

## NOT-SO-SERIOUS THREATS TO JUDICIAL INDEPENDENCE

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TALK of judicial independence is all the rage. In recent years, leaders of the Bench and Bar have decried what they describe as unprecedented assaults on the independence of the federal judiciary. The most prominent leader of this chorus has been a distinguished American and public servant, retired Associate Justice Sandra Day O'Connor. At the annual meeting of the American Law Institute in May of last year, Justice O'Connor thanked the Institute for its defense of judicial independence, which she described as under "the most serious attack" in her lifetime.<sup>1</sup> On September 27, 2006, in an op-ed entitled "The Threat to Judicial Independence," published in *The Wall Street Journal*, Justice O'Connor stated that "the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."<sup>2</sup> The next day, at a conference jointly sponsored by the Georgetown University Law Center and the American Law Institute, Justice O'Connor complained of the "common mantra" about "activist judges" and "a level of unhappiness today that perhaps is greater than in the past and is certainly cause for great concern."<sup>3</sup>

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\* Circuit Judge, U.S. Court of Appeals for the Eleventh Circuit. This Essay was delivered as the Ola B. Smith Lecture at the University of Virginia School of Law on March 19, 2007. An earlier version was delivered as the McGlinchey Lecture at the Tulane University Law School on February 26, 2007. The Essay expands on themes first published last year in a newspaper op-ed article. See William H. Pryor Jr., Op-Ed., *Neither Force nor Will, but Merely Judgment*, *Wall St. J.*, Oct. 4, 2006, at A14. I thank Michael DeBow, Malcolm Harkins, and Matthew Franck for reviewing earlier drafts and offering helpful suggestions, and I appreciate the expert citation assistance of Jennifer Peterson.

<sup>1</sup> Sandra Day O'Connor, Retired Assoc. Justice of the U.S. Supreme Court, Remarks at Ceremony for the Honorable Sandra Day O'Connor (May 17, 2006), in 83 *A.L.I. Proc.* 251, 251 (2006).

<sup>2</sup> Sandra Day O'Connor, Op-Ed., *The Threat to Judicial Independence*, *Wall St. J.*, Sept. 27, 2006, at A18.

<sup>3</sup> Sandra Day O'Connor, Assoc. Justice, Retired, Supreme Court of the United States, Remarks at the Georgetown University Law Center & American Law Institute Conference: Fair and Independent Courts: A Conference on the State

Besides the use of the term “activist judges,” Justice O’Connor has described several manifestations of threats. In her op-ed, Justice O’Connor listed first a constitutional amendment in South Dakota “advocated by a national group called ‘JAIL 4 Judges.’”<sup>4</sup> She then described efforts by Congress “to police the judiciary,” including a resolution to forbid the citation of foreign law in constitutional interpretation and a bill to create an inspector general for the judiciary.<sup>5</sup> Justice O’Connor also described the publishing of an op-ed by an associate justice of the Supreme Court of Alabama, Tom Parker, who “excoriated his colleagues for faithfully applying the Supreme Court’s precedent in *Roper v. Simmons*.”<sup>6</sup> And Justice O’Connor described threats of violence against individual judges.<sup>7</sup>

Many other leaders of the Bench and Bar also have complained of attacks on judicial independence. At a speech before the Nassau County Bar Association, Justice Alito described unfair media criticism and the use of “unfounded ethical charges” against judicial nominees as threats to the independence of the judiciary.<sup>8</sup> A year earlier, Michael Greco, the president of the American Bar Association, addressed the House of Delegates of that Association and declared, “Ironically, while American lawyers—and the American Bar Association—are helping to build independent judicial systems in emerging democracies around the world, our own courts are under unprecedented attack. They are being threatened by extremists, who would tear down our courts for political, financial or other gain.”<sup>9</sup> Mr. Greco listed

the killing of judges and their family members, the attempt to strip away the jurisdiction and discretion of our courts, the demand to impeach judges for doing what they are supposed to

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of the Judiciary (Sept. 28, 2006) (rush transcript available at <http://www.law.georgetown.edu/news/documents/CoJ092806-oconnor1.pdf>).

<sup>4</sup>O’Connor, *supra* note 2, at A18.

<sup>5</sup>Id.

<sup>6</sup>Id.

<sup>7</sup>Id.

<sup>8</sup>Michael Scholl, Alito Fears ‘Real Damage’ from Attacks on Judges, N.Y. L.J., Oct. 2, 2006, at 1.

<sup>9</sup>Michael S. Greco, President, Am. Bar Ass’n, Address to the American Bar Association House of Delegates 3 (Aug. 8, 2005) (transcript available at [http://www.abanet.org/op/greco/speeches/hod\\_annual.pdf](http://www.abanet.org/op/greco/speeches/hod_annual.pdf)).

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do—apply the law to the facts and decide cases fairly, and threats of budget cuts for the judiciary by those who disagree with court rulings.<sup>10</sup>

Last year, Michael Traynor, the president of the American Law Institute, wrote in a letter to the membership, “Judicial independence is especially important today because the judiciary and the rule of law are under relentless and severe attacks from various quarters.”<sup>11</sup> He listed as examples the use of presidential signing statements and the legislation involving Terri Schiavo.<sup>12</sup> Last month, a member of the U.S. Court of Appeals for the Fifth Circuit, Circuit Judge Carolyn King, delivered a lecture at the Marquette University Law School in which she described the “politicization” of the appointment of federal circuit judges as a threat to judicial independence.<sup>13</sup>

Some leaders have been more measured in their discussion of judicial independence. At the Georgetown conference last year, Chief Justice Roberts delivered a thoughtful address in which he criticized hyperbole about the judiciary from the left and right of the political spectrum but explained that independence “is not immunity from criticism” and judges must exercise “responsibilities” and “restraint.”<sup>14</sup> At the same conference, Attorney General Gon-

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<sup>10</sup> Id. at 3–4.

<sup>11</sup> Michael Traynor, *The President’s Letter*, A.L.I. Rep., Fall 2006, at 1, 2.

<sup>12</sup> Id. Other voices of the Bar have expressed similar concerns. In September 2006, the American College of Trial Lawyers published a report that described “Manifestations of Threats to Judicial Independence,” including the ballot initiative in South Dakota (described above by Justice O’Connor) that “would strip judges in that state of judicial immunity and submit them to the jurisdiction of a special grand jury and court,” the Terri Schiavo legislation, and other measures in Congress. Robert L. Byman, *Am. Coll. of Trial Lawyers, Judicial Independence: A Cornerstone of Democracy Which Must Be Defended* 6–9 (2006); see also Kristine L. Roberts, *Judicial Independence Under Attack*, *Litig. News*, Mar. 2007, at 1, 1 (discussing the South Dakota initiative as well as a defeated Colorado ballot initiative limiting term limits on appellate judges).

<sup>13</sup> Carolyn Dineen King, Circuit Judge, U.S. Court of Appeals for the Fifth Circuit, *Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, Hallows Lecture at Marquette University Law School (Feb. 20, 2007) (transcript available at <http://law.marquette.edu/s3/site/images/alumni/HallowsLecture2007.pdf>).

<sup>14</sup> John G. Roberts, Jr., Chief Justice, U.S. Supreme Court, *Remarks at the Georgetown University Law Center & American Law Institute Conference: Fair and Independent Courts: A Conference on the State of the Judiciary* (Sept. 28, 2006) (rush transcript available at <http://www.law.georgetown.edu/news/documents/CoJ092906-roberts.pdf>).

zales explained that most criticism of the federal judiciary is not “a source of legitimate serious concern . . . because [federal judges] enjoy constitutional protections against its consequences.”<sup>15</sup> A few years ago, Justice Stephen Breyer delivered a commencement address in which he described “a host of controversial cases” decided by the Supreme Court, including *Bush v. Gore*, and said, “Those cases produced a vast amount of commentary—positive and negative, including much that was heated. But these cases have produced less public comment about their most remarkable characteristic—the fact that losers as well as winners will abide by the result, and so will the public.”<sup>16</sup> Several years ago, Justice Thomas delivered an address at the National Lawyers Convention of the Federalist Society in which he said, “What is truly surprising about today’s judiciary is how strong it really is. . . . If anything, the judiciary’s authority in our society is at its peak.”<sup>17</sup>

But then came the annual report on the federal judiciary in which Chief Justice Roberts urged Congress to provide judges an increase in salaries and described the current level of pay as a threat to judicial independence.<sup>18</sup> On February 14, 2007, 130 deans of law schools sent a letter to Senator Leahy, Chairman of the Judiciary Committee, in support of Chief Justice Roberts’s call for an increase in judicial pay.<sup>19</sup> The deans also described the current level of pay as a threat to judicial independence.

I respectfully disagree with the conventional wisdom of the Bench and Bar. I submit that the independence of the federal judi-

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<sup>15</sup> Alberto R. Gonzales, U.S. Attorney Gen., Remarks at the Georgetown University Law Center & American Law Institute Conference: Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 29, 2006) (rush transcript available at <http://www.law.georgetown.edu/news/documents/CoJ092906-gonzalez.pdf>).

<sup>16</sup> Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Remarks at Boston College Law School Commencement (May 23, 2003) (transcript available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_05-23-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_05-23-03.html)).

<sup>17</sup> Clarence Thomas, Assoc. Justice, U.S. Supreme Court, Address at the Federalist Society Annual National Convention Banquet: On Judicial Independence 3 (Nov. 12, 1999) (on file with the Virginia Law Review Association).

<sup>18</sup> John G. Roberts, Jr., 2006 Year-End Report on the Federal Judiciary, Third Branch, Jan. 2007, at 1, 1, available at <http://www.uscourts.gov/ttb/2007-01/2006/index.html>.

<sup>19</sup> Letter from David M. Schizer, Dean, Columbia Univ. Sch. of Law, to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (Feb. 14, 2007) (on file with the Virginia Law Review Association).

ciary today is as secure as ever. The current criticisms of the judiciary are relatively mild and, on balance, a benefit to the judiciary. I am sympathetic to a call for an increase in pay, as my spouse, a certified public accountant, frequently reminds me of the opportunity cost of public service, but to say that our current pay is a threat to our independence is an exaggeration. As a federal judge whose nomination and confirmation generated controversy<sup>20</sup> and a filibuster<sup>21</sup>—there was even litigation<sup>22</sup> about my earlier recess appointment—I believe that the appointment process, on the whole, is beneficial to the independence of the judiciary.

I do not mean to suggest that judicial independence is unimportant. It is indispensable to the rule of law. Thomas Paine explained in *Common Sense*, “[I]n absolute governments the King is law,” but “in America the law is king.”<sup>23</sup> Judicial independence is now and has always been the primary reason that in America the law is king. The phrase “a government of laws and not of men” is derived from a guarantee of the separation of powers,<sup>24</sup> which includes an independent judiciary to apply the law. It is right and proper for judges and lawyers to speak often in defense of judicial independence, but talk alone is cheap.

A brief review of the history of the federal judiciary suggests that there is a tested method of defending our independence: to respect the limits of our authority. From the beginning of this great Republic, the federal judiciary has been revered by many, but during its most challenging periods, the judiciary wisely has acted with restraint. When we consider how best to maintain judicial independence, now and in the future, we can learn a lot from history.

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<sup>20</sup> See, e.g., Editorial, *Beyond the Pale*, N.Y. Times, June 23, 2003, at A20; Charles Krauthammer, Op-Ed., *A Judge Prejudged*, Wash. Post, Aug. 29, 2003, at A23; Editorial, *Pryor Will Be a Fine Judge*, Mobile Reg., April 10, 2003; Editorial, *Religious Hard-Liner Unfit to Judge*, Atlanta J.-Const., May 6, 2003, at 10A; Editorial, *Unfit to Judge*, Wash. Post, Apr. 11, 2003, at A26; Byron York, *The Nominee Who Won't Back Down*, Nat'l Rev. Online, June 12, 2003, <http://www.nationalreview.com/york/york061203.asp>.

<sup>21</sup> See Neil A. Lewis, *Filibuster on Judicial Nominees*, N.Y. Times, Aug. 1, 2003, at A14.

<sup>22</sup> *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc).

<sup>23</sup> Thomas Paine, *Common Sense* (1776), reprinted in *Common Sense and Related Writings* 72, 98 (Thomas P. Slaughter ed., 2001).

<sup>24</sup> Mass. Const. pt. 1, art. XXX; see also *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

To that end, I will address three matters. First, I will address the original understanding of American judicial independence. Second, I will address three moments in American history when the independence of the federal judiciary was challenged and the lesson to be learned from those moments. Third, I will explain why, in contrast with those historical challenges, the contemporary challenges are not serious.

#### I. THE ORIGINAL UNDERSTANDING OF JUDICIAL INDEPENDENCE

Americans recognized the need for judicial independence from the beginning of our nation. Two of the grievances against King George listed in the Declaration of Independence involved the absence of judicial independence in colonial America. The Declaration charged that the King had “obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers” and had “made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”<sup>25</sup>

At the Constitutional Convention, the Framers widely agreed that our federal government required a judiciary independent of the other branches, and they provided three guarantees for that independence in the first section of Article III. First, the Framers vested the entire judicial power in the federal judiciary.<sup>26</sup> Second, they provided that judges would have life tenure or, as the Constitution states, tenure “during good Behaviour.”<sup>27</sup> Third, they provided that the compensation of judges “shall not be diminished during their Continuance in Office.”<sup>28</sup> The judiciary would later rule that the exercise of its power requires a related protection of independence: judicial immunity.<sup>29</sup>

All federal judges are no doubt thankful that James Madison failed to persuade the other delegates to adopt his proposal about judicial pay. Madison proposed that the Constitution bar any in-

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<sup>25</sup> The Declaration of Independence paras. 10, 11 (U.S. 1776).

<sup>26</sup> U.S. Const. art. III, § 1.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871).

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crease or decrease in an individual judge's pay, once appointed.<sup>30</sup> Gouverneur Morris and Charles Pinckney persuaded the Convention that inflation would require periodic increases, and it would be unseemly and discouraging to have newly appointed judges compensated at a level higher than more senior judges.<sup>31</sup> Benjamin Franklin wisely supported the possibility of increasing judicial pay to account for the increased workload of the courts as the country grew.<sup>32</sup>

The Framers believed in judicial independence but not in the literal sense of the word "independent." The Framers expected the judiciary to be accountable to the people. Judges would be appointed by the President with the advice and consent of the Senate.<sup>33</sup> Judges would be subject to impeachment.<sup>34</sup> Judges would be bound by oath or affirmation to support the Constitution.<sup>35</sup>

Judicial independence, as originally understood and as understood today, refers to two kinds of independence, one strong and the other weak. The first is decisional independence, that is, the ability of an individual judge to decide each case fairly and impartially based on the facts and law.<sup>36</sup> The second is institutional independence, that is, the ability of the judiciary, as a separate branch, to protect its "institutional integrity."<sup>37</sup> The structure of the Constitution provides strong protections for the decisional independence of the judiciary but weak protections for its institutional independence. As scholars have described this arrangement, we have both "independent judges" and a "dependent judiciary."<sup>38</sup>

This design was explained during the ratification debates by the most eloquent defender of judicial independence: the original Wall Street lawyer, Alexander Hamilton.<sup>39</sup> In *The Federalist No. 78*,

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<sup>30</sup> 4 The Founders' Constitution 133 (Philip B. Kurland & Ralph Lerner eds., 1987); see also Charles Gardner Geyh, *When Courts & Congress Collide: The Struggle for Control of America's Judicial System* 29–31 (2006).

<sup>31</sup> The Founders' Constitution, *supra* note 30, at 136–37, 139.

<sup>32</sup> *Id.* at 136–37.

<sup>33</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>34</sup> *Id.* art. III, § 1.

<sup>35</sup> *Id.* art. VI, cl. 3.

<sup>36</sup> Geyh, *supra* note 30, at 9.

<sup>37</sup> *Id.*

<sup>38</sup> John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, 976–78 (2002).

<sup>39</sup> See Richard Brookhiser, *Alexander Hamilton*, American 57 (1999).

Hamilton explicated the tie between strong decisional independence and judicial review:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.<sup>40</sup>

Hamilton described life tenure as the foremost guarantee of decisional independence<sup>41</sup> and protection from cuts in pay as a close second.<sup>42</sup> When the Anti-Federalists argued that the federal judiciary would be too independent, Hamilton responded that the judiciary would be institutionally weak: the “least dangerous” branch because it “has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society.”<sup>43</sup>

Every law student is familiar with those Federalist Papers, but what about Hamilton’s argument in No. 81 regarding the ultimate check of judicial abuse? In a further response to the Anti-Federalists, Hamilton argued that Americans could rest assured that the judiciary would not abuse its power because Congress retained the check of impeachment. He wrote, “There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations.”<sup>44</sup> I will return to that subject in a moment.

My last point about the original understanding concerns the Judiciary Act of 1789.<sup>45</sup> At the Convention, the delegates decided that the Constitution would provide for a Supreme Court and whatever inferior courts Congress, in its discretion, decided to create:<sup>46</sup> the

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<sup>40</sup> The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>41</sup> Id. at 469.

<sup>42</sup> The Federalist No. 79 (Alexander Hamilton), supra note 40, at 472.

<sup>43</sup> The Federalist No. 78 (Alexander Hamilton), supra note 40, at 465.

<sup>44</sup> The Federalist No. 81 (Alexander Hamilton), supra note 40, at 485.

<sup>45</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1291 (2000)).

<sup>46</sup> U.S. Const. art. III, § 1.

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so-called “Madisonian Compromise.”<sup>47</sup> My professor of federal jurisdiction at Tulane, Michael Collins, has explained that the first Congress did not read the compromise language as intended, for Congress understood Article III to *require* the establishment of inferior courts.<sup>48</sup> As a judge of an inferior court, I am thankful for that interpretation by the first Congress, which enabled the judiciary to assume its independent duties with a sturdy foundation.

## II. HISTORICAL CHALLENGES TO INDEPENDENCE AND THE LESSON OF RESTRAINT

After this auspicious beginning, there have been at least three periods of serious challenges to the independence of the judiciary, two in the nineteenth century and one in the twentieth century. The first came during the advent of the administration of Thomas Jefferson. The second came during Reconstruction. The third came during the New Deal period. Each period of challenge was marked with restraint by the judiciary followed by increased respect for its independence.

### *A. The Jeffersonian Challenge*

When Thomas Jefferson and his political party wrested control of both the Presidency and Congress, the losing Federalists, during their lame duck session, passed the Judiciary Act of 1801, which created sixteen new circuit judgeships and several justices of the peace.<sup>49</sup> In the final weeks of his administration, President Adams nominated and the Senate confirmed Federalists to fill the new offices, and in the final hours Adams signed the commissions for the new officers, the so-called “midnight judges.”<sup>50</sup> “[S]ome of the commissions, including that of William Marbury, were not deliv-

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<sup>47</sup> Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 8 (5th ed. 2003).

<sup>48</sup> Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 *Wis. L. Rev.* 39, 43, 105–19.

<sup>49</sup> Judiciary Act of 1801, ch. 4, 2 Stat. 89 (repealed by Act of Mar. 8, 1802, ch. 8, 2 Stat. 132); William H. Rehnquist, *Judicial Independence*, 38 *U. Rich. L. Rev.* 579, 582–83 (2004).

<sup>50</sup> Fallon et al., *supra* note 47, at 63.

ered before Adams's term expired, and the new President refused to honor those appointments."<sup>51</sup>

When the Jeffersonian Republicans came to power, they proceeded to undo the work of the Federalists.<sup>52</sup> The Jeffersonians repealed the Judiciary Act, abolished the new circuit judgeships, and cancelled the June and December terms of the Supreme Court.<sup>53</sup> As every law student learns, William Marbury then sued Jefferson's Secretary of State, James Madison, by filing a petition for a writ of mandamus in the Supreme Court.<sup>54</sup> Most scholars believe the Jefferson administration would not have obeyed an order to deliver Marbury's commission.<sup>55</sup>

The Supreme Court responded to this controversy with the most celebrated decision in the history of American law, *Marbury v. Madison*, and that decision was a model of restraint that would help set the stage for the judiciary to weather a dangerous challenge from the Jeffersonians. Rather than order the delivery of the commission, the Court dismissed Marbury's petition.<sup>56</sup> Before reaching its decision, the Court explained that it would not review any political judgment of the executive but would limit itself to questions of law.<sup>57</sup> The Court ruled that the purported grant of original jurisdiction for the Supreme Court to issue the writ was unconstitutional, because Article III defined and limited the original jurisdiction of the Court. With Chief Justice Marshall writing, the Court, in what some have described as a "political masterstroke,"<sup>58</sup> defended the doctrine of judicial review, declared an act of Congress unconstitutional, and avoided a confrontation with the Jeffersonians. A week later, the Court continued its restraint when it decided *Stuart v. Laird* and refused to declare unconstitutional

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<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803).

<sup>55</sup> See, e.g., Fallon et al., *supra* note 47, at 64.

<sup>56</sup> *Marbury*, 5 U.S. (1 Cranch) at 180.

<sup>57</sup> Id. at 165–66.

<sup>58</sup> Fallon et al., *supra* note 47, at 64.

the repeal of the Judiciary Act of 1801, which abolished the new judgeships.<sup>59</sup>

Following these decisions, a dangerous challenge to the judiciary arose on the front that Hamilton had addressed in *The Federalist No. 81*: impeachment. In March 1803, the Jeffersonians impeached “a mentally deranged and frequently intoxicated federal district judge in New Hampshire,”<sup>60</sup> John Pickering. As the late Chief Justice Rehnquist stated, “There was no question that Pickering was a disgrace to the judiciary and should have resigned,”<sup>61</sup> and a year later, the Senate convicted Pickering on a party-line vote.<sup>62</sup> That same day, the House voted to impeach an Associate Justice of the Supreme Court, Samuel Chase.<sup>63</sup>

The charges against Chase concerned his performance of his judicial duties in charging a grand jury and presiding over two trials.<sup>64</sup> The House of Representatives charged Chase with using his position to make political speeches and conducting trials as partisan affairs.<sup>65</sup> The impeachment trial of Chase occurred a year later, and the evidence of grave misconduct was weak.<sup>66</sup> Had the Senators voted along party lines, Chase would have been convicted, but the Senate failed to convict him. As Chief Justice Rehnquist described the conclusion, “it represented a judgment that impeachment should not be used to remove a judge for conduct in the exercise of his judicial duties. The political precedent set by Chase’s acquittal has governed that day to this: a judge’s *judicial* acts may not serve as a basis for impeachment.”<sup>67</sup> But there was another conclusion of the Chase affair too: “Republicans successfully made their point,

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<sup>59</sup> 5 U.S. (1 Cranch) 299 (1803); Dean Alfange, Jr., *Marbury v. Madison* and Original Understandings of Judicial Review: In Defense of Traditional Wisdom, 1993 Sup. Ct. Rev. 329, 350–51.

<sup>60</sup> Rehnquist, *supra* note 49, at 583.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 584.

<sup>64</sup> *Id.* at 584–85.

<sup>65</sup> Ferejohn & Kramer, *supra* note 38, at 979.

<sup>66</sup> Rehnquist, *supra* note 49, at 585–87.

<sup>67</sup> *Id.* at 588–89; see also Geyh, *supra* note 30, at 53–54, 131–42; William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1992); William H. Rehnquist, *The Supreme Court* 269–70 (rev. ed. 2001) [hereinafter Rehnquist, *The Supreme Court*].

‘changing expectations of what constituted proper judicial behavior, thereby excluding overt partisan political activity.’”<sup>68</sup>

Although I do not propose that the Senators at the trial of Justice Chase considered the rulings of the Supreme Court in either *Marbury v. Madison* or *Stuart v. Laird* to be a basis for avoiding an escalation of conflict between the branches, I submit that the earlier restraint of the judiciary avoided a worsening of branch relations that could have led to an ominous result in the later trial of Justice Chase. Consider two questions that by necessity are hypothetical: First, what if the Supreme Court in *Marbury* had ruled that Madison was obliged to deliver the commission? Second, what if the Court in *Stuart* had declared the repeal of the Judiciary Act unconstitutional? We will never know the answers to those questions because the Court acted with restraint.

### B. The Reconstruction Challenge

The second period of challenge came during Reconstruction. As a result of the infamous decision of the Supreme Court in *Dred Scott v. Sandford*, which had declared the Missouri Compromise unconstitutional,<sup>69</sup> the Radical Republicans in Congress after the Civil War looked with disdain on the Supreme Court.<sup>70</sup> That disdain was understandable; *Dred Scott* was not marked by restraint. The Court had exercised jurisdiction, contrary to its precedent with nearly identical facts in *Strader v. Graham*,<sup>71</sup> and invoked, for the first time, the notion of substantive due process to declare a federal law unconstitutional.

In 1867, a newspaper editor from Vicksburg, Mississippi, William McCardle, was jailed awaiting trial by a military tribunal on charges of inciting insurrection and impeding Reconstruction.<sup>72</sup> McCardle filed a petition for a writ of habeas corpus in a federal court, which denied him relief. McCardle then appealed to the Su-

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<sup>68</sup> Ferejohn & Kramer, *supra* note 38, at 979 (quoting Keith E. Whittington, *Constitutional Constructions: Divided Powers and Constitutional Meaning* 65 (1999)).

<sup>69</sup> 60 U.S. (19 How.) 393, 452 (1856).

<sup>70</sup> Rehnquist, *supra* note 49, at 589–90.

<sup>71</sup> 51 U.S. (10 How.) 82, 93–94 (1850).

<sup>72</sup> Rehnquist, *supra* note 49, at 590.

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preme Court.<sup>73</sup> Some believed that the Supreme Court intended to rule that the Reconstruction Acts were unconstitutional.<sup>74</sup> After the appeal had been orally argued, Congress overrode a presidential veto and repealed the statute that granted the appellate jurisdiction of the Supreme Court to hear *McCardle*'s request for habeas relief.<sup>75</sup> The Court delayed its decision pending the legislation and then dismissed the appeal for lack of jurisdiction.<sup>76</sup> The Court based its unanimous decision on the express authority of Congress in Article III, Section 2 of the Constitution to make exceptions to the appellate jurisdiction of the Court.<sup>77</sup> In contrast with *Dred Scott*, the Court in *McCardle* acted with restraint.

That restraint was rewarded. As Charles Gardner Geyh has written, "the Reconstruction-era Congress had a vested interest in preserving and promoting a strong, stable, and expanded federal judiciary that would enforce the statutes that Congress enacted in the teeth of regional resistance."<sup>78</sup> The same year that the Court dismissed *McCardle*'s appeal, Congress enacted legislation that "established nine circuit judgeships, added one justice to the Supreme Court, and reduced the circuit-riding responsibilities of Supreme Court justices to one tour of duty every two years."<sup>79</sup>

Again I do not say that this was an instance of cause and effect. My point is that had the Court acted without restraint, the consequences could have been severe. Judicial independence almost surely would have suffered.

### *C. The New Deal Challenge*

The final challenge came during the twentieth century and specifically the New Deal era. At the beginning of his second term, President Franklin Roosevelt was frustrated with the Supreme

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<sup>73</sup> *Ex parte McCardle (McCardle II)*, 74 U.S. (7 Wall.) 506, 507–08 (1868); *Ex parte McCardle (McCardle I)*, 73 U.S. (6 Wall.) 318, 320–21 (1867).

<sup>74</sup> Rehnquist, *supra* note 49, at 590–91.

<sup>75</sup> Fallon et al., *supra* note 47, at 328.

<sup>76</sup> Rehnquist, *supra* note 49, at 591.

<sup>77</sup> *McCardle II*, 74 U.S. (7 Wall.) at 513–14.

<sup>78</sup> Geyh, *supra* note 30, at 70.

<sup>79</sup> *Id.* at 71.

Court, which had declared major laws of the New Deal unconstitutional.<sup>80</sup> As Charles Geyh has described it:

On the disingenuous pretext that many federal judges were old and falling behind in their work, Roosevelt settled on a proposal originally developed in 1913 by then attorney general James McReynolds, who, a quarter of a century later, as an aging Supreme Court justice who often voted against New Deal legislation, would be hoisted on the petard of his own invention.<sup>81</sup>

Roosevelt proposed adding a Justice to the Supreme Court for every member over seventy years old, which would bring the total on the Court to fifteen and was dubbed the “court-packing” plan.<sup>82</sup> Chief Justice Rehnquist has written, “The proposal astounded the Democratic leadership in Congress and the nation as a whole.”<sup>83</sup>

While the court-packing legislation was pending in Congress, the Court decided two cases, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*<sup>84</sup> and *West Coast Hotel Co. v. Parrish*,<sup>85</sup> and, in each case, upheld economic legislation. The former decision upheld the Wagner Act based on a broad understanding of the power of Congress to regulate interstate commerce, and the latter decision upheld a state minimum wage law against a complaint that the law violated freedom of contract. Associate Justice Owen Roberts, who had voted in earlier cases with the laissez-faire wing of the Court to declare parts of the New Deal unconstitutional, voted in each case to uphold the law.<sup>86</sup> Following these decisions and the announcement of the retirement of Justice Van Devanter, the court-packing legislation failed.<sup>87</sup>

Justice Roberts’s vote to uphold the economic legislation was called “the switch in time that saved nine.”<sup>88</sup> What was publicly unknown then but is known now is that Justice Roberts, following the oral arguments in the *Parrish* case in 1936, had already voted with

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<sup>80</sup> Rehnquist, *supra* note 49, at 592.

<sup>81</sup> Geyh, *supra* note 30, at 79.

<sup>82</sup> Rehnquist, *supra* note 49, at 592–93.

<sup>83</sup> *Id.* at 593.

<sup>84</sup> 301 U.S. 1, 49 (1937).

<sup>85</sup> 300 U.S. 379, 397–99 (1937).

<sup>86</sup> Geyh, *supra* note 30, at 79–80.

<sup>87</sup> Rehnquist, *The Supreme Court*, *supra* note 67, at 129–33.

<sup>88</sup> Geyh, *supra* note 30, at 79; Rehnquist, *supra* note 49, at 593–94.

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the majority to overrule the precedent on freedom of contract and uphold the state minimum wage law.<sup>89</sup> That decision of restraint had been made even before President Roosevelt proposed the court-packing legislation in 1937.

#### *D. The Lesson of Restraint*

One lesson from these episodes in legal history is that the federal judiciary has a responsibility to safeguard its own independence by being cautious about the exercise of its jurisdiction and power. The Court must not abdicate its duty, but not every controversy requires a judicial resolution or trumping of the will of the majority. The Court also has a responsibility occasionally to reconsider the correctness of its own rulings and its relationship with its coequal branches. There will always be times when the law and constitutional duty require the judiciary to issue an unpopular ruling, but the exercise of prudence and restraint, as a matter of course, will enhance the general reputation of the judiciary and enable it to weather those difficult storms.

In each of these episodes, the Court reached defensible rulings, as a matter of law, but in each episode, the Court had the discretion to decide its cases in a different manner. The Jeffersonians learned, for example, that “the principle of judicial review of acts of Congress, as Marshall described it in *Marbury*, was not at odds with the limited government persuasion of the Jeffersonian Republican Party.”<sup>90</sup> The *McCardle* Court did not have to wait a year to allow Congress to repeal its grant of appellate jurisdiction.<sup>91</sup> While the court-packing legislation was pending, Justice Roberts could have declined to reconsider his adherence to *stare decisis*. But in each instance, the Court resisted the temptation to exercise its power and instead respected the provinces of the political branches.

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<sup>89</sup> John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 2.6, at 32 n.16 (5th ed. 1995); *The Oxford Companion to the Supreme Court of the United States* 454 (Kermit L. Hall ed., 2d ed. 2005); 2 Merlo J. Pusey, *Charles Evans Hughes* 757 (1951).

<sup>90</sup> R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* 173 (2001).

<sup>91</sup> 6 Charles Fairman, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Reconstruction and Reunion, 1864–88*, at 467–78 (1971).

These three moments represent the greatest challenges to the independence of the judiciary in our history. Some suggest that we may be living in another one of those moments in history. I say not.

### III. THE NOT-SO-SERIOUS CONTEMPORARY CHALLENGES TO INDEPENDENCE

Against this backdrop, let us consider whether the judiciary today is being seriously threatened. Those who have identified these supposed threats have described three kinds: public criticism of the judiciary, legislation designed to constrain the judiciary, and pitched battles to confirm judges.<sup>92</sup> On closer examination, these contemporary events are not serious threats to judicial independence.

#### A. Public Criticisms of the Judiciary

When I consider the public criticisms of the judiciary, I am reminded of the adage our mothers taught us, “Sticks and stones may break my bones, but words will never hurt me.” Judges are adults and should be treated as persons of “fortitude, able to thrive in a hardy climate,” as Justice Brennan wrote in *New York Times Co. v. Sullivan*.<sup>93</sup> Critical words about the judiciary are not a serious threat to judicial independence.

Many of the public criticisms of judicial decisions are no more heated than the criticisms written by jurists in dissenting opinions. In *Roper v. Simmons*, Justice O’Connor protested that “the Court . . . [had] preempt[ed] the democratic debate through which genuine consensus might develop.”<sup>94</sup> Justice Breyer warned, in what he called the “highly politicized matter” of *Bush v. Gore*, that “the appearance of a split decision runs the risk of undermining the public’s confidence in the Court itself.”<sup>95</sup> Consider also the harsh words of Justice Brennan in *Oregon v. Elstad*: “the Court mischaracterizes our precedents, obfuscates the central issues, and alto-

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<sup>92</sup> See supra notes 2–13 and accompanying text.

<sup>93</sup> 376 U.S. 254, 273 (1964) (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

<sup>94</sup> 543 U.S. 551, 606 (2005) (O’Connor, J., dissenting).

<sup>95</sup> 531 U.S. 98, 157 (2000) (Breyer, J., dissenting).

gether ignores the practical realities . . . that have led nearly every lower court to reject its simplistic reasoning.”<sup>96</sup>

Perhaps the world’s leading critic of the decisions of the Supreme Court is its wittiest and harshest dissenter, Justice Scalia. Consider his dissenting opinion in *United States v. Virginia*, which involved the exclusion of women from the Virginia Military Institute.<sup>97</sup> Justice Scalia criticized “this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the countermajoritarian preferences of the society’s law-trained elite) into our Basic Law.”<sup>98</sup> Or consider another example from Virginia: the *Atkins v. Virginia* decision in which the Court ruled that the execution of the mentally retarded is unconstitutional.<sup>99</sup> Justice Scalia wrote, “Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.”<sup>100</sup> He later added, “The arrogance of this assumption of power takes one’s breath away.”<sup>101</sup> And then there is his dissenting opinion in two obscure appeals involving political patronage in the awarding of municipal contracts. Justice Scalia wrote, “Taken together, today’s decisions . . . demonstrate why this Court’s Constitution-making process can be called ‘reasoned adjudication’ only in the most formalistic sense.”<sup>102</sup> He concluded, “The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.”<sup>103</sup>

I could go on, but you get the point. I doubt any contemporary politician in America has been more flamboyant in criticizing the federal judiciary. Both Justice Scalia’s dissenting opinions and the opinions he has criticized provide ample evidence of the vitality of judicial independence.

In her op-ed about the current climate of criticism, Justice O’Connor pointed to the bizarre example of Justice Tom Parker of

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<sup>96</sup> 470 U.S. 298, 320 (1985) (Brennan, J., dissenting).

<sup>97</sup> 518 U.S. 515, 566 (1996) (Scalia, J., dissenting).

<sup>98</sup> *Id.* at 567.

<sup>99</sup> 536 U.S. 304, 321 (2002).

<sup>100</sup> *Id.* at 338 (Scalia, J., dissenting).

<sup>101</sup> *Id.* at 348.

<sup>102</sup> *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 686 (1996) (Scalia, J., dissenting).

<sup>103</sup> *Id.* at 711.

the Alabama Supreme Court.<sup>104</sup> Last year, Parker wrote an op-ed in *The Birmingham News* that castigated his colleagues for following the decision of the Supreme Court in *Roper*, which prohibited use of the death penalty for sixteen- and seventeen-year-old murderers,<sup>105</sup> but there is a good ending to this story from my home state. Not only did the other members of the Alabama Supreme Court faithfully apply the *Roper* decision,<sup>106</sup> with which many of them disagreed,<sup>107</sup> but Parker's political gambit failed miserably. Parker ran for Chief Justice of Alabama, aligned with his mentor, former Chief Justice Roy Moore, who ran for governor, and both were trounced in the Republican primary.<sup>108</sup> Their twisted ideas of opposing activist decisions by defying judicial decrees went nowhere, even in a state with a shameful history of defiance of federal authority, and the Alabama justices who did their duty all prevailed in their primary contests.<sup>109</sup> Alabama has come a long way since the days of Governor Wallace standing in the schoolhouse door.

The judiciary, of course, is not perfect. The twin evils of slavery and segregation were, to say the least, exacerbated by two decisions of the Supreme Court. Justice Harlan's dissent in *Plessy v. Ferguson* was prophetic: "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."<sup>110</sup> The judgment of history has been equally unkind to the decision in *Korematsu v. United States*, when the Court upheld the constitutionality of the internment of Japanese Americans during World War II.<sup>111</sup>

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<sup>104</sup> O'Connor, *supra* note 2, at A18.

<sup>105</sup> Tom Parker, Op-Ed., Alabama Justices Surrender to Judicial Activism, *Birmingham News*, Jan. 1, 2006, at 4B.

<sup>106</sup> *Ex parte Adams*, No. 1030633, 2005 WL 3506662, at \*1 (Ala. Dec. 23, 2005).

<sup>107</sup> See, e.g., David White, Chief Justice Race Hinges on Respect for U.S. Supreme Court, *Birmingham News*, May 22, 2006, at 1B.

<sup>108</sup> Tom Gordon, GOP Picks Riley; Democrats, Baxley, *Birmingham News*, June 7, 2006, at 1A; David White, Nabers Leads Victorious Incumbents, *Birmingham News*, June 7, 2006, at 1A. Four years ago, I successfully prosecuted Roy Moore on charges of judicial misconduct regarding his refusal to comply with a federal injunction. See generally *Moore v. Judicial Inquiry Comm'n*, 891 So. 2d 848 (Ala. 2004); William H. Pryor Jr., *Christian Duty and the Rule of Law*, 34 *Cumb. L. Rev.* 1 (2003).

<sup>109</sup> White, *supra* note 108.

<sup>110</sup> 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>111</sup> 323 U.S. 214, 223-24 (1944).

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Many of those who complain about criticisms of the judiciary concede that some criticism of judicial decisions is fair, but that assessment is too mild. Criticism of judicial decisions is essential to the progress of our constitutional republic. That was true when President Lincoln opposed *Dred Scott*, and it was true when Thurgood Marshall, as an attorney, urged the Court to depart from *Plessy*.

Many Americans today believe that more recent decisions of the federal judiciary are also terribly wrong. Americans on both ends of the political spectrum decry decisions of federal courts on issues ranging from life and death to church and state to capital punishment and other forms of criminal sentencing to the presidential election in 2000 and even the Pledge of Allegiance. When I served as a state attorney general, even I sometimes criticized the federal judiciary.<sup>112</sup>

Americans are more, not less, likely to respect judicial independence when they know that the law can be criticized and changed by ordinary political processes. Criticism, even when it is harsh, should be distinguished from defiance. As Justice Breyer stated several years ago, “We run no risk of returning to the days when a President (responding to [the Supreme] Court’s efforts to protect the Cherokee Indians) might have said, ‘John Marshall has made his decision; now let him enforce it!’”<sup>113</sup>

Supreme Court Justices, politicians, and laymen are not the only critics of the judiciary. Perhaps the most frequent and important critics of the judiciary are those able individuals who train the lawyers and judges of tomorrow: law professors. If we stifle criticism of the judiciary, then we run the risk of giving law professors too much free time. I welcome criticism from legal scholars to improve my work. As one law professor, John Yoo of Boalt Hall, explained several years ago, we should not “mistake the criticism of a branch of government that undeniably wields enormous power in our society for an actual attempt to interfere with the decisional and institutional independence of our federal judges.”<sup>114</sup> Law professors and

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<sup>112</sup> See, e.g., Bill Pryor, Op-Ed., *Parts of DeMent’s Ruling Are Dead Wrong*, Birmingham News, Nov. 23, 1997, at 1C; York, *supra* note 20.

<sup>113</sup> *Bush v. Gore*, 531 U.S. 98, 158 (2000) (Breyer, J., dissenting).

<sup>114</sup> John Yoo, *Criticizing Judges*, 1 Green Bag 2d 277, 278 (1998).

judges need each other to ensure that someone is reading what each other writes.

To assert that the current criticisms of judges are unprecedented is to diminish the sacrifices that earlier giants of the federal judiciary endured. The ostracism and abuses suffered during the civil rights era by federal judges, including Frank Johnson and Richard Rives of Alabama, John Minor Wisdom of Louisiana, and Robert Merhige of Virginia, were far worse than the current criticisms of the judiciary. Jack Bass has described, for example, the abuses suffered by Judges Johnson and Rives after their decision about the Montgomery bus boycott in these terms:

In the weeks and months and years of the decade and a half after their decision in *Browder*, Rives and Johnson received an avalanche of hate mail, abusive telephone calls, and threats. . . .

One night a bomb destroyed part of the home of Frank Johnson's mother . . . and the judge never doubted the bomb was meant for him. . . .

. . . .

For Rives, the final indignity—worse even than an indirect attack on him from his pastor's pulpit—came one morning when he and his wife visited their son's grave and found it strewn with garbage and the tombstone painted red.<sup>115</sup>

To be sure, there have been recent and reprehensible incidents of violence and threats against judges, but we should not forget that those kinds of isolated crimes have occurred before. An infamous example is described in the 1890 opinion of the Supreme Court in *In re Neagle* when Judge David Terry assaulted a U.S. Deputy Marshal in a courtroom where Justice Stephen Field was delivering a decision against Terry's wife.<sup>116</sup> Judge Terry and Justice Field had served together as members of the California Supreme Court. The Terrys later repeatedly threatened to kill Justice Field, but in 1889 a Marshal killed Terry as he assaulted Justice Field in the dining room of a train station. The Marshal thought that Terry was about to stab Justice Field with a bowie knife that Terry had

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<sup>115</sup> Jack Bass, *Unlikely Heroes* 79 (1981).

<sup>116</sup> 135 U.S. 1, 44–46 (1890).

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drawn in the courtroom altercation the year before.<sup>117</sup> I also am frequently reminded of another example because I work in the former chambers of the late Judge Robert Vance, who was murdered by a mail bomber in 1989.<sup>118</sup> These violent offenses typically involve disgruntled litigants or dangerous criminals, not harsh critics of the judiciary as a whole.

The most recent incidents of violence against judges, although terrible, do not portend a threat to judicial independence. I am grateful that Congress reacted swiftly to these recent threats by providing home-security systems for federal judges.<sup>119</sup> That appropriation suggests that politicians and the public they serve still appreciate the need for an independent judiciary.

### *B. Legislative Attempts to Curb the Judiciary*

Although the fringe of American politics offers disturbing examples of ignorance of the judicial function, recent legislative efforts to curb the judiciary are not a source of serious concern. Last year, the poster boy on this front was the South Dakota initiative, to which I referred earlier, sponsored by a group called “J.A.I.L. 4 Judges.”<sup>120</sup> You do not hear about that initiative anymore, because 89.21% of the voters of South Dakota rejected that initiative at the polls in November.<sup>121</sup> Judicial independence apparently is still safe there.

Bills in Congress to limit the federal judiciary in matters of religion, flag burning, the Pledge, and other matters all failed. As for the Terri Schiavo matter, all the fury that followed that legislation and litigation evaporated. I learned in my previous experience as a state attorney general that it is far easier to sponsor a bill than it is to enact one.

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<sup>117</sup> Id. at 52–53.

<sup>118</sup> See *Moody v. State*, 888 So. 2d 532, 540 (Ala. Crim. App. 2003); Letter Bomb Kills U.S. Appeals Judge, N.Y. Times, Dec. 17, 1989, § 1, at 1.

<sup>119</sup> See Jeff Coen, Judges Get Home Security, Lefkow Slayings Spur Expansion of Measures to Safeguard Jurists, Chi. Trib., June 25, 2006, at C1.

<sup>120</sup> The website of this group can be found at <http://www.jail4judges.org> (last visited Sept. 16, 2007).

<sup>121</sup> S.D. Sec’y of State, General Election Official Returns for Ballot Questions (2006), [http://www.sdsos.gov/electionsvoteregistration/pastelections\\_electioninfo06\\_GEballotquestions.shtm](http://www.sdsos.gov/electionsvoteregistration/pastelections_electioninfo06_GEballotquestions.shtm).

From the beginning of our Republic, the federal judiciary has defended ably its decisional independence from legislative encroachment. In *Hayburn's Case*, members of the Supreme Court sitting on circuit courts with other federal judges declined to entertain petitions of injured veterans of the Revolutionary War, under the Invalid Pensions Act of 1792,<sup>122</sup> because any rulings would be subject to the review of the Secretary of War.<sup>123</sup> In *United States v. Klein*, the Supreme Court decided, three years after *Ex parte McCardle*, that Congress could not nullify the effect of a presidential pardon on a claimant's entitlement to seek relief against the United States for a loss suffered during the Civil War.<sup>124</sup> More recently, in 1995, in *Plaut v. Spendthrift Farm, Inc.*, the Court declared unconstitutional an act of Congress that would have revived complaints of securities fraud that were barred by a statute of limitations.<sup>125</sup> Although its institutional independence remains vulnerable, the federal judiciary maintains to this day the strong decisional independence that Hamilton predicted before the ratification of the Constitution.<sup>126</sup>

### C. *The Politics of Appointment*

That brings me to my final topic: the process of nominating and confirming federal judges. Under the Constitution, the appointment of federal judges was not entrusted to a bar association or merit selection committee; it was entrusted to the elected, and hence political, officers of the executive branch and the Senate. And rightly so. There is a lot at stake in the appointment of judges, whose duty for life is to support and defend the Constitution of the United States of America.

It is fair to evaluate what a potential judge thinks about judging. The President has every right to ask that question of a potential nominee. Senators have every right to ask tough questions too. If officers of the political branches want to complain about decisions of the federal judiciary that their constituents do not admire, then

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<sup>122</sup> Act of March 23, 1792, ch. 11, 1 Stat. 243 (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324).

<sup>123</sup> 2 U.S. (2 Dall.) 409 (1792).

<sup>124</sup> 80 U.S. (13 Wall.) 128, 141 (1871).

<sup>125</sup> 514 U.S. 211, 240 (1995).

<sup>126</sup> See *supra* notes 39–43 and accompanying text.

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it is not too much to ask the potential nominee to hear and consider that complaint. It may be the last chance for the people, through their elected representatives, to have their say face-to-face with that judge.

It also is fair to evaluate the character of a potential judge. There is widespread agreement that we should have the background check that the Federal Bureau of Investigation performs, but Senators should be free to investigate other concerns so long as their investigation is conducted in good faith. The process is not always pretty, but again, a lot is at stake.

Some might argue that a grueling and highly political process of appointing federal judges discourages talented lawyers from serving and enhancing the independence of the judiciary, but I doubt that the unwillingness of some to serve necessarily diminishes judicial independence. Many talented lawyers, no doubt, are not attracted to the difficulties of public service, including the lower pay and potential unpleasantness of a political contest as a prelude to holding office. The same can be said for other forms of public service. Are the potential nominees who are not attracted to the hardships of public service necessarily the best candidates to be independent judges? An independent judge must be willing to make difficult, unpopular, and even courageous decisions when the law so demands.

There is a good argument that those who are willing to endure the hardships of a controversial appointment may be more independent than others, and there is anecdotal evidence to support this argument. Consider the service of the most famous judge from my home state of Alabama, Justice Hugo L. Black. When President Roosevelt nominated then-Senator Black to serve on the Supreme Court, that nomination generated controversy.<sup>127</sup> Hugo Black had been a prosecutor, trial judge, criminal defense lawyer, and a member of the Ku Klux Klan. Many Catholics objected to the appointment of a former Klansman, and they were especially critical of Hugo Black's tactics in a 1921 trial where Black defended a Klansman who had killed a Catholic priest.<sup>128</sup> Despite the

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<sup>127</sup> Roger K. Newman, *Hugo Black* 239–40 (1994).

<sup>128</sup> *Id.* at 253–54; Steve Suitts, *Hugo Black of Alabama* 338–65 (2005). In the interest of full disclosure, I published an essay last year that was highly critical of Black's trial tactics. William H. Pryor Jr., *The Murder of Father James Coyle, the Prosecution of*

controversy about his record, Hugo Black was confirmed by the Senate, and he served for decades as a distinguished and fiercely independent member of the Court.

At the end of the day, the process for appointing judges, which the Framers considered a matter of accountability to the people, is not nearly as unpleasant as the election campaigns that the appointing Presidents and Senators have to mount. I know: I have endured both. Given a choice between raising the funds, shaking the hands, traveling from city to city, speaking on the stump, eating the proverbial rubber chicken, responding to the attacks of an opponent, and filming the ads involved in a statewide election campaign, on the one hand, and responding to the questions asked in the confirmation process, on the other hand, I would choose the confirmation process every time. In most states, judges have to suffer the hardships of election campaigns periodically, so federal judges have little about which to complain.

It is true that sometimes Senators ask improper questions about how a judicial nominee would rule in a hypothetical case, but the risk to judicial independence that arises from that question is entirely within the control of the nominee. All nominees refuse, as they must, to answer that kind of question. If a nominee did otherwise, then the nominee would prove himself unfit for appointment. Perhaps that is reason alone to hope that a Senator will occasionally ask that improper question.

It should be no surprise that the appointment process is often contentious and even partisan. For many years the federal judiciary has exercised power in areas of extreme controversy. A backlash now and then is inevitable.

#### CONCLUSION

That fact returns me to the lesson of history. For those who are concerned about judicial independence, history suggests that judges have an opportunity to do something about it, besides complain. It is not too much for us to look in the mirror and ask whether some criticisms are fair. As Justice Harlan explained in his famous dissent in *Plessy*, “[T]he courts best discharge their duty by

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executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives.”<sup>129</sup> Perhaps, even today, we sometimes fail in that limited and critical duty. Alexander Hamilton explained in *The Federalist No. 78* that judges exercise “neither FORCE nor WILL but merely judgment.”<sup>130</sup> Hamilton’s point was that we must depend on the persuasiveness of our written opinions to command the respect of our fellow citizens. In that way, we have the foremost responsibility of safeguarding our independence.

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<sup>129</sup> 163 U.S. 537, 558 (1896) (Harlan, J., dissenting).

<sup>130</sup> *The Federalist No. 78* (Alexander Hamilton), *supra* note 40, at 465.