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COMMENTARY

NONPROMOTION AND JUDICIAL INDEPENDENCE

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I. INTRODUCTION

Life tenure is probably the most important guardian of judicial independence. A policy of not promoting judges can also contribute to judicial independence: Judges who know that they are unlikely to be promoted lack the incentive to curry favor with those who could appoint them to more powerful, more prestigious, or more lucrative posts.

The relationship between promotion and judicial independence has been studied most carefully by Mark Ramseyer and Eric Rasmusen in the context of the Japanese judiciary.¹ They show that the Japanese government used control over promotion to punish judges who declared unconstitutional a key electoral law or who belonged to a left-wing organization. Closer to home, Mark Cohen has demonstrated the danger of promotion in modern America by showing that federal judges who were more likely to

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1. See J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J.L. ECON. & ORG. 259 (1997).

be promoted tended to impose harsher penalties in antitrust cases and were more likely to uphold the constitutionality of the Sentencing Guidelines.²

This Article examines the relationship between promotion and judicial independence both in eighteenth-century England and in the American federal judiciary. Promotion was very uncommon in eighteenth-century England, and contemporaries regarded nonpromotion as a safeguard of judicial independence. In contrast, promotion has been relatively common in the twentieth-century American federal judiciary. Nevertheless, because of the pyramidal structure of the federal judiciary, the typical judge's chance of promotion is so low that it is unlikely that desire for promotion affects the decisions of more than a handful of judges.

Although nonpromotion contributes to judicial independence, promotion also has its benefits. The prospect of advancement can give judges incentives to work hard and judge wisely. In addition, staffing the appellate judiciary with those of proven judicial ability can enhance the quality of appellate judges. Thus, whereas nonpromotion is a valuable instrument for the enhancement of judicial independence, an absolute policy against promotion is probably inadvisable.

II. THE EIGHTEENTH-CENTURY ENGLISH JUDICIARY

A. STRUCTURE OF THE ENGLISH JUDICIARY

The historical part of this Article focuses on three categories of judges in eighteenth-century England: the judges of the courts of Common Pleas and King's Bench, justices of the peace, and jurors.

The judges of Common Pleas and King's Bench adjudicated most of England's more important legal disputes. Their precedents constituted the common law. Each court had a single chief justice and three puisne (nonchief) judges. Although appointment of common law judges was a royal prerogative, in practice the Chancellor appointed the puisne judges, and the Prime Minister appointed the chief justices and the Chancellor.³ In 1701, Parliament gave these justices tenure during good behavior. Until

2. See Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 192-95 (1991). Cohen's results have recently been confirmed and elaborated by Gregory B. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1487-93 (1998).

3. See JOHN H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 192 (3d ed. 1990); DANIEL DUMAN, *THE JUDICIAL BENCH IN ENGLAND 1727-1875*, at 78 (1982).

1760, however, the judgeships terminated automatically on the monarch's death.⁴

Justices of the peace were all-purpose administrators of local government. At any given time, several thousand justices were commissioned, although less than a dozen in each county did most of the work.⁵ Among the justices' responsibilities were examination of felony suspects and summary adjudication of less serious offenses. Like judges of Common Pleas and King's Bench, justices of the peace were appointed by the Chancellor. Justices of the peace never received life tenure. They could be dismissed by the Chancellor, although dismissal was rare.⁶

Jurors in eighteenth-century England, like those in modern America, were judges of fact in common law disputes.⁷ As such, it is appropriate to consider them in analyzing judicial independence. During this period, only males who owned property could serve as jurors. Jurors were selected by the sheriff.

In addition to these three categories—King's Bench and Common Pleas judges, justices of the peace, and jurors—there were many other judges in eighteenth-century England. The most important was the Chancellor, who presided over the Court of Chancery, England's most important court of equity. Other judges included the barons of the Exchequer, recorders (judges of borough courts), a judge of the Court of Admiralty, and a Master of the Rolls (an assistant to the Chancellor).⁸ Although the independence of these judges (or lack thereof) is worthy of study, in the interest of brevity, the historical portion of this Article discusses only the King's Bench and Common Pleas judges, justices of the peace, and jurors.

The eighteenth-century English judiciary is generally thought to have been relatively independent.⁹ That independence is vividly illustrated by the several cases arising from the government's attempt to punish John

4. See BAKER, *supra* note 3, at 192.

5. See J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND: 1660-1800*, at 60-61 (1986); JOHN P. DAWSON, *A HISTORY OF LAW JUDGES* 142 (1960).

6. See NORMA LANDAU, *THE JUSTICES OF THE PEACE, 1679-1760*, at 127-28 (1984).

7. This is, of course, a gross simplification of jurors' role. For a more complex and complete discussion, see THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800* (1985).

8. See DUMAN, *supra* note 3, at 17-25.

9. See BAKER, *supra* note 3, at 190; David Lemmings, *The Independence of the Judiciary in Eighteenth-Century England*, in *THE LIFE OF THE LAW* 148-49 (Peter Birks ed. 1993). While Lemmings is more skeptical of the independence of the judiciary than Baker, even he acknowledges the dearth of criticism of the judiciary and the absence of evidence to refute Baker's assessment that "the tradition of judicial independence was strong enough to prevail over party [or pro-government] sentiments once the patent was sealed." *Id.* at 148 (quoting BAKER, *supra* note 3, at 193).

Wilkes for the publication of the anti-government paper, *North Briton*, number 45. In these cases, both King's Bench and Common Pleas determined that the warrants used to arrest Wilkes and seize his papers were illegal, and juries awarded him huge damages.¹⁰

Nevertheless, the independence of the judiciary should not be exaggerated. The eighteenth-century English judiciary, unlike its modern American counterpart, was not a separate branch of government and did not claim the power of judicial review. The judges of King's Bench and Common Pleas were usually selected from among those who had proved their loyalty through service as attorney or solicitor general, king's or queen's counsel or sergeant, or similar positions in governmental service. Thus, even without the threat of dismissal or the prospect of promotion, they could usually be counted upon to be sympathetic to the government's perspective.¹¹ The King and his ministers occasionally tried to pressure the judges into favorable decisions.¹² The Chancellor, who headed England's powerful equity court, never received life tenure and was a member of the cabinet, an officer of state, and a minister of the crown. The judges of King's Bench and Common Pleas received fixed salaries set by Parliament, but there were no institutional arrangements for pensions. Pensions were granted by the king on a judge-by-judge basis, which gave the king a lever to influence the judiciary.¹³ Although this Article deals exclusively with independence from those wielding executive and legislative power, it should be noted that threats to an individual judge's independence could and did take other forms, including pressure by powerful non-governmental actors. In addition, the independence of jurors was tempered by the ability of judges to comment on the evidence, instruct on the law, force jurors to give reasons for their verdicts, and order new trials.¹⁴

10. See 10 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 659-61 (1938); 2 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 814-22 (1992).

11. See Lemmings, *supra* note 9, at 125. See generally Laura Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699 (1995).

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

13. See DUMAN, *supra* note 3, at 121-22, 124-25; 10 JOHN CHRISTOPHER SAINTY, *THE JUDGES OF ENGLAND, 1272-1990: A LIST OF JUDGES OF THE SUPERIOR COURTS* 21, 58 (1993).

14. See John Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263, 284-300 (1978); John Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1190-93 (1996).

B. NONPROMOTION IN THE EIGHTEENTH-CENTURY ENGLISH JUDICIARY

Nonpromotion was the norm in the eighteenth-century English judiciary. Jurors certainly had no reason to believe they would be “promoted” to justices of the peace, and justices of the peace were very seldom promoted to King’s Bench or Common Pleas. In fact, since justices of the peace were seldom lawyers, they were ineligible for promotion. Perhaps most surprisingly, the chief justices of the courts of King’s Bench and Common Pleas were usually selected from those without prior experience as puisne justices of those courts. Indeed, less than a third of chief justices appointed during the eighteenth century had previously served as puisne justices.¹⁵ As a result, the probability that any puisne judge would be promoted to chief justice was just under ten percent.

Contemporaries recognized nonpromotion as contributing to judicial independence. Thus, promotion from puisne judge to chief justice, called “translation,” provoked strong opposition. Members of the legal profession as well as nonlegal observers feared “that a judge who held one of the lower judicial positions might try to secure his rise to a higher position by putting his office at the disposal of the government, thereby gaining ministerial favor.”¹⁶ Similarly, there was opposition to a provision in the London and Westminster Police Bill of 1785 which would have allowed senior barristers to try criminal cases. It was feared that such temporary judges would be biased towards conviction in order to please the government, because pleasing the government might facilitate promotion to a life-tenured, common-law judgeship or to a prestigious legal post, such as attorney general. The Police Bill was rejected, in part, because “[t]he creation of such ‘occasional Judges’ was held incompatible with the Constitution and contrary to the interests of the accused, who might be tried by persons who ‘would have everything to hope for from the Crown.’”¹⁷

15. This somewhat higher percentage was calculated using the information in SAINTY, *supra* note 13. Duman calculated a promotion rate of almost 50%. His figure differs because he used a broader definition of promotion, included the Lord Chancellor, and surveyed a different time period. See DUMAN, *supra* note 3, at 91.

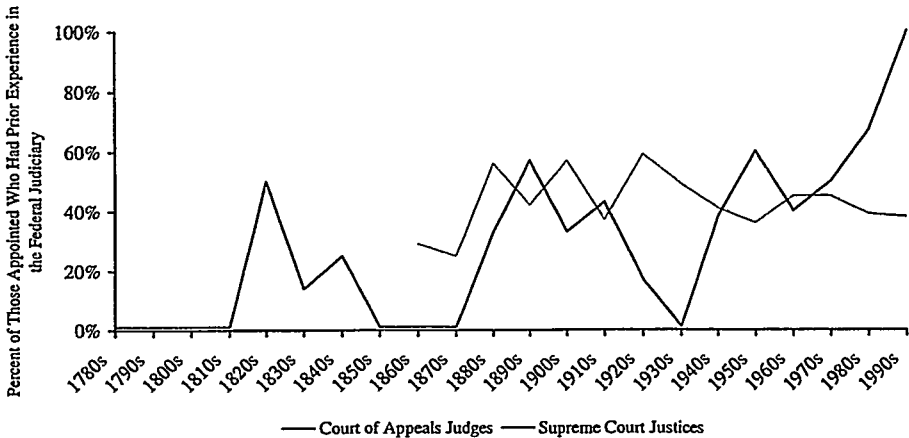
16. DUMAN, *supra* note 3, at 91.

17. 3 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 119 (1957) (quoting Lord Beauchamp and Alderman Newnham’s comments in Parliamentary debate).

III. NONPROMOTION IN THE U.S. FEDERAL JUDICIARY

Promotion of federal judges is common and, for the Supreme Court, becoming increasingly so, as the figure below makes clear.¹⁸

FIGURE 1. PROMOTION IN THE FEDERAL JUDICIARY, 1789-1996



Promotion of federal district court judges to court of appeals judgeships has been common for the last hundred years. During most of this period, between forty and sixty percent of those appointed to the courts of appeals had previously served as federal district court judges. Although some commentators have reported a trend towards increased frequency of promotion,¹⁹ promotion in the 1980s and 1990s has been relatively uncommon by American standards at thirty-eight percent. The most dramatic change has been in appointments to the U.S. Supreme Court. Al-

18. Supreme Court statistics were calculated using *ALMANAC OF THE FEDERAL JUDICIARY* (Susan Alexander ed. 1999) and *THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS & ITS JUSTICES 1790-1991* (1992). The Federal Judicial Center generously provided me with the information with which to calculate the statistics on federal court of appeals judges from 1891 to the present. Statistics on court of appeals (more accurately circuit court) judges from 1869 to 1891 are based on lists of judges in *THE FEDERAL REPORTER* and on the lists and biographies in *BICENTENNIAL COMMITTEE OF THE JUDICIAL CONFERENCE OF THE U.S., JUDGES OF THE UNITED STATES* (1978).

19. See RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 20 (1996); Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 *JUDICATURE* 254, 268 tbl.6 (1997). Posner, Goldman, and Elliot note an increase because they look at promotion from the state as well as the federal judiciary. Promotion from state to federal judgeships would affect the independence of the state courts, not the federal, and so is not included in the analysis here.

though there has been considerable variation, until 1940 it was rare for more than forty percent of Supreme Court justices to have been promoted from a federal court of appeals or district court. Since 1940, however, the percentage has never been below forty percent and has steadily increased to one-hundred percent in the 1990s. Only two justices currently on the Court—Justice O'Connor and Chief Justice Rehnquist—did not hold federal judgeships before their elevation. In a similar vein, it is interesting to note that half of eight U.S. Supreme Court chief justices appointed in the twentieth century served first as associate justices. In contrast, only one chief justice from the eighteenth or nineteenth century (John Rutledge) was an associate justice first. Compared to the eighteenth-century English judiciary, promotion has been common in the U.S. federal courts.²⁰

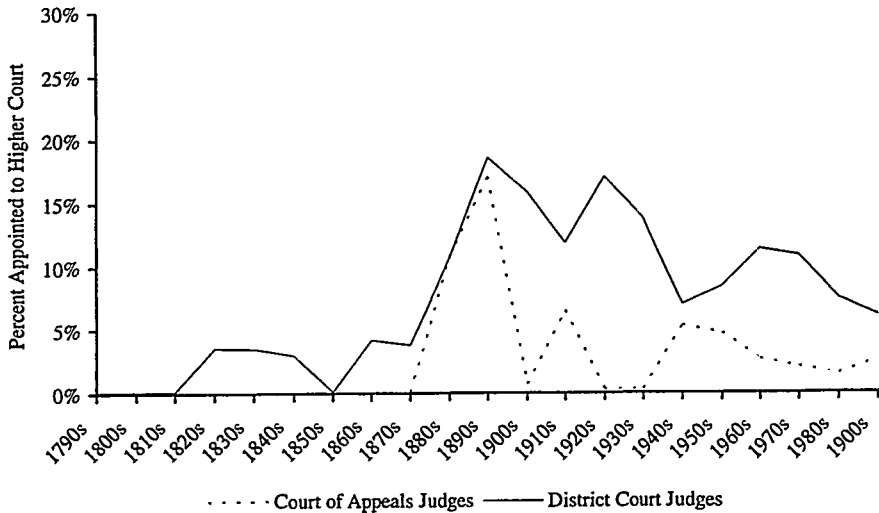
On the other hand, while promotion has been common, the probability of promotion has been relatively low because of the pyramidal structure of the federal judiciary. There are more than 150 federal appellate judges. As a result, even though every Supreme Court justice appointed in the 1990s had previously served as a court of appeals judge, the chance that any particular appellate judge would be promoted during that period was less than three percent. Similarly, because there are nearly four times as many district court judges as there are court of appeals judges, the probability that a district court judge serving during the 1990s would be promoted to the court of appeals was only six percent. The figure below charts the changing probability of promotion.²¹

20. In addition to these external threats to judicial independence, the practice of allowing federal district court judges to sit "by designation" on appellate panels at the discretion of the chief judge, a form of temporary promotion, might undermine the independence of federal district court judges, an independence already substantially controlled by hierarchical notions of precedent. See 28 U.S.C. § 292 (1998).

21. The probability that a court of appeals judge would be promoted was calculated by counting the number of court of appeals judges promoted to the Supreme Court in a particular decade and dividing that number by the average number of court of appeals judges serving during that decade. The probability that a district court judge would be promoted was calculated in a similar fashion, taking into account that district court judges could be promoted both to the court of appeals and to the Supreme Court. These probabilities represent the likelihood that a judge who served for the entirety of a particular decade would be promoted during that decade. A judge who served for more than a decade would, of course, have a higher probability of promotion, while a judge who served less than an entire decade would have a lower probability of promotion. The average number of district court and court of appeals judges from 1789 to 1994 was calculated using data from POSNER, *supra* note 19, at 394-98 tbl.A.3. For 1995 to 1998, the numbers were based on the lists of judges in the September volumes of federal case reports.

These numbers take into account only promotion within the federal judiciary. Federal judges sometimes resigned their positions to accept other positions in the government, such as solicitor general or ambassador to the United Nations. The prospect of such "promotions," like promotion within the judiciary, can compromise independence. The infrequency of such promotions (37 in the entire history of the federal judiciary and 25 in the first 92 years of this century), however, makes them rela-

FIGURE 2. PROBABILITY OF PROMOTION IN THE FEDERAL JUDICIARY, 1789-1998



Promotion was extremely uncommon until the late nineteenth century. The creation of the federal courts of appeals in the late nineteenth century coincided with a marked increase in promotion, perhaps because it simultaneously opened up a new court to which district court judges could be promoted as well as one from which Supreme Court justices could be selected. The surge in promotion, however, was relatively short lived, and by the 1940s, the probability of promotion had declined to more modest levels. The dramatic turn to filling Supreme Court vacancies with former court of appeals judges (charted in Figure 1) has had no real impact on the probability that a court of appeals judge would be promoted because the number of court of appeals judges has more than doubled in the last forty years.

Although it is not in Figure 2, the probability of promotion from associate justice to chief justice of the Supreme Court has increased from less than two percent in the period 1789-1899 to almost seven percent in the twentieth century. Even the seven-percent probability for this century, however, is lower than the ten-percent probability that an eighteenth-century English puisne justice of King's Bench or Common Pleas would be promoted to chief justice. The probability of promotion in this country has been lower in spite of the fact that half of the chief justices appointed

tively unimportant. See Emily Field van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PA. L. REV. 333, 351-52 n.67 (1993).

in the last hundred years had previously served as associate justices. In contrast, only a third of eighteenth-century English chief justices had previously served as puisne justices. This apparent anomaly results from the fact that there are eight associate justices on the U.S. Supreme Court, while there were only three puisne judges in King's Bench and Common Pleas.

Is the level of promotion in the federal courts a danger to judicial independence? Anecdotal evidence suggests that the possibility of promotion does influence judicial behavior.²² Lawyers are often heard to say that a particular ruling reflects the fact that the judge is "gunning for the circuit" or hoping to be elevated to the Supreme Court. While the average probability of promotion is relatively low, particular judges may perceive it as higher. Certain judges are often discussed as especially promising candidates for promotion, and for them the prospect of advancement may compromise their independence. On the other hand, the fact that the prospect of promotion is concentrated in a few judges means that, for the vast majority, promotion is highly improbable.

22. For some documentation of the anecdotal evidence, see Cohen, *supra* note 2, at 188-89. See also RICHARD POSNER, *OVERCOMING LAW* 111-12 (1995).

