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Controversial Judicial Decisions and Security of Tenure: Reflections on *Trump v United States*, the *Miller* Litigation, and the Attempt to Remove Sir John Donaldson in the 1970s

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1. This article will consider controversial judicial decisions and the protection afforded to judges when there are political attempts to remove them from office. The independence of the judiciary is essential in a modern democracy. As Victoria Prentice KC, the former Attorney General observed, 'an independent judiciary ensures that government exercises its powers in accordance with the law'.[1] In 2018 Lord Hodge warned about the dangers to judicial independence as a result of populism, and opined that '[j]udicial independence is a critical component of the concept of the rule of law'.[2] Yet controversial decisions by the judiciary, even if legitimately decided on constitutional and legal principles, may risk weakening judicial independence if those who dislike a decision suggest (or carry out) a reform to the judicial appointment process, or seek to dismiss a judge. Lord Hodge was critical of those who wished to develop US-style confirmation hearings for judges on the basis that judges make decisions that might be controversial: '[j]udicial decisions which have political consequences are not the same as political decisions'.[3] We cannot take the political and social circumstances that support the conditions for judicial independence for granted. The United States of America offers a warning to other western democracies of how declining public confidence and the conduct of the bench can undermine the independence of the judiciary. The article will begin by considering the fall-out of the US Supreme Court's decision in *Trump v United States*[4] and the threat to impeach those judges who expand the immunity from criminal prosecution for former Presidents. It will contrast this with the earlier academic and political reaction to *Bush v Gore*[5] before then considering how the British constitution protects senior judges from those who would

[1]'Attorney General delivers speech on the Rule of Law', Attorney General's Office, 10 July 2023 <https://www.gov.uk/government/news/attorney-general-delivers-speech-on-the-rule-of-law#:~:text=The%20rule%20of%20law%20is,to%20courts%20that%20are%20independent> accessed 15 August 2024 .
[2]Lord Hodge, 'Preserving judicial independence in an age of populism', North Strathclyde Sheriffdom Conference, 23 November 2018, [7] <https://www.supremecourt.uk/docs/speech-181123.pdf> accessed 15 August 2024.
[3]ibid [49].
[4]The decision is available at <https://www.supremecourt.gov/opinions/23pdf/23-939_e2pg.pdf> accessed 15 August 2024.
[5]531 US 98 (2000).

sanction them for reaching an unpopular decision. As part of the discussion on the UK the article will explore controversial Supreme Court decisions such as *R (Miller) v Secretary of State for Exiting the European Union (No 1)*[6] and the circumstances surrounding the last attempt to remove a senior judge, Sir John Donaldson in 1973, using the mechanism established by the Act of Settlement 1701. The *Miller* cases demonstrate the consequences of a populist reaction to judicial decisions that those in power disagree with, even if the judges (despite the efforts of some newspapers) could not be said to be biased. The Sir John Donaldson controversy in the 1970s demonstrates what can happen where a judge is regarded by a large number of politicians as biased.

Trump, Bush and Gore

2. The recent US Supreme Court's decision in *Trump v United States*[7] is controversial. The opinion of the Court was that a former President was entitled to absolute immunity for acts that they committed that were to be regarded as official acts of the President. This meant that a former President was immune from criminal prosecution if it could be shown that the acts were 'within his conclusive and preclusive constitutional authority'. In the present case this meant that former President Donald J Trump had immunity in relation to his official acts during the attack on the US Capitol Building on 6 January 2021. In her dissenting opinion Associate Justice Jackson warned that, '[t]o the extent that the majority's new accountability paradigm allows Presidents to evade punishment for their criminal acts while in office, the seeds of absolute power for Presidents have been planted. And, without a doubt, absolute power corrupts absolutely'.[8] Associate Justice Sotomayor ended her dissent by saying, '[w]ith fear for our democracy, I dissent'.[9] Seeking to present the dissenting opinions as misguided, Chief Justice Roberts who delivered the majority opinion argued that, '[a]s for the dissents, they strike a tone of chilling doom that is wholly disproportionate to what the Court actually does today'.[10] Notwithstanding the notoriety of Trump and the shock of what happened on 6 January 2021, the decision offered a controversial immunity to all future Presidents once they had left office.

3. Unpopular decisions result in scrutiny of those judges who made the decision, however they are appointed, and whether there is a case for sanction. The sanctioning of judges is a form of accountability; often the legislature exercises its constitutional right to review the conduct of judges and determine whether there are grounds to remove the judge. Accountability is vital to safeguard against abuse or misuse of power and underpins the rationale for a separation of powers with checks and balances. There is however scope for tension between accountability and judicial

[6][2017] UKSC 5.
[7]The decision is available at <https://www.supremecourt.gov/opinions/23pdf/23-939_e2pg.pdf> accessed 15 August 2024.
[8]ibid 20.
[9]ibid 30.
[10]ibid 37.

independence, a point commented upon by Mark Tushnet, as enhanced accountability could perhaps lead to less independence.[11]

4. The UK is itself no stranger to unpopular and controversial judicial decisions. Although this is inherently subjective and decisions such as *R (Miller) v Secretary of State for Exiting the European Union (No 1)*[12] and *R (Miller) v The Prime Minster (No 2)*,[13] which have been criticised, have also received considerable support. The first instance decision in *Miller (No 1)*[14] saw the High Court branded the 'Enemies of the People' by the *Daily Mail*,[15] and the decision is cited as a dangerous example of the misuse of judicial power.[16] British judges can be removed from office, although senior judges enjoy security of tenure during their good behaviour and can only be removed by an address to the Crown by both Houses of Parliament. No judge has been removed this way since Sir Jonah Barrington in 1830, who was the only judge ever removed in this manner.[17] It is important to note that the decisions of British judges do still come under scrutiny by Parliament. Andrew Le Sueur offers a number of examples in his 2013 chapter on the judiciary and parliamentary accountability.[18]

5. The 2000 decision in *Bush v Gore*[19] is a prime example of where the US Supreme Court's decision is criticised on the basis of judicial politics. The issue at stake in *Bush v Gore* was whether to allow a recount in a district in Florida, which if permitted to go ahead many believed would have seen the Democratic Candidate for President, Al Gore, win Florida's electoral college votes and thus win the general election. The Supreme Court's decision prevented a recount and therefore the Republican Candidate, George W Bush, became President. All of those judges in the majority who prevented a recount were appointed by Republican presidents; conversely those judges who had supported a recount had either been appointed by Democratic presidents or were regarded as liberal. As Stephen P Nicholson and Robert H Howard observed, '[t]he decision fell along ideological, and to some

[11]Mark Tushnet, 'Judicial Accountability in Comparative Perspective' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013) 60.
[12][2017] UKSC 5.
[13][2019] UKSC 41.
[14]*R (Miller) v Secretary of State for Exiting the European Union (No 1)* [2016] EWHC 2768 (Admin).
[15]James Slack, 'Enemies of the people: Fury over "out of touch" judges who have "declared war on democracy" by defying 17.4m Brexit voters and who could trigger a constitutional crisis' *The Daily Mail* (3 November 2016) <https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> accessed 15 August 2024.
[16]See Policy Exchange and in particular the Judicial Power Project <https://judicialpowerproject.org.uk/> accessed 15 August 2024.
[17]For commentary on the dismissal of Sir Jonah Barrington and the wider context see Patrick O'Brien, 'When Judges Misbehave: The Strange Case of Jonah Barrington' (*UK Const L Blog*, 7 March 2013) <https://ukconstitutionallaw.org/2013/03/07/patrick-obrien-when-judges-misbehave-the-strange-case-of-jonah-barrington/> accessed 15 August 2024; Chris Monaghan, 'The Nineteenth Century and Beyond: The Existence of the Threat of Impeachment' in Chris Monaghan and Matthew Flinders (eds), *British Origins and American Practice of Impeachment* (Routledge 2024); and Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (Cambridge University Press 2013).
[18]See Andrew Le Sueur, 'Parliamentary Accountability and the Judicial System' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013).
[19]531 US 98 (2000).

degree, partisan lines'.[20] The majority in *Bush v Gore* sought to demonstrate their role within the constitution and how the choice of President was not a matter for the judges:

> None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.[21]

6. The dissenting Justices underscored the significance of the majority's decision: 'the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent – and are therefore legal votes under state law – but were for some reason rejected by ballot-counting machines.'[22] The dissenting Justices warned that the risk was that now:

> [t]he endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law … One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.[23]

7. Academics were critical of the majority's decision in *Bush v Gore*. For example, Akhil Reed Amar argued that '[b]y stopping the vote count in Florida, the U.S. Supreme Court used its power to act as political partisans, not judges of a court of law . . . [T]he conservative justices moved to avoid the "threat" that Americans might learn that in the recount, Gore got more votes than Bush … '[24] Erwin Chemerinsky offered a rebuttal of this view, opining:

> I believe, however, that the role of politics was more subtle and more profound. In other words, it was not that the five Justices in the majority set out to make sure that Bush became President, and the four dissenters acted to make sure that Gore was President. I truly believe that each of the nine Justices deeply believed that he or she was making a ruling on the law, not on partisan grounds. But how each saw the case was entirely a product of the Justices' biases and views.[25]

8. Chemerinsky was clear that the Justices, notwithstanding not consciously setting out to make their candidate win the White House, were exercising their discretion as judges using 'life experiences, values, and ideology'.[26] However, Stephen P Nicholson

[20]Stephen P Nicholson and Robert M Howard, 'Framing Support for the Supreme Court in the Aftermath of *Bush v Gore*' (2003) 65(3) *The Journal of Politics* 676, 680.
[21]531 US 98 (2000) 111.
[22]ibid 127 (Justice Stevens, Justice Ginsburg and Justice Breyer).
[23]ibid 128–129.
[24]Akhil Reed Amar, 'Bush, Gore, Florida, and the Constitution' (2009) 61(5) *Florida Law Review* 945, 947.
[25]Erwin Chemerinsky, 'The meaning of Bush v. Gore: Thoughts on Professor Amar's Analysis' (2009) 61 *Florida Law Review* 969, 978.
[26]ibid 970.

and Robert M Howard provided a view on how many would perceive the decision: '*Bush v. Gore* was not simply a matter of law versus politics: it effectively ended the 2000 presidential election, and some critics framed the decision as nothing less than stealing the election.'[27] Akhil Reed Amar is critical of the Supreme Court and viewed the Court as usurping the role of Congress in determining the outcome of the election where there was a dispute, noting that the Court 'inappropriately inserted itself at the expense of the legislature which took upon itself to resolve various issues that were properly Congress' to decide as the body tasked by the U.S. Constitution with the counting of electoral votes and the resolution of electoral-vote disputes'.[28] Criticising the decision Laurence H Tribe argued that '[t]here is thus a strong connection between the veritable culture shock set off by the Supreme Court's intervention in the presidential election of 2000 and the proper characterization of the Court's action as a violation of the implicit "political process" doctrine that has governed our national life without much interruption from the outset'.[29] There is a danger now that because of the decreased legitimacy of the Supreme Court, the Court will no longer be seen as a legitimate forum to decide disputes about elections, which could, 'lead to violence and insurrection'.[30] Despite the controversy concerning *Bush v Gore*, 'the court enjoyed more robust legitimacy among the public than it does today' and people generally accepted the decision and this ensured 'a peaceful transition of power. There was no violent riot; there was no open resistance'.[31]

9. Over 20 years later this lack of legitimacy in the wake of *Trump v United States* resulted in Congresswoman Alexandria Ocasio-Cortez responding to the decision by threatening to impeach those members of the court who had found for Trump, stating: '[t]he Supreme Court has become consumed by a corruption crisis beyond its control. Today's ruling represents an assault on American democracy. It is up to Congress to defend our nation from this authoritarian capture. I intend on filing articles of impeachment upon our return.'[32] This was described in the media as 'a political long shot'.[33]

10. Federal judges can be impeached by the House of Representatives. Under Article III of the US Constitution the judges 'shall hold their Offices during good Behaviour'. This reflects the position under British law, with the Act of Settlement 1701 stating that, 'judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may

[27]Nicholson and Howard (n 20) 680.
[28]Reed Amar (n 24) 960.
[29]Laurence H Tribe, 'The Unbearable Wrongness of Bush V. Gore' (2002) 19 *Constitutional Commentary* 571, 601–602.
[30]Matthew Hall and Joseph Daniel Ura, 'Loss of Supreme Court legitimacy can lead to political violence' *The Conversation* (1 July 2024) <https://theconversation.com/loss-of-supreme-court-legitimacy-can-lead-to-political-violence-233316> accessed 15 August 2024.
[31]ibid.
[32]Posted on 1 July 2024 <https://x.com/AOC>. See also <https://thehill.com/homenews/house/4750034-ocasio-cortez-impeachment-articles-supreme-court-justices-trump-immunity/> accessed 15 August 2024.
[33]See <https://abcnews.go.com/Politics/democrats-call-action-supreme-court-after-trump-immunity/story?id=111613633#:~:text=Has%20a%20Supreme%20Court%20justice,How%20would%20it%20work%3F&text=The%20U.S.%20Supreme%20Court%20ruling,conservative%20members%20of%20the%20court> accessed 15 August 2024.

be lawful to remove them'. In order to bring about an impeachment, the Democrats, presuming that there was a consensus to impeach those justices, would require a bare majority of those voting in the House of Representatives to pass Articles of Impeachment. As of July 2024, the Republican Party were the majority party in the House of Representatives, holding six more seats than the Democratic Party. Based on the presumption that none of the Republican representatives would support the impeachment, any attempt to bring about an impeachment would fail.[34] This however might be irrelevant if the Democrats gained a majority in the November 2024 House of Representatives election.

11. In the US (at a federal level) impeachment has been used far more to proceed against the judiciary than the President.[35] As with the impeachment of a President, the impeachment of a judge would only require a bare majority of those present in the House of Representatives to vote to impeach, and would then require the support of a two-thirds majority of those present in the Senate to convict the judge and remove them from office. It is important to note that the two-thirds majority in the Senate is outlined in the Constitution and applies to a vote to remove an individual from office, whereas the Senate's practice has been to only require a bare majority for the decision as to whether to disqualify the individual (who has been removed) from holding office again in the future. As Frank O Bowman, III observes:

> [i]mpeachment has been employed against presidents only rarely and, as a rule, only against extraordinarily deviant characters or in periods of particular national turmoil. Impeachments of judges have been far more common and have customarily been matters of governmental housekeeping – evicting gravely deficient judicial officers otherwise unremovable because of their constitutional tenure of service 'during good behavior'.[36]

Fifteen federal judges have been impeached, with eight judges convicted, the most recent of those being G Thomas Porteous JR, a federal judge for the US District Court for the Eastern District of Louisiana. Porteous was convicted and removed in 2010.[37] He had been accused of inter alia corruption and misleading the Senate when he was confirmed as a judge. The use of impeachment against judges was for the most part apolitical, as Bowman argues '[n]one of these cases were observably partisan-political in character'.[38]

[34]Very few people ever vote against a President from their own party; the first Senator to do so was Senator Mitt Romney in 2019. More members of Trump's own party voted to impeach him in the House of Representatives, with ten Republican members of Congress voting to impeach Trump in 2021. *The Washington Post* called the 2021 impeachment vote 'the most bipartisan vote in history'. See Aaron Blake, 'Trump's second impeachment is the most bipartisan one in history' *The Washington Post* (13 January 2021) <https://www.washingtonpost.com/politics/2021/01/13/trumps-second-impeachment-is-most-bipartisan-one-history/> accessed 15 August 2024.

[35]See 'Judges and Judicial Administration – Journalist's Guide', United States Courts <https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide#:~:text=As%20of%20September%202017%2C%20only,the%20Federal%20Judicial%20Center's%20website> accessed 15 August 2024.

[36]Frank O Bowman III, 'Impeachment in the United States' in Chris Monaghan, Matthew Flinders and Aziz Huq (eds), *Impeachment in a Global Context: Law, Politics, and Comparative Practice* (Routledge 2024) 132.

[37]Jennifer Steinhauer, 'Senate, for Just the 8th Time, Votes to Oust a Federal Judge' *The New York Times* (8 December 2010) <https://www.nytimes.com/2010/12/09/us/politics/09judge.html> accessed 15 August 2024.

[38]Bowman (n 36) 144.

12. To date, none of the three Presidents to be impeached (with Donald Trump having been impeached twice) has been convicted by the Senate. The reason for this is the requirement of a two-thirds majority in the Senate to convict, which means that the bar is lower to bring an impeachment in the House of Representatives (a bare majority of those voting) than to secure a conviction in the Senate.[39] The only impeachment that would have probably secured a conviction was that of President Nixon, whereby there was a significant cross-party consensus for the impeachment, with the result that a conviction was not necessarily an impossibility.[40] This was a crucial factor in Nixon's decision to resign (before he was impeached) the Presidency and secure a pardon from his successor, President Gerald Ford. The fact that no Presidents have been removed from office raises the question whether presidential impeachment is useless. As Jack N Rakove notes, '[t]he paradox of presidential impeachment, then, is that while it is concerned with the unique responsibility of a single official, its use depends on the existence of a sense of collective institutional responsibility that now seems wholly infeasible and politically unattainable'.[41] Rakove viewed the key problem with impeachment as the '"weaponization" of impeachment', which meant that it was now 'a tool that an opposition party can deploy opportunistically whenever it controls the House'.[42] However, Brian C Kalt emphasises the fundamental benefit of impeachment in placing restraint on Presidents, as 'without impeachment, presidents would be more easily able to abuse their powers to get themselves re-elected, and get sympathetic cronies elected to succeed them'.[43] The key thing was not whether Presidents were removed, but that impeachment acted as a restraint, as 'every president has been constrained by the possibility of impeachment and removal'.[44]

13. The first case of impeachment being used against a federal judge was that of John Pickering who was removed in 1803. Pickering's impeachment was on the basis of his mental health and drinking and the Republicans voted to convict, whilst the Federalists (who Pickering was one) voted to acquit. The allegations against Pickering were valid (and conceded by Pickering's son), but impeachment meant that the votes for and against removing Pickering were political in the sense that the votes were purely on party lines.[45] In terms of the bigger political picture the impeachment and conviction of Pickering was a result of the Republican party trying to destroy the

[39]See Article I of the US Constitution.
[40]Bowman (n 36) 148 argues that '[Nixon's] forced resignation should be considered a success of the impeachment mechanism'.
[41]Jack N Rakove, 'Impeachment, Responsibility and Constitutional Failure: From Watergate to January 6' in Chris Monaghan and Matthew Flinders (eds), *British Origins and American Practice of Impeachment* (Routledge 2024) 236.
[42]ibid 237.
[43]Brian C Kalt, 'Parallel Evolution: American Impeachment and the Two-Party System' in Chris Monaghan and Matthew Flinders (eds), *British Origins and American Practice of Impeachment* (Routledge 2024) 204.
[44]ibid 203.
[45]According to Michael J Gerhardt, '[Pickering's] son filed a petition arguing that Pickering was so ill and deranged that he was incapable of exercising any kind of judgment or transacting any business and that he should therefore not be removed from office for misconduct attributable to insanity': Michael J Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (2nd edn, The University of Chicago Press 2000) 50.

Federalists, who were the opposition party in Congress, but who still had support in the judiciary.[46] This was followed by the impeachment of Associate Justice Samuel Chase in 1804.[47] Chase was acquitted by the Senate, and this was the last time an Associate Justice of the Supreme Court was impeached.[48]

14. Other federal judges have been impeached and removed from office. The acquittal of Chase did not mean that other Justices of the Supreme Court would not be threatened with impeachment by those politicians who disagreed with their decisions. Such an example was Chief Justice Earl Warren who faced an orchestrated attempt to have him removed from the Supreme Court. This attempt relied on rallying public support, and central to this were the billboards that were erected across America in 1961 with the message, 'Save our Republic: Impeach Earl Warren'. These billboards were paid for by the conservative John Birch Society.[49] As David E Kyvig noted, whilst there were some who sought the impeachment of Earl Warren, '[m]ost Americans … found the notion bewildering'.[50] Warren was an advocate of equal protection and anti-discrimination, which was controversial in the 1950s and 60s.[51] The call to impeach Warren did not appear to impact the Supreme Court's decision-making, but as David E Kyvig argues it 'brought back [impeachment] into public consciousness … An almost forgotten constitutional term was once again being publicly discussed'.[52] Another Associate Justice of the Supreme Court who faced calls to be impeached was William O Douglas. Despite never being impeached, Douglas did see his work on the Supreme Court restricted, such as being prevented from writing the majority opinion in *Roe v Wade*.[53] This led Kyvig to observe that 'the constitutional process for removing a judge from the bench need not be successful to be influential'.[54] This chimes with Kalt's assessment of the value of presidential impeachment serving as a deterrent and safety break.[55]

British judges and security of tenure

15. From a British perspective it would have been unthinkable for Conservative MPs after the success of the party in the December 2019 general election to have called for the removal of a UK Supreme Court Justice because of the unanimous decision in *Miller (No 2)*. What public discontent there was, was expressed briefly about looking at how judges were appointed.[56] Controversially, when Sajid Javid, the then Secretary of

[46]Peter Charles Hoffer and NEH Hull, *Impeachment in America, 1635–1805* (Yale University Press 1984) 206–208.
[47]For commentary, see Peter Charles Hoffer and NEH Hull, *Impeachment in America, 1635–1805* (Yale University Press 1984).
[48]Hoffer and Hull (ibid) 254 note that despite his acquittal, Chase 'never again dashed off a vitriolic political charge for a grand jury or used a courtroom as a forum for his politics'.
[49]David E Kyvig, *The Age of Impeachment: American Constitutional Culture since 1960* (University Press of Kansas 2008) 36.
[50]ibid 36.
[51]ibid 38–39.
[52]ibid 59.
[53]410 US 113 (1973). Kyvig (n 48) 111.
[54]Kyvig (n 48) 112.
[55]Kalt (n 42) 203.
[56]See Jack Simson Caird who observed, '[i]n the aftermath of the Miller 2/Cherry judgment, delivered on 24 September 2019, the Supreme Court has come under attack for making a "political" intervention. This had led to some calls for political

State for Housing, Communities and Local Government, was asked on BBC Question Time whether 'the high court judgment flew in the face of democracy', he replied that 'Yes, it does … This is an attempt to frustrate the will of the British people, and it is unacceptable'.[57] In response, Lord Patten, a former Conservative Cabinet minister, said that Javid should be dismissed by the Prime Minister for his comments.[58] However, reflecting on the criticism of the High Court, Graham Gee observed that 'what is noteworthy about *Miller* is how no ministers and only a sprinkling of MPs have criticized the High Court. In this respect, I do not regard Sajid Javid's clumsy answer on the BBC's *Question Time* programme on the evening that the Miller judgment was released as anything near an inappropriate ministerial comment on a judicial decision'.[59]

16. *Miller (No 2)* was controversial, as evidenced by Boris Johnson name-checking Baroness Hale of Richmond in his last speech to the House of Commons as Prime Minister: '[w]ith iron determination we saw off Brenda Hale and we got Brexit done'.[60] This conduct and open hostility towards the former President of the Supreme Court was exceptional in its constitutional impropriety and was a reflection of how the courts and Baroness Hale could be presented as hostile malign forces. Offering a reflection on how some judicial decisions could result in criticism, Lord Hodge noted that 'some have given rise to political debate. Such tensions are unavoidable in a healthy democratic system and show that the system of the separation of powers is working'.[61]

17. The security of tenure for senior judges is an important part of the UK's constitution. Security of tenure was first protected by statute in the Act of Settlement 1701. This ensured that judges would enjoy security of tenure during their good behaviour. The security of tenure provision is now set out in the Senior Courts Act 1981 (for senior judges)[62] and the Constitutional Reform Act 2005 (for Supreme Court Justices).[63] The purpose of the tenure provisions in the Act of Settlement 1701 was to

supervision of judicial appointments on the basis that the Supreme Court is now a "political player"': Jack Simson Caird, 'Miller 2, the Supreme Court and the politics of constitutional interpretation' *Counsel Magazine* (21 October 2019) <https://www.counselmagazine.co.uk/articles/miller-2-the-supreme-court-and-the-politics-of-constitutional-interpretation> accessed 15 August 2024. See also Chris Monaghan and Josie Welsh, 'Questions of Control: Accountability in the Shadow of Prorogation' in Matthew Flinders and Chris Monaghan (eds), *Questions of Accountability: Prerogatives, Power and Politics* (Hart Publishing 2023). There was similar criticism of the High Court's decision in *Miller (No 1)*. See Sir Jeffrey Jowell, 'Miller and the duties of the LC' *Counsel Magazine* (20 December 2016) <https://www.counselmagazine.co.uk/articles/miller-and-the-duties-of-the-lc> accessed 15 August 2024.

[57]Daniel Boffey, 'Brexit lawyers confront Liz Truss over "dangerous" abuse of judges' *The Guardian* (6 November 2016) <https://www.theguardian.com/politics/2016/nov/05/lawyers-war-liz-truss-over-abuse-judges-brexit-barristers> accessed 15 August 2024.

[58]Tom Peck, 'Lord Patten: Sajid Javid should have been sacked' *Independent* (6 November 2016) <https://www.independent.co.uk/news/lord-patten-sajid-javid-should-have-been-sacked-a7400801.html> accessed 15 August 2024.

[59]Graham Gee, 'A Tale of Two Constitutional Duties: Liz Truss, Lady Hale, and Miller' (*Policy Exchange*, 28 November 2016) <https://policyexchange.org.uk/blogs/a-tale-of-two-constitutional-duties-liz-truss-lady-hale-and-miller/> accessed 15 August 2024.

[60]HC Deb 18 July 2022, vol 718, col 726.

[61]Patrick S Hodge, 'The scope of judicial law-making in constitutional law and public law' [2021] JR 146, 176.

[62]Section 11 states that, '[a] person appointed to an office to which this section applies shall hold that office during good behaviour, subject to a power of removal by Her Majesty on an address presented to Her by both Houses of Parliament'.

[63]Section 33 states that, '[a] judge of the Supreme Court holds that office during good behaviour, but may be removed from it on the address of both Houses of Parliament'.

prevent the monarch from appointing and removing judges at their pleasure. Traditionally most judges had been appointed subject to the monarch's pleasure which gave the monarch the right to dismiss those judges who fell out of royal favour. This reflected the position of judges as the monarch's servants and part of the executive administration of the country. Prior to the Act of Settlement 1701, monarchs did dismiss judges at their pleasure, with Charles II and James II exercising this right on a regular basis.[64] Their grandfather, James I, had notably dismissed Sir Edward Coke as Chief Justice of the King's Bench in 1616.[65] Senior judges can nowadays be dismissed, but it requires both Houses of Parliament to make an address to the Crown.

18. Security of tenure is vital for judicial independence. The independence of the judiciary is a fundamental principle of the constitution. The Act of Settlement secured this independence whereas judges could not be dismissed at the discretion of the king, even if in reality they continued to play a role in politics and government. This was not the separation of powers, but rather the balance of powers within a mixed system of government. Such was the importance placed on judicial independence and impartiality, that it has been the judicial branch in its relations to the legislature and the executive that has come closest to the idea of the separation of powers. In *R (on behalf of Anderson) v Secretary of State for the Home Department*[66] Lord Steyn observed that, '[o]ur constitution has, however, never embraced a rigid doctrine of separation of powers. The relationship between the legislature and the executive is close. On the other hand, the separation of powers between the judiciary and the legislative and executive branches of government is a strong principle of our system of government'.[67] This had its origins in the early eighteenth century, as HT Dickinson described the constitutional arrangements as 'a complicated system of checks and balances. It preserved the privileges of the crown, aristocracy and people, while seeking to secure a harmonious relationship between all three'.[68] Dickinson referred to this as a 'delicate balance and this constitutional equilibrium'.[69] In the mid eighteenth century the British approach was to 'eagerly [embrace] Montesquieu's emphasis on "the power of the judging"' and to enlarge its scope beyond 'the English jury and circuit assizes' to mean 'judicial power'.[70] Such a writer was Sir William Blackstone who used Montesquieu as the basis to accommodate 'already well-rehearsed precepts concerning the importance of independent courts and

[64]See Henry Brooke, 'The History of Judicial Independence in England and Wales', 3 November 2014 <https://sirhenrybrooke.me/2015/11/03/the-history-of-judicial-independence-in-england-and-wales/> accessed 15 August 2024.
[65]See John Baker, *The Reinvention of Magna Carta 1216–1616* (Cambridge University Press 2017), specifically chapter 10, 'A Year "Consecrate to Justice": 1616'.
[66][2002] UKHL 46.
[67]ibid [39]. See however to some extent the changes brought about by the Constitutional Reform Act 2005, although the Act has primarily strengthened the separation of the judiciary from the two others branches.
[68]HT Dickinson, 'The British Constitution' in HT Dickinson (ed), *A Companion to Eighteenth-Century Britain* (Blackwell Publishing 2006) 7.
[69]ibid.
[70]David Lieberman, 'The mixed constitution and common law' in Mark Goldie and Robert Wokler (eds), *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge University Press 2016) 334.

impartial judicial decision-making to English liberty'.[71] Today the importance of the independence of the judiciary is reflected in art 6 of the European Convention on Human Rights and the various academic iterations of the rule of law.[72] Even Lord Hewart LCJ, who had himself been criticised by the Court of Appeal in *Hobbs v Tinling Co Ltd*[73] for not giving a defendant a fair trial (as well as being regarded as a 'bad judge'),[74] was clear in *R v Sussex Justices ex p McCarthy*[75] that it 'is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[76]

Criticism of Sir John Donaldson

19. In 1973 Sir John Donaldson faced a parliamentary campaign to have him removed. The attempt by a large number of MPs to remove Donaldson using the mechanism set out in the Act of Settlement is of significance given the value placed on the independence of the judiciary. The Industrial Relations Act 1971, which was introduced by Edward Heath's Conservative government, established the National Industrial Relations Court. Sir John Donaldson was appointed to become the judge who would sit on the court. According to Simon Lee, '[a]t the [National Industrial Relations Court] Donaldson decided repeatedly against trade unions, culminating in a stand-off with the engineering workers union, ordering sequestration of £75,000 of funds for contempt of court'.[77] Donaldson's Obituary in the *Independent* was sympathetic and emphasised the personal cost of the criticism to his career:

> Although he was a Conservative, his judicial work at the [National Industrial Relations Court] did not necessarily betray this, but his career paid the price for it during the subsequent Labour government. In a rare example of political influence in judicial appointments, he had to watch colleagues of lesser ability promoted above him, even though, ironically, his record on civil liberties issues was considered liberal and understanding.[78]

20. Donaldson had been frequently criticised in Parliament. One example was on 11 June 1973 when Mr Heffer MP declared that it 'is a political court with a political judge who is interfering in political matters'.[79] In response the Attorney General declared, '[i]t is not a political court and Sir John is not a political judge. It is grossly unfair of the hon. Member to accuse Sir John Donaldson in that way'.[80]

[71]ibid 335.
[72]One of the best accounts is Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004). See also Tom Bingham who argued, 'A truly independent judiciary is one of the strongest safeguards against executive lawlessness': Tom Bingham, *The Rule of Law* (Allen Lane 2010) 25.
[73][1929] 1 KB 1.
[74]Graeme Williams QC, *A Short Book of Bad Judges* (Wildy, Simmonds and Hill Publishing 2013).
[75][1924] 1 KB 256.
[76]ibid 259.
[77]Simon Lee, 'Lord Donaldson of Lymington' *The Guardian* (3 September 2005) <https://www.theguardian.com/news/2005/sep/03/guardianobituaries.obituaries> accessed 15 August 2024.
[78]'Lord Donaldson of Lymington' *Independent* (3 September 2005).
[79]HC Deb 11 June 1973, vol 857, col 990.
[80]HC Deb 11 June 1973, vol 857, col 990.

21. Matters came to a head when on 6 December 1973 Mr David Watkins introduced an early day motion and sought to have it debated in the House of Commons: '[m]ay I ask the Leader of the House whether he will find time next week for a debate on Early Day Motion No. 49, which has now been signed by 187 [MPs]? Also, may I make the point to him, quite squarely, that [we] … have no intention of withdrawing it until such time as the subject matter has been resolved by a decision of this House?'[81] The early day motion stated:

> That a Select Committee be appointed to consider the presentation of an humble Address to the Crown praying for the dismissal of Sir John Donaldson, High Court judge and President of the National Industrial Relations Court, by reason of his Court's action in sequestrating £75,000 from the political fund of the engineering section of the Amalgamated Union of Engineering Workers, which is the fund as laid down by section 3, subsection (3) of the Trade Union Act 1913, and not the fund used for the day-to-day operation of the Union, and thereby ensuring that the punishment was solely inflicted on the Union's political activities, namely, support given to the Labour Party and financial assistance rendered to the constituency parties of the Members of Parliament who are also members of that union for their election campaigns and routine organisation, because, if Sir John Donaldson was not aware of this action, he is guilty of gross negligence and incompetence and if he was aware then it was an act of political prejudice and partiality.[82]

In response, the Leader of the House of Commons, Mr Prior stated, 'No, Sir, I cannot find time for that debate'.

22. On 10 December 1973 the Speaker of the House of Commons held that the motion could not be debated because the Orders of the Day had precedence. In response Mr Orme MP said:

> … 187 Members signed the motion because we believed that this matter should be debated in the House. We shall not remove the motion from the Order Paper. I should like to ask you, Mr. Speaker, to advise us whether there is any other means whereby we can bring the matter before the House. In the interests of common justice, having made charges against a High Court judge and knowing the seriousness of that, we believe that Sir John Donaldson and other people who have opinions should be allowed to defend themselves and to make their own representations. This is the high court of Parliament; this is the highest court of the land in this regard. I therefore ask for your guidance, Mr. Speaker, whether there is some other manner by which we can bring this matter before the House.[83]

23. The controversy surrounding Donaldson continued to be discussed in 1974 by senior figures within the government.[84] Donaldson was criticised in May 1974 by the Secretary of State for Employment, Michael Foot. On 16 May 1974 the Prime Minister's

[81]HC Deb 6 December 1973, vol 865, col 1460.
[82]HC Deb 6 December 1973, vol 865, cols 1460–1461.
[83]HC Deb 10 December 1973, vol 866, col 43.
[84]All documents cited below are available at the National Archives. I am grateful for the help afforded by staff at the National Archives during my visit in April 2024. The reference is 'Complaint about Sir John Donaldson, President of the National Industrial Relations Court', LCO 2/8165.

Principal Private Secretary, Robert Temple Armstrong, wrote to the Lord Chancellor's Office, in response to the Lord Chancellor's meeting with the Prime Minister, Harold Wilson, earlier that morning. The Lord Chancellor had 'reported to the Prime Minister the disquiet expressed to him by the Lord Chief Justice about the remarks made by the Secretary of State for Employment about Sir John Donaldson in particular and the judiciary in general'.[85] The Secretary of State for Employment, Michael Foot, had described Donaldson as having a 'trigger-happy judicial finger' during a parliamentary debate on the Trade Union and Labour Relations Bill.[86] The letter is telling as the Prime Minister was on the one hand seeking to assure the Lord Chief Justice, Lord Widgery, that '[t]he Prime Minister had no wish to upset the delicate relationship between Parliament and the Judiciary, and accepted that the remarks made by the Secretary of State for Employment had gone further than he would have wished'.[87] But on the other hand, the Prime Minister was extremely critical of Sir John Donaldson: 'the previous Government had made a mistake in appointing as the Judge in the Industrial Relations Court a Judge with declared political allegiance to the Conservative Party; and the conduct and some of the speeches of the Judge himself had verged on the injudicious as well as the unjudicial.'[88] In response, Denis Dobson, on behalf of the Lord Chancellor's Office, wrote on 17 May 1974 that, '[t]he Lord Chancellor thinks it would be useful for the Prime Minister to be aware of these facts because there appears to be a widespread misunderstanding in some quarters about the nature and extent of Sir John's political background'.[89] The *New Law Journal* in its editorial of 16 May 1974 was critical of Foot's comments, observing that '[i]t can only serve to undermine further confidence in the independence of the judiciary and the proper separation of the Executive and the Judiciary'.[90]

24. Sir John Donaldson continued to be publicly criticised and issued a personal statement to the press:

> Judges administer the law. In occasion it is their duty to draw attention to the consequences of the law. But they do not seek to change it. That is for Parliament. They do not support or oppose changes in the law. For centuries it has been the Constitutional Convention that Parliament does not interfere with the judges in the discharge of their duties … It would be most unfortunate if that convention were broken.[91]

25. After the abolition of the National Industrial Relations Court, Sir John Donaldson continued to be vocal about the conduct of those who ignored the law in pursuit of their own agenda. On 23 October 1974 the *Daily Telegraph* reported on a speech that Donaldson gave on 'Respect for the Law'.[92] Donaldson was quoted as saying, '[t]he

[85]Robert Temple Armstrong to Denis Dobson, 16 May 1974.
[86]'Judging the Judge' (1974) 124 *The New Law Journal*.
[87]Robert Temple Armstrong to Denis Dobson, 16 May 1974.
[88]ibid.
[89]Denis Dobson to Robert Temple Armstrong, 17 May 1974.
[90]'Judging the Judge' (1974) 124 *The New Law Journal*.
[91]*Daily Mail* (23 May 1974) and *Daily Express* (23 May 1974).
[92]Robert Parker, 'Power Groups who Break the Law "Ruin Democracy"' *Daily Telegraph* (23 October 1974).

British way of life, and the rule of law, are not falling apart, he said. They are a little frayed at the edges and under strain by three types of groups of people'. In his speech Donaldson gave an example of how these three groups of people negatively affected the rule of law. Pointing to one of the groups, Donaldson criticised and caricaturised the view of a hypothetical member of that group: 'I am a member of a democratically run group. The group has democratically decided that it cannot accept a particular law. Whilst I am a law-abiding citizen, the policy of the group prevents my complying with the law.' The following day Sir John Donaldson wrote to Sir Denis Dobson in the Lord Chancellor's Office about the Employment Protection Bill and sought to put forward his views to the Department of Employment. Donaldson noted that there had been a breakdown of relations between himself and the Department. He asked, '[w]ould it be possible for the Lord Chancellor to make my position clear to the Secretary of State and for diplomatic relations to be resumed?'[93]

26. Reflecting on the abolition of the National Industrial Relations Court, *The Observer* declared that the 'court degenerated into a political football that caused Lord Denning to say recently that the rule of law was in greater danger now than it had been for some hundreds of years'.[94] In 1975 Sir John Donaldson delivered a lecture at Durham University in which he defended the National Industrial Relations Court and argued that '[a] political campaign had been directed at the Industrial Relations Act and at the Court. The involvement of the court in this campaign was both unfair and unfortunate'.[95]

Conclusion

27. Given the importance of judicial independence it is imperative that judges should not be criticised by those in power and removed because politicians disagree with a judge's decision. For their part a judge must ensure that they undertake their judicial duties in a manner that does not undermine the public's confidence in the independence and impartiality of the judiciary. The UK's constitution safeguards judicial independence and restricts the ability of the government to dismiss a judge. The mechanism first established in the Act of Settlement 1701 creates security of tenure by empowering Parliament with the removal of judges (via an address by both Houses to the Crown), and not the government. In recent times the closest to a judge being removed by an address by both Houses of Parliament was Sir John Donaldson, who had fallen foul of the parliamentary Labour party for his perceived bias as a judge. To his supporters this was unfair, threatened judicial independence and the operation of constitutional norms. However, to his critics Donaldson was deserving of critique. It is doubtful that Donaldson would ever have been removed under the Act of Settlement 1701, but this incident offers an example of the perils that exist for members of the judiciary.

[93]Sir John Donaldson to Sir Denis Dobson, 23 October 1974.
[94]'Legal dilemma' *The Observer* (29 December 1974).
[95]'Donaldson pleads for strike victims' *The Observer* (2 February 1975).

28. The UK's strong tradition of judicial independence acts as a safeguard to judges. Compared to the US where impeachment is the mechanism to remove federal judges (this mode of removal has been deployed on 15 occasions) the UK has only removed one judge using the mechanism set out in the Act of Settlement 1701. Decisions such as *Trump v United States* are controversial and with the Supreme Court's declining legitimacy in the eyes of many Americans it is not unlikely that in due course a Justice of the Supreme Court is impeached (the first since Associate Justice Chase) and removed from office. The situation in the US is caused in large part by the appointment process which means that a federal judge is automatically associated with the politics of the President who nominated them. This meant that decisions such as *Bush v Gore* were always going to be viewed by critics of the Court as a political decision. With *Trump v United States* such a perception of the Court as driven by politics (rightly or wrongly) was held by many observers from the outset and such a perception will give credence to the calls to impeach judges. Finally, in the UK, despite the controversy surrounding *Miller (No 1)* and *Miller (No 2)* it is inconceivable that an address would be made by both Houses of Parliament to remove a judge.

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