Address to Boalt Hall School of Law, University of California at Berkeley, February 26, 1979, by Chief Judge Frank M. Coffin of the U. S. Court of Appeals for the First Circuit

The Three Branches: Accountability in a Mixed System

Exactly twenty-five years ago this month I was a young lawyer with an office over a shoe store in a textile mill town of 40,000 and litigating partner in my state's largest law firm -- boasting a dozen lawyers. More particularly, although I did not know it, I was on the verge of a climb on the tree of government that would let me swing from all three branches.

In that distant February I held the dubious honor of being chairman of the platform committee of a moribund minority political party. In March I found myself not only a member of that party's state committee but its chairman. In September, after an exciting campaign, I found myself in the delightful if awkward position of being chairman of a party whose candidate, Edmund S. Muskie, had just been elected governor. Two years later found me testing the waters as a candidate for Congress. They proved as hospitable to me as to my friend. Then followed four years in the Congress, five years in the executive branch, principally as Deputy Administrator of the Agency for International Development and 13-1/2 years on the First Circuit Court of Appeals.

In the course of these years I have often reflected on the wide variations of life and work experienced in the three constitutionally charted fields of endeavor. The catalogue of differences includes extent and nature of power exercised; pace and pressure of daily activity; visibility and public image; peer relationships and audience feedback; breadth of focus and extent of staff resources; the qualities and disciplines of mind and spirit demanded; rewards and frustrations. The list could go on.

What I propose is that we explore what I call, to borrow from Darwin, "constitutional selection -- the origin of species"; and that we then try to see how each branch achieves legitimacy -- or accountability -- within our unique, asymmetrical, and eclectic form of government.

To begin, then, the Darwin-Wallace theory of natural selection explained variations in the forms of life by the effect of ruthless competition for the means of existence, allowing only the fittest to survive. In our political life the engine of variation has been the Constitution.

The three great structural Articles begin with the simplest of sentences: "All legislative Powers herein granted shall be vested in a Congress. . . . ; the executive Power shall be vested in a President. . . . ; the judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." These words were the fruits of a major act of creation, the political analogue of the astronomers' "Big Bang" that set off the universe. The idea of putting a people's charter on paper was new. The idea of dividing the powers of government into these three parts was new. The idea of an elected president (who, as far as the Constitution revealed, presided over nothing) was new. And the idea of one supreme court was new.

The organism thus created almost immediately began the biological process of mitosis, the differentiation and replication of chromosomes within each cell. The Congress found that it needed committees and rules and traditions. It borrowed freely from English experience; a

notable early example was Jefferson's Manual, a still useful compilation of parliamentary precedents which Jefferson devised for his own use in presiding over the Senate. The Constitution's only reference to what we know as the "executive branch" was that the president "may require the Opinion, in writing, of the principal Officer in each of the executive Departments". President Washington quickly invented the non-constitutional device of a cabinet. And before the ink on the parchment was dry, both the president and the Congress found themselves members of another new institution, political parties. As for the courts, one of the first things Congress attended to proved a brilliant and durable achievement in structuring a national judicial system -- the Judiciary Act of 1789. The courts themselves turned much of their early attention to their own organizational and procedural problems; indeed, during the first decade of the Supreme Court's existence, it disposed of only 79 appellate cases.

As natural selection led to the proliferation of species of biologic life, the artificial selection inherent in the Constitution led to the variations of species in public life. In nature the conditions of survival determined what insects, birds, plants, animals, and fish would flourish. In the life of the new republic the roles assigned the three branches determined the development of the several species. The legislators and the president are to develop, focus, and lead the electorate in making the most urgent national decisions. Once the decisions are made at the polls, both Congress and the president serve to carry out the majority will. Legislators are closest to the people, at once their servants and their leaders. Intuition, communication, and the manifold skills involved in representing a constituency, a state as a whole, a party, committees, and hopefully the deepest interest of the nation are demanded of them. And the demand is sharpened by the periodic ordeal -of election campaigns. One tends not to ask of a legislator: is he brilliant? is he an expert? is he systematic and well organized? but rather: where does he stand on the issues of the day? how effectively does he discuss them? does he understand and work for the needs of his constituency?

The executive branch civil servant is part of a huge apparatus vested with the task of carrying out the national policies embodied in legislation. His expertise is called on in the translation of the President's program into new legislation, in explaining and defending it to the Congress, in formulating regulations to accompany enacted legislation, and in devising the institutions and procedures and carrying out the activity legislated. He is a career professional, expert in a specific field, with responsibility to act or administer in that field efficiently. One does not ask of the bureaucrat whether he senses the mood of the people or can discuss issues publicly in an effective way, but whether he is competent in his field, knows the ways of bureaucracy, and can get things done. Both the legislator and the executive serve the perceived will of the majority as expressed either in elections or enacted laws.

The judge has the ancient task of settling disputes between specific individuals, groups, or institutions -- a field we might call private law. He also is vested with a wide range of responsibility in the field of public law -- interpreting the laws passed by Congress and the regulations issued by the executive agencies; and monitoring the conduct of Congress, the executive agencies, public institutions in general, and even of private individuals, groups, and institutions in the light of federal laws, treaties, and the Constitution. Insofar as the judge interprets and applies a law he is carrying out the will of the country as manifested through its elected representatives, perhaps not quite as the representatives would have done it had they thought of the particular problem. But legislatures cannot foresee every contingency and courts must act to fill in the gaps; in so doing, they in a sense are acting as a specially convened, narrowly focused, subsequent amending legislature. But in settling private law disputes or in

enjoining the enforcement of a law, regulation, agency, or other institution because of something the court finds unconstitutional, the judge cannot decide on the basis of what the majority thinks or would think. He cannot because a slender majority of the voters of the country long ago decided that our Constitution should put certain limitations on government and recognize certain rights of individuals. One does not, therefore, ask of a judge whether he senses the mood of the country, leads or communicates well, is an expert, or can get things done. The relevant questions are: has he mastered and does he respect the disciplines of his craft? does he consistently strive to be impartial and fair? to the extent that he has room for discretion does he use it wisely?

Even this cursory survey of the three branches suggests that the role definitions in the Constitution have led not merely to a separation of powers but separate systems of valued talents, foci and modes of thought, institutions, folkways, areas of freedom and power, and modes of achieving accountability -- in short, separate species with their own subcultures. My perception is that the development of these species and subcultures has added an unwritten gloss which, though not part of the Constitution, is supportive of its goals much like ambient air of a certain if ineffable quality is essential to even the giant Sequoia.

I want to direct our microscope to the extent to which and the modes by which the three branches make themselves accountable. This is a subject about which more than the usual amount of humbug is spoken and written. In particular, the issue of accountability is one raised more often concerning the judiciary than it is about the Congress or the executive branch. The issue arises, in simplest terms, because we are a democracy; because a democracy means that the will of the people governs; because judges often frustrate that will; and judges -- at least federal judges -- are appointed, not elected, and, once appointed, hold office for life, and are not responsible to anyone.

This is strong and bitter medicine. It is hard to take for one who looks on our form of government as a democracy pure and simple. When the judiciary is referred to as "the least democratic" branch, the term is used as something of a reproach, a suggestion that somehow something crept into our scheme of things which is out of tune, a discordant note in the democratic harmony. Every time we hear it, it is a reminder that each generation in a sense is a new Constitutional Convention. Each generation must decide for itself whether it accepts those seminal principles thrashed out in that hot Philadelphia summer long ago.

The Founding Fathers had seen enough of pusillanimous colonial judges who were answerable to the king. They had even flirted with and found wanting, in the period of the Articles of Confederation, the English model of a supreme parliament. So it is both not surprising and significant that, despite sharply divided views on other issues affecting the judiciary, there was a prompt and unanimous vote that tenure should be during good behavior. The Convention demonstrated a basic consistency in its treatment of the judicial branch. It defeated attempts to create a Council of Revision in which the judiciary would be associated with the executive in vetoing imprudent legislation; and it faithfully, time and time again, repulsed efforts to make the judiciary dependent upon the legislative branch. It seems as if the Founding Fathers were determined to protect the integrity and separateness of the judiciary, but, once that was accomplished, to entrust great tasks to it. For when at last they expressly proclaimed the supremacy of the Constitution and laws "in pursuance thereof" in the judiciary article, it was the judiciary which was to be singled out as "the ultimate arbiters of enforcement and enforceability". While the Convention did its engineering job well, assuring a structure which guaranteed the independence, integrity, and equality of the appointed judiciary, it very largely overlooked the substance of individual rights. It is commonly said that the prevailing

view among the Founding Fathers was that the protection of the individual was a matter for the states. In any event, in the post-Convention turbulence, it came to pass that the Bill of Rights was exacted as the price of ratification.

When the dust settled after ratification, it was clear to one who looked carefully that something unique had happened in the annals of state creation. What was created fitted no prefabricated, prototypical mold. To begin with, the Founding Fathers were a mixture. They had gone through a war of independence fueled by the idealism which found its voice in the Declaration of Independence. But they were both good readers of history and practical men of affairs. They held in common a deep distrust of any person, any group, any institution having absolute power. They knew that government would seldom -- and then not for long -- be in the hands of people as wise and disinterested as Plato's guardians. The form of government they created was not borrowed from any one model. It was not a democracy in the old Athenian or town meeting sense. It was not even a representative democracy in the English and continental sense where parliament can do no wrong. It defies a generic label and claims no simple pedigree. Scholars have to settle on the word "mixed". For there is no word or ringing phrase which connotes a theory of government attributing most of the power of society most of the time to three different kinds of elected representatives but so devised that no one official or group should easily be placed in the position of having the last word, making all officialdom subject to a number of rights and privileges of individuals, and assigning as interpreter of the charter and monitor of official conduct the branch least dependent upon and most secure from the citizenry and its elected representatives.

And so the President can propose, but Congress can dispose. Even Congress cannot easily dispose if the President vetoes, in which case the President's one vote has a weight equal to that of one third of the Senate. Moreover, Congress usually cannot act at all unless both houses agree. But while big states can have more of a say in the House of Representatives, small states have an equal say in the Senate. Even if the President and both houses are agreed on some action, this may not be enough. For the Constitution is not based on the assumption that the national government has an infinity of powers which are simply divided among the three Articles. It is a charter which recognizes that the entire government is one of limited powers and sets them forth in a written document. The Supreme Court and the "inferior" courts are there to police the boundaries of government as a whole and of each part. But this may not mean that the courts have the last word. Our Constitution favors a good bit of shuttlecock and battledore. And so, while courts may invalidate legislation, Congress can usually repair the defect and accomplish its objective. Likewise, though rarely, if the Constitution comes to be seen as an obstacle to the deepest will of the people, it can be amended. And while the judges are not dependent on the Congress, their appointment has had to be approved by the Senate, and new judgeships, appropriations for staff and facilities, and rules of practice are subject to the Congressional will. Most importantly, the number, nature, levels, and jurisdiction of all the "inferior" courts are matters for Presidential and Congressional decision. Finally, of course, the decisions of the 94 federal district courts are checked, as a matter of right, by the 11 courts of appeals, and the decisions of the latter are checked, as a matter of discretion, by the Supreme Court.

All these mechanisms for circumscribing the separate foci of power limit the capacity of any official or branch to do evil. They are not devices for insuring efficiency, wisdom, or good. This is left, in our mixed system, to the democratic engine, elections. And this engine operates only as to Congressmen, Senators, the President, and, through the President, the top echelon of

executive branch officials. Federal judges are insulated from this device of accountability. And this insulation is a fount of frustration and irritation to lawmakers, who must live under the Damoclean sword of election campaigns, and to anyone who may be angered by court decisions. Immunity from the electoral process is therefore often equated with absence of accountability.

"Accountability" in government is a talisman of fairly recent origin. Its original home is the world of business, where every branch and unit of an enterprise can, under increasingly sophisticated cost accounting techniques, be held accountable for its contribution to the overall profit picture. Since profit is the single and final criterion, measurement of performance in specific terms is feasible. The concept has been applied with vigorous rhetoric to governmental departments and activities, with zero-based budgeting and "sunset laws" being recently popular rubrics. The Office of Management and Budget in the federal establishment is constantly pursuing better means of evaluating governmental programs, and the General Accounting Office has as its mission not only the checking of accounts but the overall appraisal of projects and programs.

But the accountability of people, of officials, is an even more elusive goal. Perhaps the most obviously accountable is the President, who, we like to think, is held responsible for the well being of the nation as a whole. His every deed, word, and sneeze receives saturation exposure. Out of the myriad of events, ceremonies, appearances, successes and failures in policy and program, and impressions of both his private and public character the public fashions a quadrennial verdict. Election or defeat is the accounting. But it is a very rough sort of accounting. Experts spend their time between elections trying to assay the meaning of the message. Whether it turns out to be endorsement or rejection of certain policies, such macrocosmic factors as prosperity or depression, peace or war, an image of the President as person and leader, or an amalgam of all these, it is safe to say that such factors as intellectual acuteness and administrative flair are minor items in the calculus. The accounting is policy and result oriented. And even this most remorseless flood of reporting, analysis, and debate in which the President is bathed is somewhat checked by a countercurrent -- the President's considerable opportunity to use the resources of government and the media to his advantage. To the extent he is successful, the cutting edge of accountability is blunted. If it is true that most Americans do not today admire former President Nixon, it is probably no less true that in his three decades of public life, two vice presidential campaigns, three presidential campaigns, and five and one half years as President, the people were not able to assess his deepest qualities sufficiently to hold him to account as a person before the dramatic debacle of Watergate.

The accounting process to which legislators are subjected involves far less intense exposure of conduct and demeanor than that given a President. Here again the accounting is a rough calculus, defying both prediction and retrospective analysis. In some states and districts the dominant party's nominee is the inevitable winner. In others, liberal and conservative legislators, whose values are in no way reconcilable with each other, are elected and reelected by the same constituency. One cannot be more precise than to say that while policy stands cannot be ignored, the "image" factor has become ever more determinative during television's first quarter century.

While legislators do not have the President's access-at-will to the media, they have their own accountability-blunting instrument -- selective emphasis of their voting record. The process by which a bill becomes law entails so many votes at so many stages that a legislator can honestly portray his position on a major issue as either support or opposition by selecting the stage at which he reports: votes in subcommittee, in full committee, an unrecorded aye or nay, an

unrecorded (standing) division vote, an unrecorded teller vote, or one of three types of recorded votes. This could be on an amendment, a motion to recommit (kill) the bill, on final passage, on a motion to reconsider, or on the conference report. Even the most determined citizen, after obtaining his Senator's or Congressman's "voting record", faces a formidable task in making an accurate performance audit to see how well his representative has lived up to campaign promises. In any event, whether the accounting process is fuzzy or not, the focus is on the extent to which the legislator reflects the will of the people and their image of what a legislator should be. As in the case of the President, the testing seldom elevates to the top of the list such qualities as sheer intellectual capacity, organizational ability, effective committee work, or diligence in the national interest. In short, to the extent that a legislator is held accountable by the electorate, support or opposition is in the main for his or her stands on the issues of the day; it is not the quality of effort exerted in support of those stands.

If elections are imperfect devices to achieve full accountability of the chief executive and the legislature, there is probably even less room for real accountability of the vast reaches of the bureaucracy. The spoils system having yielded to a civil service system, government civil servants are secure in their jobs, subject only to such an extreme departure from the norm as to justify the rare discharge, and to cyclical reorganizations and reductions in force. Accountability approximating that of elected officials is confined to the top echelon of political appointees, who serve at the pleasure of the President. But there are in fact few forced resignations. And when they do occur, the question is not one of competence or administrative ability but of fealty to the President's policies. As for the lower ranks, the government civil servant is so entrenched and shielded in his grade if not his specific job that only extreme aberrancy allows a superior to penetrate the defenses and effect a discharge.

I do not wish to overstate; I do not echo the refrain, which increases in intensity the farther away one is from the workings of government, that the bureaucracy is full of time-servers, nuzzling away unproductively in the public trough. My experience is that the bright lights and creative spirits, of whom there are far more than the public credits, are recognized, promoted, and given greater responsibilities without deadening delay. Indeed, we might say that there is more positive accountability in the executive branch than in either of the other two, in the sense of rewarding and promoting the proven achievers. Here, unlike the election reward system, the criteria for promotion are such things as intellectual power, administrative ability, and diligence, as contrasted to stands on goals, principles, and policies. The problem lies with negative accountability, identifying and appropriately dealing with substandard performance. For the least imaginative, efficient, and productive either climb in the service, albeit at a slow rate, or remain locked into a grade until retirement.

What about the accountability of judges? Are they as free of checkrein as commonly pictured? To begin with, it is well to remember that judges lack a power possessed by both legislators and executives, the power of initiative. As Chief Judge Magruder of my circuit once said, "The position of a judge has been likened to that of an oyster -- anchored in one place, unable to take the initiative, unable to go out after things, restricted to working on and digesting what the fortuitous eddies and currents of litigation may wash his way." 55 Harv. L. Rev. 194 (1941).

As for trial judges, there is no denying their near absolute power in their courtroom even though a jury may be the final decider of ultimate issues. But their every ruling and instruction can be and often is made an issue on appeal, when three other judges review their conduct. Appeal is not a perfunctory proceeding. It is a most meticulous, measured, painstaking process . .

. sometimes, in the eyes of the harrassed trial judge on the firing line, too meticulous.

The courts of appeals, in turn, have their own accountability mechanism. In the first place, two of a panel of three judges must agree, or if a sitting en banc of the total court is held, a majority of that court. Perhaps more important, the decision in all but the most frivolous cases must be in writing. The factual basis, assumptions and inferences, the pertinent legal authorities, the reasons of law and policy are there for all to see. A powerful deterrent of caprice, whim, and arbitrariness is this simple requirement that pen be put to paper. Not only must thoughts be put in writing, but they must fit within the conventions which the legal profession has constructed over centuries. Ironically, I have felt more restrained in making judicial decisions than in making legislative or administrative decisions just because of the lowering presence of the professional discipline. Moreover, these decisions are subject to further review by the Supreme Court. And even though that Court can review only one or two per cent of them, the possibility is a healthy presence.

Other forces are also at work. Some of the eleven circuits, facing similar questions, may disagree and create a conflict which increases the likelihood of Supreme Court review. If the decision is both significant and vulnerable, the chances are that one or more law school journals will publish a trenchant critique. Such scholarly comment, of course, does not change the decision, but over the long run it helps mold a sophisticated body of opinion which in turn has some force in determining the longevity of that decision.

These devices of accountability in the judiciary are oriented to particular decisions. They test for the rightness of results. The instruments are a verbatim record of all proceedings in the trial court, a review available of right in all cases, a collegial written opinion by an appellate court, the possibility of review by the Supreme Court, and critical commentary in other courts and academic circles. Unlike the accountability accomplished by elections, this apparatus does not test for reflection of the current popular mood or will; such test would in any event be inappropriate. And the civil service fitness reports used in the executive branch for purposes of promotion are irrelevant to the judiciary where there is no promotion except for the instances where a President may wish to appoint a judge of a lower court to a higher court. In such cases there is an exhaustive professional evaluation by the American Bar Association, a similar appraisal by a Presidential advisory commission, and the advice and consent of the Senate.

But there is another dimension of accountability within the judiciary which is terra incognita to most people. It is the system of internal government which has developed over the years. Notwithstanding the fiercely cherished tradition of judicial independence, there is a chain of command linking each judge to the Judicial Council of his circuit, and each circuit to the federal judiciary's top policy making body, the Judicial Conference of the United States. Each Council is charged by law to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." (28 U.S.C. § 332) In the past the Councils have worn their mantle of authority lightly, addressing aberrant behavior informally, exercising pressure indirectly, and preferring to be a Dutch uncle rather than Big Brother. They are today assuming a more active role. And even as this is being delivered, Congress is considering legislation to create additional machinery within the judiciary empowered to deal with complaints of judicial misconduct or disability meriting some sanction short of impeachment. Judges are also held to the most austere ethical code of conduct applicable to a secular profession, with several committees of judges in the federal judiciary being charged with the duties of interpreting, advising, and identifying violations.

This passing glimpse at the apparatus of self government within the federal judiciary

suggests a paradox: the life-tenured judge, his independence guaranteed by the Constitution even to the extent of banning any diminution in his compensation, is, in both his professional work product and his conduct, subject to more oversight and restrictions than is his elected cousin in the legislative branch. The latter, though serving at the pleasure of the voters, knows no other superior and, between elections, may if he wishes be a law unto himself, so long as he refrains from illegal activity.

Two conclusions can be drawn from this sketch of accountability in the three branches. The first is that, when the rhetoric is put aside, the judiciary is not substantially more free from accountability than its sister branches. The means are different but in terms of what is to be accounted for, they are of comparable effectiveness (or ineffectiveness) and scope. The second conclusion is that meaningful accountability in fact remains an unrealized goal for all branches. Elections test roughly for stands on issues, image, and attention to local needs. They do not test for excellence in legislative skills, insight into the national interest, or traits of character of personality -- unless these have been made a front page issue. The fact that the 535 Senators and Congressmen vary so widely in competence, energy, wisdom, and character is testimony to the limited scope of electoral accountability.

As for the executive branch, personnel evaluation procedures in the civil service may identify gross incompetence but rarely root out the office tyrant, the sluggard, the official who badly plans a program or fails to follow through, the insensitive field worker who infuriates state and city representatives who must deal with him. Judicial review can correct the most egregious errors made by judges in particular cases, and judicial self government may exercise the most sensational and chronic misconduct. But there will remain some bench bullying in the courtroom, other kinds of unjudicial conduct, inefficient case management, and unpardonable delay in deciding cases.

There is still another rent in our armor of accountability. We have always found it easier to build procedures to prevent or correct gross error or misconduct than to stimulate better quality. The very word "accountability" has a negative tinge to it -- being answerable. One is not called upon to answer why he did an outstanding job, or even why he did not do such a job, only why the job was as poor as it was. It seems to me that while there may be other and better ways of guarding against breach of the public trust, these at best will not insure excellence. Even if we could establish some prestigious performance rating bureau which could give the most penetrating evaluation of legislators, bureaucrats, and judges, we would have created, in effect, a fourth branch of government with incalculable power over the other three. We would have finally opted for Plato's guardians.

On the whole, with some dazzling and glaring exceptions, we have the quality of public servants which we deserve. What we deserve depends upon the depth of our understanding and expectations. I tend to think that the quality of the Congress, in terms of breadth of outlook, sophistication, and devotion to the public good, has increased in the past quarter century. I think also that the civil service today is better than ever, with its constant influx of brighter and better educated young people. As for judges, I cannot help but think that the judiciary, both state and federal, has, in the past dozen years, dramatically increased its quantitative output per judge in an era where the complexity of the law was in metastasis -- a collective job performance which I suspect is unrivalled in the history of the judicial profession.

But the deeper participation of the public through increased understanding and a voice informed by that understanding is critical. For this is at the heart of the kind of accountability that has a positive thrust. Not only must mountebanks and incompetents be seen and declared as

such, but competence and excellence ought to be recognized. Censure is only a negative weapon. Part of our problem lies in our habitual demeaning of all public servants. To the extent that our stereotypes cast Senators and Congressmen as cynical and vapid windbags, bureaucrats as self and time serving manipulators of red tape, and judges as pompous pettifoggers, we discourage a wider pursuit of excellence.

Just as in a business, a military unit, or a university, the atmosphere of expectation as to standards has something to do with performance. When we try to think of groups of public officials who were known for their competence and even excellence, we think of such historical examples as the elite top cadre of French officials, the "inspecteurs"; the British Civil Service and Foreign Office; in the days before India's independence, the Indian Civil Service; the Austrian Civil Service; the British judiciary; Parliament and Congress in their high moments; and the 1787 Constitutional Convention. My own conviction is that much of the excellence observed in these institutions arose from the participants' consciousness of what was expected from them by the people.

To be a significant force, the expectations must be discriminating. Citizens, individually and in groups, must know what they can realistically expect from their public servants. When justifiable expectations are fulfilled, respect and credit should freely be given. When they are not realized, criticism and censure should issue just as freely. Respect and censure, selectively given, based on appraisal of performances of officials in the light of knowledge of the roles, powers, freedoms, restraints, and values governing their species are the lubricants of affirmative accountability. Applied in many ways and on many levels, they can strengthen the relatively few and clumsy mechanisms which our Constitution and laws have given us.