[50] Jefferson T and Kaminski JP, *The Quotable Jefferson* (Princeton University Press 2006).

letter in 1823 saying that while the judicial bodies were meant to be the "most helpless and harmless members of the government" they threatened to become the most dangerous owed to the fact that man is not meant to be trusted for life.[51] Jefferson's inherent distrust of the judiciary and a belief that giving them life tenure, good pay, and no real means to remove them would undoubtedly lead to an abuse of power and encroachment upon the executive and legislature was a common sentiment shared amongst all Anti-Federalists.[52] It is interesting to note that in the US, the discussions about ensuring judicial independence to protect the integrity and purity of the distribution of justice never occurred as it did in the UK in the time leading up to the 2005 reforms. Rather, the conversations during these times were about how to keep the federal judiciary as small as possible so that in the inevitable time they do succumb to their power, as Jefferson thought, their reach is limited.[53]

Discussions surrounding the power of appointment of judges largely occurred in the Federal Convention of 1787 which was concerned with the action to vote on the proposal to give the power of appointment to the executive branch alone. However, a familiar criticism was spoken that asserted that the executive would only invite "political dealing, patronage, favoritism, and intrigue".[54] As a compromise, the partnered system of appointment by the executive and confirmation by the legislature was established. Unsurprisingly, in 1801, with the presidency of Thomas Jefferson, the Anti-Federalists promptly abolished the 1789 Act, the judgeships it created, and passed their own Judiciary Act of 1801 which redefined the jurisdiction of the courts and the number of circuit courts which would not be revisited again

[51] Supra note 42.
[52] Supra note 37.
[53] ibid.
[54] Gauch JE, "The Intended Role of the Senate in Supreme Court Appointments" (1989) 56 The University of Chicago Law Review 337.

until 1891 with the only intention to expand the number of circuit courts to meet with the rapidly expanding country.

C. Modern Reforms in the UK Judiciary

Returning focus now to the UK, the power to appoint judges, as discussed above, was invested in two ministers: the Lord Chancellor and the Prime Minister, whose decisions were then subject only to pro forma confirmation by the Crown. This practice had been extensively criticized and was described as "nothing short of naked political control".[55] In this time, the system offered "a hard test for the commonly held view of judicial appointment according to which appointment by a single political body acting alone is likely to result in political preferment".[56] During this time, appointments to the High Courts and above were largely taken from within the exiting ranks of judges accompanied by considerable input from the Lord Chief Justice. Thus if preferment is found in a system of ministerial appointment that is constrained by the *de facto* requirement of appointment from within, then *a foritori* political preferment is also likely to exist in other systems of ministerial appointment that lack these constraints.[57] Ultimately, this rhetoric was not enough to quell the growing voices of public mistrust and skepticism regarding the true impartiality of the judges. As a response, a series of reforms throughout the entirety of the judicial system in the UK were introduced, the most significant reforms being the abolition of the Appellate Court of the House of Lords and replacement with a Supreme Court, and the abolition of the office of Lord Chancellor as it stood for centuries, and the creation of a Judicial Appointments Commission.[58] The backlash, particularly against the abolition of the Lord Chancellor's office was, simply put, spectacular

[55] Rozenberg J, *Trial of Strength: the Battle between Ministers and Judges over Who Makes the Law* (Richard Cohen 1998)
[56] Hanretty C, "The Appointment of Judges by Ministers" (2015) 3 Journal of Law and Courts 305
[57] ibid
[58] Supra note 18

in large part due to the way it was handled at the time and has been called "one of the great political mysteries of our time"[59] as the judiciary had entirely no warning of the changes about to take place until a few days prior to the enactment.[60] Lord Irvine, the then Lord Chancellor, was astonished that then Prime Minister Tony Blair seemed to think nothing of abolishing the office and likened it to a routine transfer of departmental responsibilities. Irvine wrote of the ambush saying:

> I asked [Tony Blair] how a decision of this magnitude could be made without prior consultation with me, the judiciary…and the palace. The Prime Minister appeared mystified and said that these changes always had to be carried into effect in a way that precluded such discussion because of the risks.[61]

In contrast, the response to the establishment of a UK Supreme Court was far less dramatic. Beyond bringing the system to modern times, this reform in particular is a response to the requirement imposed by the European Convention on Human Rights, through the Human Rights Act 1998, which stipulates that it is not enough that judges be independent; they must be seen as being independent.[62] Before the reforms, with the highest court of the land sitting directly within the legislative chamber, "the independence of the judiciary [was] potentially compromised in the eyes of the citizens."[63] While the fiscal independence, security of tenure, and freedom from executive interference remains as it had been, the establishment of the Supreme Court confirms and enhances independence by adding to it the physical appearance of independence mainly by virtue of the physical removal of the Supreme Court chamber from Parliament and into a separate building.[64]

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[59] O'Brien P, "John Crook: The Abolition of the Lord Chancellor" (*The Constitution Unit Blog* February 22, 2016) <http://constitution-unit.com/2013/06/20/john-crook-the-abolition-of-the-lord-chancellor.
[60] "Lord Chancellor Derry Irvine Blair Breaks Silence" (*The Guardian* November 1, 2009) http://theguardian.com/politicis/2009/nov/01/derry-irvine-blair-lord-chancellor.
[61] ibid.
[62] Human Rights Act 1998.
[63] Steyn, "Neill Lecture" (March 1, 2002).
[64] Woodhouse, Diana. "The Constitutional and Political Implications of a United Kingdom Supreme Court (2004) 24 Legal Stud. 134.

D. Juxtaposition Between UK and US Judicial Developments

With the recounting of both systems brought up to modern times, it is curious to observe the juxtaposition. The current UK system is a response to what was widely perceived as too much political interference in the courts, from who was appointed to sit on the bench to the potential for executive influence in deciding cases.[65] As a result, the UK did everything to eliminate the possibility of political interference. In the US, however, the judicial appointments process could be construed as a totally arbitrary decision entirely dependent on how the members of the Senate feel that particular day about the candidate before them. Nowhere is there a comprehensive guide for what qualifications a federal judge ought to have, and on the contrary, it seems that qualifications could become quite irrelevant as the President can present someone with no legal knowledge whatsoever.[66]

The UK, when drafting the reforms for the judiciary leading up to 2005, did not once look towards the US model, likely due to the fact that the then-current system of judicial appointments through the Lord Chancellor bore slight resemblance to the US process – with a vague set of requirements known only to the Lord Chancellor that culminates in a *pro forma* appointment confirmation.[67] However, if the UK, with its system reminiscent of that in the US, recognized the inherent appearance of a lack judicial independence as enough to undermine public trust in the integrity of their judicial system so as to enact drastic, unprecedented reforms, how can the US still claim to uphold judicial independence in the way the UK is able to assert?

[65] Refer to the case of Sir John Wood in which a High Court Judge exposed attempts by the Lord Chancellor to influence a particular outcome of a case. Details of which are found in section III of this dissertation.
[66] Supra note 36.
[67] Supra note 50.

II. How Has Judicial Independence Been Protected in the UK and the US?

A. Evolution of Judicial Independence in the UK

The UK's progress of realizing the potential gap in judicial independence and taking hard measures to rectify that gap grew out of surging talk from the 1980s and 90s about the accountability of the judiciary to ensure its integrity, which would culminate in the 2005 reforms. Certainly, there has been ongoing discussion regarding conventions that would ensure continued judicial independence following the reforms. The accountability process, as mentioned in Section II, had been that since the Lord Chancellor took upon himself all accountability it would encourage him in his position to ensure the integrity and independence of the judiciary. However, once the public began to grow unsatisfied with the current system, discussions began to address how to repair the public trust in the professional and political decision makers. The idea of increased accountability, however, was met with backlash. In the 2002 BBC Reith Lectures, Onora O'Neill warned that the "accountability revolution", as it was being called, was damaging rather than repairing, saying that "plants don't flourish when we pull them up too often to check how their roots are growing."[68] It had been claimed, instead, in the UK that the notion of an accountable judge is an oxymoron, and that a court cannot be both independent and accountable.[69]

In 1996, Lord Ackner delivered a scathing lecture on a series of events that, in his mind, had eroded the foundation of judicial independence.[70] Lord Ackner first put forth that the expansion of judicial review by the courts has been met with intense criticism which resulted in retaliation from the Government.[71] He then went on to discuss the series of events

[68] O'Neill O, "BBC Reith Lectures" (2002) http://bbc.co.uk/radio4/reith2002/3.html.
[69] Le Sueur, Andrew "Developing Mechanisms for Judicial Accountability in the UK" (2004) 24 Leg Stud 73.
[70] Ackner, "The Erosion of Judicial Independence" (1996) 146 The New Law Journal.
[71] ibid.

that make up this retaliation. The first event being the creation of the Lord Chancellor's Advisory Committee, a committee that was staffed by civil servants on which all members were appointed at the sole discretion of the Lord Chancellor which Lord Oliver of Aylmerton called "an instrument by which the Executive can…control the legal profession which was previously self-regulated and…secure an even greater control…over the composition and…the conduct of judiciary at all levels". The second event was the proposal of the Judicial Pensions and Retirement Bill[72] that sought to reduce the retiring age, but this was met by resistance based on economic concerns from the Treasury.[73] The final event was "the strange case of Sir John Wood"[74] in which letters had exposed the Lord Chancellor's attempts to require a High Court Judge, Sir John Wood, to follow a legal course that Wood considered to be contrary to his judicial oath. Particularly damning was a letter from the Lord Chancellor to Wood saying that if the judge did not apply certain statutory rules to the case in a way the Lord Chancellor approved of, the Lord Chancellor would "consider [Wood's] position" on the bench. Wood wrote back to the Lord Chancellor refusing to accept the demand and received no response. [75]

Along with debates regarding the general accountability of the judiciary, an old conversation began to resurface, namely the powerful hybrid office of the Lord Chancellor.[76] The uncertainty of the true integrity of the Lord Chancellor had been debated time and time again with much of the rhetoric meant to placate the nervous public of the importance and nobility of the role of Lord Chancellor.[77] Notably, according to Lord Birkenhead in his 1992

[72] Judicial Pensions and Retirement Act 1993.
[73] While reducing the retiring age was a popular wish among the judiciary, it would have resulted in an increase to the cost of a pension scheme and the Treasury refused to accept this extra cost and sought to meet the difference by downgrading the value of the judicial pension.
[74] Supra note 59.
[75] ibid.
[76] Supra note 58.
[77] ibid.

anthology, *Points of View*, he argued that if the Lord Chancellor's position were to cease, the protective buffer between the judiciary and the executive by way of the Lord Chancellor linking the branches together would disappear.[78] Years later, Lord Philips further defended the office saying "there was no question of the Lord Chancellor being influenced by political considerations in his appointments" since appointments were so heavily consulted with judiciary and other views that shaped the Lord Chancellor's opinion.[79] In spite of these efforts, this process was not only routinely criticized for being "white, predominately male, and drawn from the upper social class,"[80] but also for the fact that even if these appointments were not politically influenced, this was not obvious to the people at large since it was a political Minister who made these appointments under a process that was vague and opaque.

After the passage of the Human Rights Act in 1998 radical changes were implemented to draw a clear separation of powers. Former Lord Chief Justice Lord Thomas posited that, providing that the new boundaries between the branches of the state are respected, the interactions between the judiciary and the other branches[81] is likely to be beneficial.[82] He further considered the importance of the two other branches to be proactive in "consulting the judiciary on matters which go to the heart of the proper administration of justice while also respecting the constitutional limits of [the judiciary] to contribute".[83] However, he warned that policy is a matter for politicians and about which judge should not comment lest their impartiality appear to be prejudiced.[84]

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[78] Birkenhead FES, *Points of View* (Books for Libraries Press 1970); Earl Birkenhead stated in 1922 that "in the absence of such a person the judiciary and the executive are likely enough to drift asunder to the point of a violent separation, followed by a still more violent and disastrous collision".
[79] Philips N, "The Politics of Judicial Independence" (February 8, 2011).
[80] ibid.
[81] i.e., the newly vested power of the judiciary to give technical and procedural advice to the legislature and the executive about practical consequences of proposals and policies.
[82] Thomas J, "Institute for Government" (December 1, 2014).
[83] ibid.
[84] ibid.

What do the years since the enactment of the 2005 reforms tell about whether seeking the consultancy of the judiciary without undermining the existing position is achievable? Sir Jack Beatson has stated that he was "acutely conscious" that judges were giving more and more talks and lectures which, mimicking politicians, are increasingly being called speeches.[85]

Sir Beatson himself preferred the new guidance for judges asked to appear before Parliament, done in consultation with Parliamentary authorities, first done in 2008 and again in 2012, which laid out the boundaries of what is proper for judges to say and "sets out the longstanding conventions governing the appropriate parameters of judicial comment which have been important in safeguarding the independence of the judiciary".[86] This guidance, while intended to strengthen the boundaries between the judiciary and legislative during consultation, has sometimes been met with frustration from the other branches. For instance, in the case *A v Secretary of State for the Home Department (2004)*[87], judges who had decided that detention without trial under the Anti-Terrorism, Crime and Security Act 2001 was incompatible with the ECHR in this case were unwilling to meet with Charles Clarke, then Home Secretary, in 2005 to advise how those suspected of terrorism could effectively be dealt with without being incompatible with the EHCR. Clarke publicly expressed his frustration with the "inability to have general conversations of principle with the law lords…because of their sense…that it is not appropriate to meet in terms of their integrity. I'm not sure I agree".[88]

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[85] Beatson J, "Hart Judicial Review Conference" (December 12, 2014), he commented saying "if a judge comments on a particular case or a legislative policy of other matter in a lecture, there can be no reason in principle why he or she should not answer questions on that matter in Parliament…where one judge has opined on a sensitive topic…another judge who is asked to give evidence on it may find it difficult to mount a compelling case based on constitutional propriety for refusing".
[86] Judicial Executive Board, *Guidance to Judges on Appearances Before Select Committees* (2012).
[87] *A v Secretary of State for the Home Department* (2004) UKHL 56 (2005) 2 AC 68 (Belmarsh A).
[88] Clarke, C Interview with Riddel M, "The New Statesman" (September 26, 2005) http://newstatesman.com/node/151599.

In order to address these deficiencies, the Judicial Executive Board created a single point of contact within the judicial system to handle requests by Select Committees and giving procedural guidance.[89] Some academics have warned that the effect of the recent reforms, being the separation of politicians from the justice system and the judiciary, could actually have the opposite intended result. Today, many members of Parliament are lawyers, or have been lawyers, and there are judges who have had political experience. The complete separation of these two spheres could result in a shallow understanding between the roles of politicians and judges in the UK constitution. Therefore, while caution is warranted, the consultations senior judges provide ministers and civil servants is a crucial part of ensuring that judicial independence is maintained.[90]

Lord Hodge in 2018 delivered a lecture in which he spoke about the role of the judiciary in the UK in upholding the rule of law in the wake of Brexit and the continuing political debate on the judiciary's role. In particular, Lord Hodge spoke about the attacks by the press on the Divisional government minister that "the judges had improperly allowed their private views on the merits of Brexit to influence their legal judgement."[91] Of course, this brought a rain of criticism and outrage amongst the legal profession. Sir Jeffrey Jowell QC stated that in light of the politically charged climate where the press was seemingly calculated to damage public confidence in the judiciary, "a prudent Lord Chancellor should surely have acted to stem the risk of damage that such misleading and inflammatory

[89] Supra note 75; "It is not intended to compromise the independence of the individual judges or to prevent committees hearing from particular judges. The request [for an appearance of a judge which is made to the LCJ's private office] may thus either ask for an appropriate judge to be identified or ask for a particular judge. Consideration can be given to the nature of the issue which the committee is addressing, whether there is a risk that the judge will be asked questions which it would be appropriate for him or her to answer given the conventions, and what options there are for answering questions in a way which limits the risk of conflict with the judge's legitimate and proper judicial role".

[90] O'Brien P, *Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press 2015).

[91] Lord Hodge, "North Strathclyde Sherrifdom Conference" (23 November 2018).

allegations may cause."[92] When the Supreme Court made its decision regarding the legality of Brexit[93] that was then duly criticized by the press, the Lord Chancellor took this opportunity to praise the independence of the UK judiciary. Lord Hodge continues to say that these events nonetheless caused a significant blow to the judiciary, namely that "the suggestions by the press, whether implicit or explicit, that the judges of the Divisional Court were consciously attempting to block the service of an Article 50 notice and thus thwart the democratic will" goes far beyond the healthy criticism of judicial decisions from the past; it seriously undermined the confidence of the public in the impartiality of judicial decision making.[94]

As a result, there were two suggestions that emerged over this controversy to remedy the issues present: one, that judges ought to abandon the conventions that will them to remain politically neutral and join the public debates, and the other that politicians ought to be involved in the appointment process for senior judicial offices. Interestingly, a suggestion that the UK might adopt a system akin to that present in the US was put forth by Lady Hale.[95] The second suggestion is a curious one considering that this comes after a reform designed explicitly to remove politics from the appointment process entirely. Lord Hodge questioned the utility of the suggestion stating that since there is no reason for judges to bring their personal political views into their decisions, there's a risk that confirmation hearings in the US style might give legitimacy to political decision making in the judiciary.[96]

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[92] Supra note 80.
[93] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[94] Supra note 80.
[95] Supra note 80; Lady Hale suggested to invite two members of Parliament onto the confirmation committee, one from the two largest opposing parties in order to bridge the gap between the judiciary and the legislature. Lord Hodge assures us, however, that when Lady Hale put forth this idea, it was merely one of pure impartial suggestion and in no way indicates her preference on the matter.
[96] Supra note 80; "…judicial decisions which have political consequences are not the same as political decisions…[senior judges] have no political mandate to bring their personal political views into their reasoning…There is a real risk that confirmation hearings might give legitimacy to political decision making within the judiciary and thus bring about the opposite of what its proponents seek".

It is clear that there is an overall consensus among the judiciary, politicians, and academics, that the judge's place is firmly on the bench. It is clear that there is no room or tolerance for encroachment by judges into political arenas either in lectures, decisions, or consultations. This would support not only the reasoning for enacting the 2005 reforms but it also supports the convention of Parliamentary Sovereignty which will be discussed later in this dissertation.

B. Perceptions of Judicial Independence in the US

Moving focus now to the US, the former Chief Justice of the US Court of Appeals for the Fifth Circuit, Carolyn Dineen King, described the specific challenges to judicial independence she felt the federal court system faces today. Namely, she describes "vitriolic attacks" against the judiciary "[emanating] from the President himself[97] who with distressing frequency…takes the podium to decry 'activist judges' at the state and federal level who, in his view, are responsible for various decisions with which he…disagree[s]".[98] While King admits these attacks and scrutiny are nothing new, she clarifies that they become disturbing when they reach the extremity and volume that was being experienced at the time. She also continues to say that "there is nothing inappropriate with political or partisan considerations factoring into the judicial appointment process" stating that the Founding Fathers entrusted

[97] Then George W Bush, although current President Donald Trump has made his fair share of vitriolic attacks against the judiciary on Twitter: Trump, Donald (@realDonaldTrump). "Sorry Chief Justice John Roberts, but you do indeed have "Obama judges," and they have a much different point of view than the people who are charged with the safety of our country. It would be great if the 9th Circuit was indeed an "independent judiciary," but if it is why…are so many opposing view (on Border and Safety) cases filed there, and why are a vast number of those cases overturned. Please study the numbers, they are shocking. We need protection and security - these rulings are making our country unsafe! Very dangerous and unwise!... There are a lot of CRIMINALS in the Caravan. We will stop them. Catch and Detain! Judicial Activism, by people who know nothing about security and the safety of our citizens, is putting our country in great danger. Not good!" 21 Nov 2018, 10:51 PM, 11:09 PM, 11:42 PM, Tweet.

[98] King CD, "Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts" (2007) 90 Marquette Law Review.

the nomination and confirmation powers in the elected branches for a reason and so it is natural for those elected to "seek judges whose judicial philosophies seem consistent with their own" and, presumably, by extension, consistent with those of the people.[99] King goes on to say that over the last 50 years or so there has been an "ever increasing and contentious focus in the nomination and confirmation process" on where judicial candidates stand on politically salient issues as the demand for social change grows.[100] She cites the politically charged cases *Brown v Board of Education*[101], *Roe v Wade*[102], *Gideon v Wainwright*[103], *Miranda v Arizona*[104], and *Mapp v Ohio*[105] as cases that have transformed the federal judiciary into a forum to which the disadvantaged could vindicate their rights.[106] Of course, this statement and the cases mentioned were met with backlash by conservative interest groups who sought to force the federal courts to overturn or narrow the gains achieved by so-called liberal activities. As Professor Stephan Burbank of University of Pennsylvania Law School stated, the courts became:

> …fodder for electoral politics…[with the view] that it is appropriate to pursue chosen ends through the selection of judges who are committed or will commit in advance to pursue those ends on the bench. The impression sought to be created is that not only are courts part of the political system; they and the judges who make them up are part of ordinary politics[107]

The logical conclusion of such a backdrop is that the goal of appointing justices to the Supreme Court and the intermediate federal appellate courts has become to further policy

[99] Supra note 87.
[100] ibid.
[101] *Brown v Board of Education of Topeka* [1954] 347 U.S. 483.
[102] *Roe v Wade* [1973] 410 US 113.
[103] *Gideon v Wainwright* [1963] 372 US 335.
[104] *Miranda v Arizona* [1966] 384 US 436.
[105] *Mapp v Ohio* [1961] 367 US 643.
[106] Supra note 87.
[107] Burbank S, *Conference, Fair and Independent Courts: a Conference on the State of the Judiciary ; Symposium, the Law of Politics: the Role of Law in Advancing Democracy* (Georgetown Law Journal Association 2007).

agendas.[108] Professor Burbank points out that it goes beyond mere policy leanings, and that since there is a risk that judges might adhere themselves to the rule of law concept or experience a "post appointment judicial preference change", some Presidents have sought out "hard wired" individuals whose preferences are unlikely to change. For more moderate candidates, they might still be "induced nonetheless to commit to a desired path of judicial decision in advance."[109] Former Chief Justice King recounted that the greatest threat to judicial independence were "judges with ambition" saying that they constantly watch how their decisions may be perceived by the Administration or the Senate Judiciary Committee and how it would affect his chances for advancement.[110]As Supreme Court Chief Justice William Howard Taft observed, "nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism."[111] Supporting this, one commentator declared that "the presidential impulse to pack the court with politically compatible justices is irresistible"[112] and another maintains that "political and ideological compatibility has arguably been the controlling factor" in determining nominations.[113] This concern to fill the courts with like-minded individuals creates a reliance on "predictive judgement" of "the nominee's likely future voting pattern on the bench".[114] Others state that "presidents seek nominees who share their views on the role

[108] Supra note 21.
[109] Supra note 96, citing Ruger T, "Justice Harry Blackman and the Phenomenon of Judicial Preference Change" (2005) 70 Missouri Law Review.
[110] Supra note 87, citing Calabresi G "Symposium on Judicial Independence" Yale Law School (2004).
[111] Dinh Viet D, *Threats to Judicial Independence, Real and Imagined* (Georgetown Law Journal Association 2007).
[112] O'Brien D, *Storm Center: The Supreme Court in American Politics* (WW Norton 2020).
[113] Abraham, H *Justices and Presidents: A Political history of Appointments to the Supreme Court* (New York: Oxford) 1974.
[114] ibid.

of the Court and on the appropriate behavior of a justice" and, of greatest importance "will vote to decide cases consistent with the president's policy preferences".[115]

In spite of these glaring shortcomings regarding the politicization of the appointment process, there has been no call for widespread reform of how justices are appointed in the US. On the contrary, the last great concentrated focus on judicial selection reform occurred with the publication of the 1996 Miller Center Commission Report on the Selection of Federal Judges and the 1997 Report of the ABA Commission on the Separation of Powers and Judicial Independence. In the 1996 report, the main concern was regarding the rapidly expanding federal judiciary as a result of an enlarged federal jurisdiction. This led to Presidents and Senators having to nominate and confirm larger numbers of judges which has resulted in a complex and bureaucratic process and, combined with a trend of a divided government since the 1950s resulting in Senators holding up judicial appointments for no reason aside political affiliation, endless delays. The report documented that "the cumbersome and protected judicial selection process imposes costs on the justice system and on potential appointees"[116] fearing that qualified persons may be reluctant to go through such a burdensome process which in turn directly affects the quality of those serving on the bench saying "if problems in promptly filing judicial vacancies with high-caliber appointees are not addressed, dockets will become even more crowded and we will find that justice delayed is justice denied".[117] The report put forth a lengthy list of recommendations including: a process by which Senators can expedite the selection of judicial nominees when recommending candidates to the president and the confirmation process itself by increasing staff attorneys responsible for investigating nominees; a strong recommendation that Senators forego

[115] Watson G and Stookey JA, *Shaping America: the Politics of Supreme Court Appointments* (Harper Collins 1995).
[116] Thompson K, "Miller Commission Report on the Commission on the Selection of Federal Judges" (1996).
[117] ibid.

withholding a confirmation hearing on a nominee if the nominee is noncontroversial; and, eliminating redundancies and paperwork.

Similarly, the 1997 American Bar Association Report studied factors that were potentially eroding judicial independence and many of the factors they studied shared similarities with the words of concerned justices above, in particular regarding the "vitriolic attacks"[118] from public officials. The Report found that when a judicial decision is criticized, the justice who wrote it is often prohibited by judicial ethics rules from entering the debate to defend his opinion.[119] This results in an exchange of ideas that is open to the risk of misinformation running rampant. It further found, as did the Miller Report, that protracted delays in the nominations and confirmation process results in an overworked and therefore weakened federal judiciary and found that tying judicial appropriations and judicial pay to the Presidential line-item veto authority resulted in a contradiction to the principle that judges pay ought not to be reduced or otherwise altered while they are in office.[120]

In a 1998 follow up report by the American Bar Association, the ABA put forth recommendations for improvements to be made to rectify the issues identified in the 1997 report. These recommendations included a resolution that public officials should refrain from threatening to initiate judicial impeachment proceedings because of disagreement with isolated decisions and that state and local and territorial bar associations should develop effective mechanisms for evaluating and promptly responding to misleading criticisms involving judges and judicial decisions.[121] For the issues regarding protracted delays, the report deferred to the solutions presented in the 1996 Miller Report and put forth a

[118] Supra note 87.
[119] Supra note 105.
[120] Cooper N, "Report of the ABA Commission on Separation of Powers and Judicial Independence: An Independent Judiciary" (1997).
[121] ibid.

recommendation that Congress enact legislation that delinks congressional pay from judicial pay and excludes judiciary appropriations from the Presidential line-item veto authority.[122] It is curious to note that nothing ever came from these reports and the system stands as it had been for decades.[123] Equally interesting is that none of the identified factors contributing to the possible erosion of judicial independence identified the system's highly partisan and political nature, with the exception that Senators should not withhold confirmations for no valid reason beyond party affiliation.

It is plain to see that concerns surrounding executive interference in the judiciary are nearly identical across the UK and the US. Yet, where the UK made a logical decision in enacting widespread reform to properly address and rectify these concerns, the US remains convinced that in spite of these issues, their system is still the best for appointing justices. The greatest deviance in political and legal arguments regarding the concept of judicial independence lies in each country's tolerance for judicial politics. These deviances further support each country's conventions regarding the role of the judiciary. The convention of Parliamentary Sovereignty in the UK lends itself to the idea that judges ought not be political in any capacity, and the doctrine of judicial review in the US lends itself to the argument that judges must be political and are expected to be political. This idea is further discussed in the chapter below.

[122] ABA "Follow Up Report on the ABA Commission on Separation of Powers and judicial Independence: An Independent Judiciary" (1998).
[123] Madeira E, "The ABA Has Had a Long Commitment to Judicial Independence, but How Should It Meet New Challenges?" (*ABA Journal*) http://abajournal.com/news/article/the_abas_long_commitment_to_protecting_judicial_independence.

III. What's the Difference? A Combination of Differing Legal Philosophies and Judicial Jurisdictions.

It seems common sense to both the UK and the US that judiciaries ought to be independent and impartial and yet what this independence looks like varies greatly in the capacity for politics each judicial system is expected to have. This dissertation puts forth the explanation that the UK convention of Parliamentary Sovereignty combined with the dominating philosophy of Hartian legal positivism leaves no room for politics in its judiciary whereas the movement of American Legal Realism that so heavily influenced the legal world in the US, combined with the constitutional duty of judicial review is why the US is reliant on judges being openly political and requires a political appointment process. This chapter will now look at Hartian legal positivism, American legal realism, the conventions of Parliamentary sovereignty, and constitutional judicial review in turn to demonstrate this point.

A. Legal Positivism

At its core, legal positivism is "the thesis that the existence and content of law depends on social facts and not on its merits... It says that they do not determine whether laws or legal systems exist".[124] With regard to judicial decision making processes, which logically flows from the concept of judicial independence, H.L.A. Hart states that "judicial decision…often involves a choice between moral values, and not merely the application of some outstanding moral principle". Hart further posits that "in any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by the

[124] Green L and Adams T, "Legal Positivism" (*Stanford Encyclopedia of Philosophy* December 17, 2019) http://plato.stanford.edu/entries/legal-positivism/.

law and the law is accordingly partly indeterminate or incomplete"[125] In these circumstances, and only in these circumstances, Hart says that:

> [the] judge must exercise his law-making powers. But he must not do so arbitrarily: that is, he must always have some general reasons justifying his decision and he must act as a conscientious legislator would by decided according to his own beliefs and values.[126]

Hart continues saying that these powers are constrained only to those rules that deal with specific issues and the power is not broad enough to throw out laws or spark massive legislative reform.

There are several methods of judicial interpretation at a judge's disposal to interpret statutes. The contemporary judicial practice is heavily influenced by the 'purposive' method of interpretation[127] which is that method of putting forward a creative interpretation of a statute in cases when interpreting a statute in its primary meaning leads to an absurdity. What cemented the usage of purposive interpretation in the methods of the judiciary was the House of Lords decision in *Pepper v Hart.*[128] The case concerned whether a teacher at a private school was required to pay taxes on a benefit he received in the form of a reduced school fee. The plaintiff sought to rely on a statement in Hansard made at the time the Act in question

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[125] Hart HLA, *The Concept of Law* (Oxford University Press 2012).

[126] ibid; Dworkin criticizes this observation saying that there is no reason for a judge to exercise law making powers saying that the law is never indeterminate as Hart claims and goes further to say that only elected representative should have law making powers in a democracy and judges are not usually elected in a democracy. He further states that by including implicit legal principles which are those that best fit the explicit law and provide the best moral justification, they inherently fill the "gaps" referred to by Hart. Hart has replied to this criticism saying that "judges should be entrusted with law making powers to deal with disputes which the law fails to regulate [and this] may be regarded as a necessary price to pay for avoiding the inconvenience of alternative methods of regulating them such as reference to the legislature.

[127] Gearey A, Morrison W and Jago R, *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (Routledge 2013); While the purposive interpretation is regarded as a 'European' method, it has been argued that this interpretation by British judges is justified not by reference to European law, but to common sense.[127] It has further been argued that the interpretation of statutes can be analyzed as falling into two stages: first, to acquire a general sense of both the legal and factual context and the intention of the legislature; second, to read the particular words in their primary and natural meaning or to their technical meaning. If this reading leads to an absurd interpretation, the judges may put forward a creative interpretation that avoids the absurdity.

[128] *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3.

(The Finance Act) was passed where a minister gave precise circumstances under which the taxes would not be payable. However, the courts previously had not been permitted to take Hansard statements into account when interpreting statutes.[129] The House of Lords sided with the teachers and allowed the usage of Hansard statements when interpreting statutes.

However, the House of Lords was careful to narrowly define the occasions when a court would be allowed to make reference to Hansard. First, the legislation in question must be ambiguous.[130] Second, the courts must restrain themselves only to take into account clear ministerial statements and cannot use statements made by members of Parliament in debate.[131]

This is a practical application of the exception to judicial legislation that Hart allowed in his formulation of legal positivism. In Hart's philosophy, judges are only entrusted with law making powers to deal with cases where the law is ambiguous or fails to regulate properly. The decision in *Pepper v Hart* reiterates the narrow limit of judicial purposive interpretation- that is the interpretation method that allows a judge to step into a legislative mindset.

B. Legal Realism

Both legal realism and legal positivism believe that law is a human construct, separate from the natural law theory. However, legal realism is often termed "American legal realism" as it is distinct from the type of legal realism found in Scandinavian countries and it is an

[129] Supra note 116.
[130] ibid.
[131] ibid; In the later case of *R (on the application of Spath Holme ltd) v Secretary of State for the Environment, Transport and the Region* [2000] UKHL 61; the House of Lords stressed again the importance of the first limb of the judgement in *Pepper v Hart* requiring the legislation in question to be absolutely ambiguous. Were this not strictly enforced, there was a danger that any case that raised an issue of statutory construction would create extra, unnecessary costs as lawyers would now require to devote time to research the relevance of parliamentary statements.

"indigenous jurisprudential movement in the United States during the 20th century, having a profound impact not only on American legal education and scholarship, but also on law reform and lawyering".[132] Legal realism was overwhelmingly taught in Ivy League law schools, particularly in Yale and Columbia, who were coined "hotbeds" [133] of realist thought.[134]

Legal realism reemphasizes the importance of human will and fallibility in both law making and legal interpretation processes. Realists believe that legal rules should not be an element in deciding the outcome of cases, suggesting that judicial decisions become more predictable when focusing on the specific facts of the case and social reality rather than legal doctrine. All realists agreed that in deciding cases, judges react primarily to the underlying facts of the case, rather than to applicable legal rules and reasons.[135] There is some disparity over how judges respond to the facts of a case. Some thought that a judge's personality has more to do with the decision than anything else, but the majority believe that judicial decisions fall into discernible patterns, albeit not patterns one would expect from examining existing rules. The patterns correlate with the underlying factual scenarios of the dispute: "it is the judicial response to the 'situation type' -i.e., the distinctive factual pattern- that determines the outcome of the case".[136] In other words, justices rely on their "ideological values…[and]…political and moral values of the sort that distinguish liberals from conservatives" when deciding cases and interpreting the law and the constitution.[137]

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[132] Supra note 23.
[133] ibid.
[134] (*Federal Judicial Center*) http://fjc.gov/judges; Incidentally, thirteen former and current Supreme Court justices earned their degrees from Yale and another nine earned theirs at Columbia. Overwhelmingly, a large proportion of federal justices were found to have been educated at Yale either for undergraduate degrees or for law degrees.
[135] Leiter B, "Positivism, Formalism, Realism" (1999) Columbia Law Review 99.
[136] Cohen F, "Transcendental Nonsense and the Functional Approach" (1935) Columbia Law Review 809.
[137] Eisgruber CL, *The next Justice: Repairing the Supreme Court Appointments Process* (Princeton University Press 2010).

There are many overlaps between legal positivist thought and legal realism, although it is essential to point out that legal positivism, a tradition of analytical jurisprudence, is meant to attempt to describe a universal legal system. Realists on the other hand, seek a method of critical examination. As realist scholar Karl Llewellyn explained, "there is no school of realists…There is, however, a movement in thought and work about law".[138] Therefore, while there is no 'system' of American legal realism truly comparable to that of legal positivism, adherents of the method do share several common points of departure: first, the separation of law and morality[139]; second, the fallacy of the logical form as the source for answers to legal questions[140]; and third, the prediction theory of law.[141]It has been explained that "the sine qua non of legal realism was the belief that doctrine obscured more than it explained about why a court decided as it did. Thereafter, legal realists split into a variety of approaches to the law".[142] However, one cannot be so quick to reject the legal realists as incapable of definition due to the disparate nature of the concerns presented by its scholars. All shared a common interest in understanding judicial decision making and this is the basis for legal realism: an attempt to answer the question of how judges decide law that legal positivism has largely left out.

Legal realism's impact on American legal scholars and legal practitioners can be felt even at the highest level, which is most clearly demonstrated in the Supreme Court case of the *Republican Party of Minnesota v White*.[143] This case dealt with a Minnesota lawyer

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[138] Llewellyn KN, "Some Realism about Realism: Responding to Dean Pound" (1931) 44 Harvard Law Review 1222.
[139] Holmes OW, "The Path of the Law" (1897) 10 Harvard Law Review 457 ; this is a common sentiment to both realists and positivists (supra note 123).
[140] ibid; this is recognized by Hart, though he heavily criticizes realists as extremely exaggerating this principle (supra note 123).
[141] ibid; This is totally rejected by Hart (supra note 123).
[142] Powe LA, "Justice Douglas after Fifty Years: The First Amendment, McCarthyism and Rights" (1989) 6 Constitutional Commission.
[143] *Republican Party of Minnesota v Whi*te [2002] 536 US 765 at 788, citing *Renne v Geary* [1991] 501 US 312, 349.

named Gregory Wersal who ran for a seat on the Minnesota Supreme Court. During his campaign, he openly criticized the decisions made by the court in politically controversial areas and it resulted in a formal complaint as the Minnesota State Bar Association had a regulation prohibiting the voicing of political or controversial opinions by candidates running for judicial office. The US Supreme Court declared that the standing regulation in Minnesota that forbade judicial candidates running for office[144] from declaring their controversial legal/political opinions during their election campaigns to be in violation of the First Amendment saying that "if the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process…the First Amendment rights that attach to their roles" which included their right to announce their controversial views.[145]

It is curious to note that in order for the case to be eligible to be heard in the Supreme Court, the regulation or law in question had to be "narrowly tailored to serve a compelling state interest"[146] and so the interest claimed by the defendants was that the regulation preserved the impartiality and the appearance of impartiality in Minnesota's judiciary. Responding to this, the Court produced three different definitions of judicial impartiality that the regulation could be judged against: first, a definition of a lack of bias for or against a party to the case[147]; second, a definition of a lack of bias for or against legal issues, or as the

[144] In the US, some states have adopted a system of holding general elections to appoint judges and to remove judges as well.
[145] Supra note 143.
[146] ibid.
[147] The court made clear that the regulation in question prohibited candidates from speaking about issues, not about parties. A judge who has a clear opinion on a certain issue may decide on that issue the same way regardless of the parties involved. Therefore, the regulation was not "narrowly tailored" to serve the interest of judicial impartiality in this way.

Court put it, the lack of a "preconception in favor of or against a particular legal view"[148]; and finally, a definition of open mindedness, or a judge's susceptibility to persuasion.[149]

Returning to the question of maintaining judicial independence and the appearance of impartiality, this case sheds an interesting and rare light into the true thought process of the court in deciding this case. It is this author's theory that the lens of legal realism provides an explanation to why the Court was able to dismiss concerns over a politicized judicial appointments system. [150] Returning to the second definition of judicial impartiality put forth by the Supreme Court justices in *Minnesota v White*, that of a "preconception in favor of or against a particular legal view"[151] the Court took issue with this definition stating that requiring a judge to approach a case free from any preconceptions regarding the central issue is unrealistic. Judges are professionals who ought to have formed a series of opinions by the time they take the bench. If they haven't, it would suggest a "lack of qualification" not a "lack of bias".[152] Quite simply, the legal realism theory acknowledges and even relies upon the fact that judges are humans. Humans with biases, flaws, preconceived notions, and subconscious prejudices. Rather than demand that judges completely disengage from their own opinions when faced with a case, the American realists embrace these opinions. The true

[148] Supra note 143.
[149] The problem the court had with this definition is that the regulation in question did not do anything to serve a judge's susceptibility to persuasion. The regulation only applied to statements made in the course of an election campaign and it was obvious to the justices that judges can make their stances clear before and after the campaign in a number of ways, rendering the regulation ineffective of pursuing its main intention.
[150] Raban O, "The Supreme Court's Endorsement of a Politicized Judiciary: A Philosophical Critique" (2007) 8 Journal of Law in Society 114; In his work, Raban offers the lens of legal positivism as an explanation and states that the determinate rules that make up the guidance offered to judges "are not about what the law requires..but about what the law should require" (citing Hart HLA, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review 584. Following this logic, Raban continues to say that "judges of course, never openly declare that they legislate: they always claim that they are merely discovering what pre-existing law requires. Judicial determinations are always put forward s claims about what the law is – not about what the law should be". Therefore, this practice of judicial legislation means that politicized judicial decision making is unavoidable.
[151] Supra note 131.
[152] ibid.

sign of independence, according to a legal realist, is not a judge characterized by a total lack of political affiliation and controversial thought, but rather a judge who is open and transparent in their opinions so that in the course of judicial elections at the state level, or when being appointed by the people's representatives on a federal level, the people know precisely who their judges are.[153]

Incidentally, despite the fact that American legal realism had not even been thought of at the time, Thomas Jefferson's concerns and hopes for the judiciary align with legal realist thought and directly influenced how his administration drafted the Judiciary Act of 1801. Jefferson described his fears of a judge who manipulates the law and Constitution in any way he desires"[154], recognizing that judges will act on their own intuitions to the facts of a case, not follow precisely what legal doctrine would have them decide. Jefferson attempted to comfort his intense distrust of the judiciary by writing that he:

> must comfort [himself] with the hop that judges will see the importance and the duty of giving…integrity in the administration of [their country's] laws, that is to say, by every one's giving his opinion seriatim and publicly on the cases he decides. Let him prove by his reasoning that he has read the papers…considered the case, that…he uses his own judgement independently and unbiased by party views, and personal favor or disfavor.[155]

C. American Judicial Review

In the US, the Supreme Court has the jurisdiction to declare any laws passed by Congress unconstitutional and to render the law null and void.[156] In the UK, the extent of judicial review allowed by the convention of Parliamentary sovereignty are only with regard to those laws potentially incompatible with EU legislation or ECHR conventions and the

[153] Supra note 123.
[154] Specifically, he described a judge that "sophisticates the law to his mind by the turn of his own reasoning" and warned that "the constitution…is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please" (Supra note 42).
[155] Supra note 42.
[156] Supra note 28.

extent to which the UK Supreme Court is allowed to act on incompatible laws is to issue "Declarations of Incompatibility" that only pass the duty on to Parliament to rectify the incompatibility.[157]

Judicial review in the US, however, has not always existed. It was not until the case *Marbury v Madison* that this duty was uncovered by Chief Justice Marshall. The significance of Marshall's opinion in this case has been memorialized in the decision of *Cooper v Aaron*:

> This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.[158]

The facts of the case have become legend in US legal and history studies when studying the formation of the country. Upon taking Presidential office, Thomas Jefferson ordered that the commissions for federal judgeships that have not been delivered as of his presidency be withheld. One of those commissions was for Marbury who took his grievance to the Supreme Court. However, when the Secretary of State, James Madison, who was ordered to withhold the commissions, received notice to appear, he not only declined to acknowledge the suit but refused to appear even through counsel. Three issues were now at play before the Court: first, was the Secretary of State answerable in court for the conduct of his office; second, could the Court revoke a presidential decision; third, by what means could any judicial decision on the matters be enforced? [159]

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[157] "Declaration of Incompatibility" (*Oxford Reference*) https://www.oxfordreference.com/view/10.1093/acref/9780199664924.001.0001/acref-9780199664924-e-1038.

[158] *Cooper v Aaron* [1958] 358 US 1.

[159] Alstyne W, "A Critical Guide to Marbury v Madison" (1969) 1969 Duke Law Journal 1; Marshall understood this to be a dangerous situation. Madison was Jefferson's Secretary of State and Jefferson was head of the Democratic Party while Marshall and Marbury were Federalists. Jefferson was almost certain to order Madison to stop the commission deliver even before he executed the action. If the Court ruled Madison to deliver the commission and he refused, the court had no power to enforce the decision and it would make the Court appear weak. If they did not act, it would still make the Court look weak out of fear that Madison would disregard their decision.

Chief Justice Marshall struck a middle-ground ruling: Marbury was entitled to his commission, but according to the Constitution, the Court did not have authority to require Madison to deliver the commission. However it did find that the Judiciary Act of 1789, which authorized the Supreme Court to "issue writs of mandamus…to persons holding office under the authority of the United States"[160] (through which the Supreme Court attempted to compel Madison to appear) was constitutionally incompatible because it gave the Supreme Court more authority than was given under the Constitution. The Court upheld the Constitution as "superior, paramount law" and ruled that when ordinary laws conflict with the Constitution, they must be struck down. The Court went further saying that it was the duty of judges to interpret laws and determine when they conflict with the Constitution, which itself gives the judicial branch the power to strike down laws passed by Congress.[161]

The power of judicial review was used most controversially in the following cases: *Brown v Board of Education*, when the Court threw out Jim Crow laws of the segregated south[162]; *Roe v Wade*, when the Court declared abortion under a Constitutional right to privacy, overturning many states' abortion bans[163]; and *Obergefell v Hodges*, when the Court threw out state-level bans on same-sex marriage, declaring the fundamental right to marry be guaranteed to all same-sex couples.[164] It is important to note that in *Brown v Board of Education*, six out of the nine justices were liberals, with one identifying as independent, in *Obergefell v Hodges*, four of the justices were democratic with two justices being of a moderate position allowing for the liberal majority, and in *Roe v Wade* five out of the nine justices were liberal.[165] These trends should not be surprising to anyone familiar with the

[160] Judiciary Act (1789).
[161] Supra note 28.
[162] Supra note 91.
[163] Supra note 92.
[164] Supra note 93.
[165] Supra note 112.

movement of legal realism. The justices in these cases were not necessarily concerned with what the law dogmatically and doctrinally said in accordance with the Constitution, but rather they seemingly reacted to their perceived fairness of the facts of the case and through their own intuitions and beliefs, created the outcomes that occurred. Because of this acceptance of a judge's personal prejudices, the US has created a system where the question of how a politicized appointments process can withstand judicial independence is irrelevant. It is precisely because of the openness of a judge's political learnings that it allows for, in a way, even greater judicial transparency. The powerful duty of judicial review in the US required a judge to act as a legislator; therefore, in order to properly act as a legislator, political affiliations are bound to arise when debating facts of a case and interpretations of a particular law. It is a much better thing that judges are required to be open and transparent in their political beliefs so that the public need not be surprised when a judge that's seemingly impartial and totally free of prejudices decides in a way that aligns with his personal political stance.

D. Parliamentary Sovereignty

The constitutional convention of Parliamentary Sovereignty in the UK, however, keeps the hands of the court firmly tied, so to speak, as to the extent of the judicial power the Supreme Court, and lower courts, are allowed. Parliamentary Sovereignty is the principle that makes Parliament the supreme legal authority in the UK and is considered "the most important part of the UK Constitution".[166]

However, particularly since the ruling in *Pepper v Hart* discussed above, the rise of judicial power throughout the common law world represents a departure from the constitutional tradition of the courts staying in their interpretive roles and wandering into

[166] "UK Parliament" (*UK Parliament*) https://www.parliament.uk/.

what some would describe as 'judicial activism'. Some would argue that this departure into judicial power and gradual changes to constitutional law and practice comprises "the rule of law, privilege[s] irresponsible law making, and undercut[s] democratic self-government" demanding these power be "wound back".[167] Those who share this view posit that the courts are not 'the guardians of the constitution'[168] and are "not responsible for the constitution's coherence or justice or for upholding constitutional norms in general".[169] Those who agree state that the commitment to Parliamentary sovereignty does not permit judicial review of legislation. While some commentators recognize the importance to "protest vehemently against [Parliament's] decisions", they maintain that the only body who should have any authority to set aside its decisions and challenge the justice of the law is Parliament alone.[170]

A large part of the blame for this departure from common law tradition is the decision of the UK to join the European Economic Community, now the European Union. However, in spite of the UK's decision to leave the EU, the UK remains, for now, a signatory to the European Convention on Human Rights and has already implemented the Conventions into the Human Rights Act 1998. This Act made European Convention rights accessible in domestic courts and the HRA further changed the kind of judicial reasoning that was required of domestic courts. As a result, "Acts of Parliament and executive actions are routinely questioned in the courts, including questions…that the common law constitutional tradition treated as non-justiciable".[171] So intense was this concern of an increasingly powerful

[167] Ekins R. Gee G. "Putting Judicial Power in its Place" (2017) 36 University of Queensland Law Journal 2.
[168] Hale, "The Supreme Court: Guardian of the Constitution" 2016.
[169] Supra note 151.
[170] ibid.
[171] ibid; they further note that the courts in the past few years have "revived a discourse of common law constitutional rights' as evidenced in the cases Osborn v Parole Board and Kennedy v Charity Commission and recognize it as either an attempt to "avoid neglecting the common law and to square rights adjudication with our legal history and tradition" or "more worryingly" an attempt to anticipate the HRA's possible repeal.

judiciary that the Judicial Power Project was formed to "put this right, aiming to engage judges, lawyers, academics, politicians, and others in public life in conversation"[172] with the intention that "over time this body of work will help to equip the political classes to exercise their responsibilities, and judges and lawyers to recognize the proper limits on judicial action."[173] Others, however, disagree with the notion that judicial power in the UK is getting out of hand.[174] They argue that judges have "a unique perspective on the law" citing adversarial proceedings as opposed to abstract questions of policy and legislative choice as reasons for why "the judge is uniquely positioned to effect change, incremental and historically rooted, but nonetheless genuinely creative, which draws upon the insights of this perspective."[175] In short, when drafting legislation, Parliament has only abstract ideas of policy to draw upon; judges see those laws in action, observing the true effects and application and so is better equipped to effect change to ensure a fair and just society.

Nonetheless, the positivist undertones of the teachings of Hart and Bentham can be heard throughout these debates. Bentham, famously, was vocal about his warning of the dangers of judicial power with the heart of his criticisms being a concern of unelected and unaccountable officials making law for people[176]. While not as vocal as Bentham about the dangers of judicial power, Hart's positivist thoughts suggest that all the tools required by a judge to make a decision has already been given by Parliament and the only time a judge is permitted to wander into a law-making capacity is when the law absolutely fails to cover the facts of a case at hand, recalling the House of Lords decision in *Pepper v Hart*.

[172] ibid.
[173] ibid.
[174] ibid; Admittedly, those that disagree are primarily judges and lawyers themselves.
[175] T. Adams, "The Politics of Judicial Power" (2015) UK Constitutional Law Blog.
[176] Jain S, "Importance of Judicial Law Making: Perspectives of Bentham & Austin" [2013] SSRN Electronic Journal.

Conclusion

The doctrine of judicial independence has stood the test of time as an indisputable pillar of democratic society, irrespective of the form of the system that upholds it. Without it, the erosion of public trust that is beginning with the dissemination of untrustworthy information and a diminishing faith in their institutions will run unchecked. This dissertation strives to demonstrate that there is no universal approach to judicial appointments systems and to the implementation of judicial independence. Each system is tailored to each nation's unique constitutional conventions to ensure an impartial and independent judiciary.

Legal realism tells Americans that judges hardly look to laws and then to the facts, but rather they look to the facts and then look to the law. Combine this thought with the power of judicial review that is entrusted in the judiciary, and a system is created that does not shy away from judges having vocal political opinions, but instead demands it. The politicized system is a logical way to ensure that those in charge of deciding the validity of a certain law or policy do not cause shock when their personal beliefs inevitably lead them to decide in a certain way. Politically compatible appointments are simply a natural consequence of this system and the politically charged dissection that occurs in the Senate confirmation hearings is the way in which the true colors of a judge are exposed to the people so there are no surprises. In a system where judges hold such legislative power, it is in the interest of judicial transparency and independence that they are vocal about their personal beliefs. To delude the public that judges are apolitical creatures with absolutely no prejudice or bias when they are confronted with a case is, in a sense, to totally tarnish judicial integrity and erode public trust.

The system in the UK, however, demands from the beginning that judges stay on the bench and not wander into the legislative sphere. There is no reason for judges to have political leanings and no reason for the appointments process to contain any politics

whatsoever because their duties do not require political thought. Parliament, in its supreme capacity, has already provided justices with everything required to come to a just decision. Even in the rare cases in which a judge might be permitted to encroach upon a legislative role, the courts are heavily restricted by judicial precedent and philosophical teachings and accompanying criticisms when judges get too eager. The reforms of 2005 were tailored for the UK's unique system in which Parliament reigns supreme. Removing entirely the executive component ensures that the case of Sir John Wood will not be repeated in that the judiciary will not be externally pressured to step outside of their legal duty to interpret according to Parliament's wishes and so incidentally curb any latent desires to put on the legislative or executive hat.

In spite of all the philosophical musings and bureaucratic checks, the discussions above and those resounding the world over mean nothing if a judge himself does not uphold the principle every time he sets foot in the courtroom. As Lord Ackner recalled the words of the Lord President of the Federal Court of Malaysia, Tun Mohamed Suffian, "…while governments publicly endorse the principle [of judicial independence], some quietly work to undermine it and it behooves judges of the world to be on their guard against the erosion of their independence".[177]

[177] Supra note 63.

Bibliography

A v Secretary of State for the Home Department (2004) UKHL 56 (2005) 2 AC 68

ABA "Follow Up Report on the ABA Commission on Separation of Powers and judicial Independence: An Independent Judiciary" (1998)

Abraham, H *Justices and Presidents: A Political history of Appointments to the Supreme Court* (New York: Oxford) 1974

Ackner, "The Erosion of Judicial Independence" (1996) 146 The New Law Journal

Alstyne W, "A Critical Guide to Marbury v Madison" (1969) 1969 Duke Law Journal 1

Appellate Jurisdiction Act 1875

Beatson J, "Hart Judicial Review Conference" (December 12, 2014)

"Bill of Rights Institute" (*Bill of Rights Institute*) <https://billofrightsinstitute.org/>

Birkenhead FES, *Points of View* (Books for Libraries Press 1970)

Brown v Board of Education of Topeka [1954] 347 U.S. 483

Browning A, *English Historical Documents, 1660 - 1713* (A Browning, Eyre & S Pottiswoode 1953)

Burbank S, *Conference, Fair and Independent Courts: a Conference on the State of the Judiciary ; Symposium, the Law of Politics: the Role of Law in Advancing Democracy* (Georgetown Law Journal Association 2007)

Calabresi G "Symposium on Judicial Independence" Yale Law School (2004)

Clarke, C Interview with Riddel M, "The New Statesman" (September 26, 2005) http://newstatesman.com/node/151599

Cohen F, "Transcendental Nonsense and the Functional Approach" (1935) Columbia Law Review 809

Constitutional Reform Act 2005, Sections 25-31, Schedule 8

Cooper N, "Report of the ABA Commission on Separation of Powers and Judicial Independence: An Independent Judiciary" (1997)

Cooper v Aaron [1958] 358 US 1

Cox A, "The Independence of the Judiciary: History and Purposes" (1996) 585 University of Daytona Law Review 545

Dean T, 'Judges In The Dock: The Inside Story Of The Battle For Britain's Courts' (*Prospectmagazine.co.uk*, 2020) https://www.prospectmagazine.co.uk/magazine/judges-in-the-dock-battle-britain-courts-boris-johnson-prorogation-supreme-court-hale-miller-constitution

"Declaration of Incompatibility" (*Oxford Reference*) <https://www.oxfordreference.com/view/10.1093/acref/9780199664924.001.0001/acref-9780199664924-e-1038>

Dicey, A.V. *The Law of the Constitution* (1885)

Dickens C, *A Tale Of Two Cities* (IDG Books Worldwide 2000)

Dinh Viet D, *Threats to Judicial Independence, Real and Imagined* (Georgetown Law Journal Association 2007)

Eisgruber CL, *The next Justice: Repairing the Supreme Court Appointments Process* (Princeton University Press 2010)

Ekins R. Gee G. "Putting Judicial Power in its Place" (2017) 36 University of Queensland Law Journal 2

"FAQs: Federal Judges" (*United States Courts*) https://www.uscourts.gov/faqs-federal-judges

(*Federal Judicial Center*) http://fjc.gov/judges

Gauch JE, "The Intended Role of the Senate in Supreme Court Appointments" (1989) 56 The University of Chicago Law Review 337

Gearey A, Morrison W and Jago R, *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (Routledge 2013)

Gideon v Wainwright [1963] 372 US 335

Green L and Adams T, "Legal Positivism" (*Stanford Encyclopedia of Philosophy* December 17, 2019) http://plato.stanford.edu/entries/legal-positivism/

Hale, "The Supreme Court: Guardian of the Constitution" 2016

Hamilton A, The Federalist No. 78 (Clinton Rossiter) 1999

Hanretty C, "The Appointment of Judges by Ministers" (2015) 3 Journal of Law and Courts 305

Hart HLA, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review 584

Hart HLA, *The Concept of Law* (Oxford University Press 2012)

Hodge P, 'Preserving Judicial Independence In An Age Of Populism' (North Strathclyde Sheriffdom Conference, Paisely, 2018)

Holmes OW, "The Path of the Law" (1897) 10 Harvard Law Review 457 ; this is a common sentiment to both realists and positivists

Hostettler J, *Sir Edward Coke: A Force For Freedom* (Barry Rose Law Publishers 1997)

Jain S, "Importance of Judicial Law Making: Perspectives of Bentham & Austin" [2013] SSRN Electronic Journal

Jefferson T and Kaminski JP, *The Quotable Jefferson* (Princeton University Press 2006)

'Judicial Appointments Commission' (*GOV.UK*, 2020) <https://judicialappointments.digital/>

Judicial Executive Board, *Guidance to Judges on Appearances Before Select Committees* (2012)

Judiciary Act (1789)

Justice Brown (1911); citing Miller J in United States v Holiday, 3 Wall (US) 407 (1865)

King CD, "Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts" (2007) 90 Marquette Law Review

Le Sueur, Andrew "Developing Mechanisms for Judicial Accountability in the UK" (2004) 24 Leg Stud 73.

Leiter B, "American Legal Realism" in W Edmundson and M Goldings (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2003)

Leiter B, "Positivism, Formalism, Realism" (1999) Columbia Law Review 99

"Letter from James Madison to Caleb Wallace," , *The Writings of James Madison, comprising his Public Papers and his Private Correspondence, including his numerous letters and documents now for the first time printed,* vol 9 (GP Putnam's Sons 1900)

Llewellyn KN, "Some Realism about Realism: Responding to Dean Pound" (1931) 44 Harvard Law Review 1222

"Lord Chancellor Derry Irvine Blair Breaks Silence" (*The Guardian* November 1, 2009) <http://theguardian.com/politicis/2009/nov/01/derry-irvine-blair-lord-chancellor>

Lord Hodge, "North Strathclyde Sherrifdom Conference" (23 November 2018)

Madeira E, "The ABA Has Had a Long Commitment to Judicial Independence, but How Should It Meet New Challenges?" (*ABA Journal*) http://abajournal.com/news/article/the_abas_long_commitment_to_protecting_judicial_independence

Mapp v Ohio [1961] 367 US 643

Marbury v Madison [1803] 5 US 137

McCluskey M, "Ruth Bader Ginsburg's Supporters Are Offering Her Their Ribs" (*Time* November 8, 2018) https://time.com/5449074/ruth-bader-ginsburg-broken-ribs/

Miranda v Arizona [1966] 384 US 436

Montesquieu Clde S, Neumann FL and Nugent T, *The Spirit of the Laws* (Hafner Publishing Company 1949)

Nicholson J, "7th Congress, 1st Session" (1802)

O'Brien P, "John Crook: The Abolition of the Lord Chancellor" (*The Constitution Unit Blog* February 22, 2016) <http://constitution-unit.com/2013/06/20/john-crook-the-abolition-of-the-lord-chancellor>

O'Neill O, "BBC Reith Lectures" (2002) http://bbc.co.uk/radio4/reith2002/3.html

O'Brien D, *Storm Center: The Supreme Court in American Politics* (WW Norton 2020)

O'Brien P, *Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press 2015)

Pepper (Inspector of Taxes) v Hart [1992] UKHL 3

Philips N, 'Judicial Independence And Accountability: A View From The Supreme Court' (UCL Constitution Unit, 2011) Launch of Research Project on the Politics of Judicial Independence

Philips N, “The Politics of Judicial Independence” (February 8, 2011)

Pittman C, 'The Emancipated Judiciary In America: Its Colonial And Constitutional History' (1951) 37 American Bar Association Journal

Powe LA, “Justice Douglas after Fifty Years: The First Amendment, McCarthyism and Rights” (1989) 6 Constitutional Commission

R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5

R (on the application of Spath Holme ltd) v Secretary of State for the Environment, Transport and the Region [2000] UKHL 61

Raban O, “The Supreme Court’s Endorsement of a Politicized Judiciary: A Philosophical Critique” (2007) 8 Journal of Law in Society 1

Rakove J, 'The Original Justifications For Judicial Independence', *Fair and Independent Courts* (2006)

Renne v Geary [1991] 501 US 312, 349

*Republican Party of Minnesota v Whi*te [2002] 536 US 765

Roe v Wade [1973] 410 US 113

Rozenberg J, *Trial of Strength: the Battle between Ministers and Judges over Who Makes the Law* (Richard Cohen 1998)

Ruger T, “Justice Harry Blackman and the Phenomenon of Judicial Preference Change” (2005) 70 Missouri Law Review

Scherer N, *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process* (Stanford University Press 2005)

Shetreet S, *Judges on Trial* (North-Holland Pub Co 1976)

Stevens R, *The High Court – Guide for Applicant* (Application for Appointment As Justice of the High Court, the Lord Chancellor’s Department) 2000

Stevens R, *The Independence of the Judiciary: the View from the Lord Chancellors Office* (Clarendon Press 1997)

Steyn, “Neill Lecture” (March 1, 2002)

Supreme Court of Judicature (Consolidation) Act 1873

Supreme Court of Judicature Act 1873

T. Adams, “The Politics of Judicial Power” (2015) UK Constitutional Law Blog

“The Magna Carta Project” (*Magna Carta Project - 1215 Magna Carta - Clause 40*) <http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_40>

Thomas J, “Institute for Government” (December 1, 2014)

Thompson K, “Miller Commission Report on the Commission on the Selection of Federal Judges” (1996)

“UK Parliament” (*UK Parliament*) <https://www.parliament.uk/>

Warren, Charles “New Light on the History of the Federal Judiciary Act of 1789. Harvard Law Review, Vol. 37, No. 1 (Nov 1923) pp 49-132

Watson G and Stookey JA, *Shaping America: the Politics of Supreme Court Appointments* (Harper Collins 1995)

Woodhouse, Diana. “The Constitutional and Political Implications of a United Kingdom Supreme Court (2004) 24 Legal Stud. 134

Zhan H, *The process of appointment of judges in some foreign countries: The United Kingdom* 2000 (The Process of Appointment of Judges in Some Foreign Countries)