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Judicial Independence: Rebuffing Congressional Attacks on the Third Branch

By Stephan O. Kline*

I. INTRODUCTION

ourts are easy targets for popular anger. This is a burden that predates the founding of the United States, but ultraconservatives in the 104th and 105th Congresses have launched a particularly broad array of attacks that pose a threat to judicial independence. The Republican majorities considered constitutional amendments that would eliminate life tenure for federal judges. They passed bills which limit the jurisdiction of courts and considered other legislation which would strip judicial remedies. They convened hearings to study and control "judicial activism." The Senate has brought gridlock to the judicial confirmation process, and senior Republicans have even articulated their desire to impeach and "intimidate" judges because of distaste for particular judicial decisions.

Some members of Congress are particularly outspoken on this issue. Representative Bob Barr (R-Ga.) believes that

[i]t is time to begin exploring how and in what way we might take steps to "re-balance" and restore integrity to our Federal judicial system. This includes, but is not limited to, exploring the manner in which the constitutional tenure for judges to hold their office during "good behavior" can be fully effectuated to take into account the consequences for misbehavior—a problem plainly presented to the American people by the assumption of power beyond the scope of the office. There are, as

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with other problems confronting our institutions, a number of ways that the problems of judicial activism or overreaching, can be addressed: defining "good behavior"; limiting tenure of judges; limitations on the jurisdiction of judges and impeachment.¹

Senator John Ashcroft (R-Mo.) claims:

Given the vast power wielded by the judiciary and the Clinton administration's pattern of flawed nominees, the Senate must take proper care in its consideration of candidates for judgeships. Activist, out-of-control judges pose a clear and present danger to constitutional freedom. It is the Senate's solemn duty to set a higher standard than we have seen so far from the Clinton Administration.²

Senator Jeff Sessions (R-Ala.) echoes his colleague, and in one recent confirmation hearing, he remarked:

As you know, this Senate has been focusing on the question of judicial activism because we believe that we need to have a commitment and an understanding and a belief that the nominees we confirm are committed to the proposition that they would enforce the law as written and not use redefinition of words or other things to impose a personal agenda.³

While legislators in previous Congresses have reacted negatively to certain court decisions,⁴ the federal courts have rarely been a substantial and sustained focus for Congress. This has now changed. According to a

¹ Judicial Misconduct and Discipline: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. 8 (1997) [hereinafter Judicial Misconduct and Discipline] (statement of Rep. Bob Barr).

² John Ashcroft, Symposium, INSIGHT MAG., Mar. 2, 1998, available in 1998 WL 9105346.

³ Confirmation Hearings on Federal Appointments Before the Senate Committee on the Judiciary, Part 3, 105th Cong. 23-24 (1998) (statement of Sen. Jeff Sessions).

⁴ For instance, 100 southern Democratic members of the 84th Congress signed a "Southern Manifesto" condemning *Brown v. Board of Education*, 347 U.S. 483 (1954), and urging the impeachment of its author, Chief Justice Earl Warren. In the early 1980s, multiple bills were considered in Congress which would have stripped federal courts of jurisdiction to hear abortion, bussing, and school prayer cases in response to Supreme Court decisions. *See infra* Part III.D.1 for notes 219-23.

report released by the American Bar Association's Commission on the Separation of Powers and Judicial Independence,

While there is nothing new about judicial criticism, there are aspects of the present cycle of political debate that are relatively new and lack clear precedent. In recent years an unfortunate shrillness has often marked the tenor of inter-branch discussions. This new skepticism has caused some to fear that Congress is seeking to over-regulate the courts in ways that are not keeping with a truly independent judiciary ⁵

The current attacks on judicial independence are so severe that Senator Russell Feingold (D-Wis.) has said: "I think we are close to being able to say this is an unprecedented series of threats toward the independence of our judiciary "6 While some may not know how to define it, even those like Senators Ashcroft and Sessions and Representative Barr, who sternly criticize judges, courts, and their decisions and take action reinforcing their critiques, profess to support the concept of judicial independence while refusing to acknowledge that they contribute to the erosion of this important doctrine.⁷

A number of commentators and legal scholars have placed the efforts of the congressional majority in historical context by comparing them to the 1930s. Professor Sheldon Goldman of the University of Massachusetts, who has studied the federal courts for more than three decades, has called the current confirmation gridlock "unprecedented in its scope [and] a Congressional analogue of President Roosevelt's court packing plan of 1937" Both Roosevelt's court packing and the Republican's court

⁵ ABA COMM'N ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, REPORT: AN INDEPENDENT JUDICIARY, opening at ii (1997).

⁶ Judicial Activism: Defining the Problem and Its Impact: Hearings on S.J. Res. 26, a Bill Proposing a Constitutional Amendment to Establish Limited Judicial Terms of Office Before the Subcomm. on Constitution, Federalism, and Property Rights of the Comm. on the Judiciary, 105th Cong. 10 (1997) [hereinafter Judicial Activism] (statement of Sen. Russell Feingold).

⁷ See infra Part II.A.

⁸ President Franklin Delano Roosevelt responded to a series of Supreme Court decisions curtailing the regulatory powers provided by Congress to his administration by proposing that the Court be expanded one seat for each justice who was older than 70. While President Roosevelt ultimately suffered a grave political defeat as Congress failed to adopt his plan, the Supreme Court shifted ideological direction and never again declared New Deal laws unconstitutional. The court packing plan is considered the twentieth century's boldest and most

blocking plans had their genesis in displeasure with court decisions. In order to explore the current attacks, this paper first defines judicial independence and the concept of judicial activism. It then discusses the contemporary threats to judicial independence posed by the Republican majorities of the 104th and 105th Congresses.

II. THEORY: SAFEGUARDS AND CRITICISM OF THE THIRD BRANCH

A. Judicial Independence

Jerome Shestack, a past president of the American Bar Association, correctly assessed that "[w]hat marks our nation from so many unstable or authoritarian governments is, to a substantial measure, the independence of our judges as preservers of our constitutional rights." Judicial independence helps insure that litigants will know that decisions made by judges are based on law and not popular favor. According to the Director of the Administrative Office of U.S. Courts, "Judicial independence is a judge's ability to decide a case free from pressures or inducements." Judge Deanell Reece Tacha of the United States Court of Appeals for the Tenth Circuit expands on this concept:

aggressive example of a successful attack on judicial independence. See, e.g., WILLIAM F SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY, 1932-1968, at 60-70 (1970); see also Barry Cushman, Rethinking the New Deal, 80 Va. L. Rev 201 (1998); David A. Pepper, Against Legalism: Rebuffing an Anachronistic Account of 1937, 82 MARQ. L. Rev 63 (1998).

Federal case law reflective of the Court's new willingness to accede to Roosevelt's demands includes the following: *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939) (upholding authority of the Secretary of Agriculture to control milk marketing); *Mulford v. Smith*, 307 U.S. 38 (1939) (upholding provisions of the Agricultural Adjustment Act); *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939) (upholding constitutionality of the TVA); and *United States v. Bekins*, 304 U.S. 27 (1938) (upholding statute concerning municipal bankruptcies).

⁹ See Joan Biskupic, Hill Republicans Target "Judicial Activism," WASH. POST, Sept. 15, 1997, at A8.

¹⁰ Kenneth Jost, *The Federal Judiciary, Are the Attacks on U.S. Courts Justified*, CQ RESEARCHER, Mar. 13, 1998, at frontpiece.

¹¹ L. Ralph Mecham, Introduction to Mercer Law Review Symposium on Federal Judicial Independence, 46 MERCER L. REV 637, 638 n.2 (1995).

[J]udicial independence means simply that a life-tenured Federal judge is free from all political and other outside pressures to decide cases in a wholly impartial manner. She must commit herself to following the Constitution, the statutes, common law principles, and the precedent that interprets each of them. Her decision-making is limited to properly admitted evidence, constrained by appropriate procedural rules, records, and legal principles. Prevailing political winds have no effect. The codes of conduct require a judge to adhere not only to the principle of actual impartiality and absence of outside influence, but also require a judge to be free from even the appearance of any improper influence. Thus, a judge resigns from all other affiliations that would call her impartiality into question, divests herself of any financial interests which would raise similar questions, and refrains from all activity that appears to have the capacity to influence personal decision-making.¹²

Sixty years ago, when the Senate Judiciary Committee decided to reject President Roosevelt's court packing plan in 1937, it explained why judicial independence is important:

Courts and the judges thereof should be free from a subservient attitude of mind, and this must be true whether a question of constitutional construction or one of popular activity is involved. If the court of last resort is to be made to respond to a prevalent sentiment of a current hour, politically imposed, that Court must ultimately become subservient to the pressure of public opinion of the hour, which might at the moment embrace mob passion abhorrent to a more calm, lasting consideration.¹³

In 1871, the Supreme Court itself described the need for judicial independence in a discussion on judicial immunity.

It is essential in all courts that judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions without independence, and without fear of consequences.¹⁴

¹² Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 MERCER L. REV 645, 646 (1995).

¹³ REORGANIZING THE FEDERAL JUDICIARY, S. REP NO. 75-711, at 15 (1937).

¹⁴ Bradley v. Fisher, 80 U.S. 335, 349 n.16 (1871) (emphasis added).

William Rehnquist, current Chief Justice of the United States, focused on the separation of powers and the importance of judicial independence in his 1996 year-end speech on the state of the judiciary.

The federal judiciary's achievements and disappointments of the past year illuminate both the basic principle of separation of powers and the interdependent relationship that exists between Congress and the judiciary. In the words of Justice Robert Jackson, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." To preserve liberty, the Judicial branch of the federal government is separate, equal, and independent from the Legislative branch. Yet both must work together if feasible solutions are to be found to the practical problems that confront today's federal judiciary. ¹⁵

Judicial independence is integral to the United States's unique notion of the separation of powers. The framers of the Constitution based many of their views of government on the British monarchy. Under the British system, judges were beholden to the monarch for salary protection and tenure in office. Under the system of government established in this country, the founders believed that the courts needed protection from the two political branches, the legislative and executive, which were responsive both to majoritarian rule and the voters. The courts were established, in part, to limit excesses of the popular branches and to preserve the rights of minorities. ¹⁶

¹⁵ Chief Justice William Rehnquist, 1996 Annual State of the Judiciary Address 15 (Dec. 31, 1996) (transcript on file with author).

The judicial branch is not completely isolated from the two political branches. The president makes appointments to the federal courts. See U.S. Const. art. II, § 2. Congress has the power to "constitute Tribunals inferior to the supreme Court," id. art. I, § 8; to appropriate money for the courts, see id., and to impeach judges, see id. art. II, §§ 2, 3. Congress has frequently used its responsibility to set jurisdictional boundaries on the courts, including establishing sharp limits on the Supreme Court's acceptance of cases by mandatory appeal in 1925 and passing the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1975). Judges have frequently participated in political branch activities. John Jay, for three months, served simultaneously as the first Chief Justice of the United States and as Secretary of State. Supreme Court Justice Robert H. Jackson took an 18-month leave of absence to serve as the chief American prosecutor at the Nuremburg war crimes trials after World War II. Chief Justice Earl Warren served as Chairman of the President's

Former president of the American Bar Association N. Lee Cooper accurately summarizes the two major purposes of judicial independence:

An independent federal judiciary was created for two distinct reasons. First, making the judiciary a third branch of government independent of the legislative and executive would enable the judiciary to check over concentrations of power in the political branches—hence the need for institutional judicial independence. Second, making the judiciary independent of outside influences, both within and without government,

Commission on the Assassination of President Kennedy, and Warren Burger began his service as Chairman of the Commission on the Bicentennial of the United States Constitution prior to his resignation as Chief Justice. See, e.g., Laurence H. Tribe, God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History (1985); President's Comm'n on the Assassination of President Kennedy, Report of the President's Commission on the Assassination of Present John F Kennedy (1964); David G. Savage, Turning Right: The Making of the Rehnquist Supreme Court (1992). Judges and justices have also frequently testified before Congress on diverse topics including court budgets, the need for additional judgeships, jurisdiction, and court reorganization plans.

In testifying on behalf of the Judicial Conference of the United States before the ABA's Special Commission on the Separation of Powers and Judicial Independence, Senior Judge Joseph H. Rodriguez of the District of New Jersey focused on how mechanical controls can themselves become an attack on judicial independence:

[W]hile we as federal justices and judges are as independent as our counterparts in any democracy, we are very much dependent upon the Congress for the enactment of laws to enable us to do a better job of administrating justice. This relationship, it seems to me, results in a "healthy tension."

Clearly, Congress' role in the affairs of the Third Branch is important and legitimate. Congress determines the number of judgeships, the structure and function and procedures of the judiciary, the jurisdiction of the courts, the salaries of judges, as well as our annual appropriation. I believe that Congress, for the most part, does a good job in its oversight of the judiciary.

If the Legislative branch is sensitive and responsive to our needs, we shall remain one of the most durable legacies of the founders of this nation. If it is not, then suspicion, under-funding, minute oversight, and capricious additions to workload may become the equivalent of a constitutional amendment effectively repealing Article III.

ABA Public Hearing of the Comm'n on the Separation of Powers and Judicial Independence [hereinafter ABA Hearings of the Comm'n] (Feb. 21, 1997) (testimony of Senior Judge Joseph H. Rodriguez).

would better enable the judiciary to render impartial decisions in individual cases—hence the need for decisional independence. In both cases, the operating assumption was that a judiciary independent of the electorate and its representatives was needed to preserve the democratic values the electorate and its representatives held dear

Shirley Abrahmson, the Chief Justice of the Wisconsin Supreme Court, agrees with Cooper's assessment of the types of judicial independence and believes that "[t]he general consensus ——is that judicial independence, although difficult to define, is valuable to our system, and that threats to [judicial independence] are ultimately threats to the rule of law "18"

First Circuit Senior Judge Frank Coffin, believes that a judge's "most elusive mission is that of safeguarding individual rights in a majoritarian society with due regard to the legitimate interests of that society "19 Bruce Fein, a legal scholar and former Reagan Department of Justice official who helped select federal judges, says that

the whole purpose of having the judiciary and conceiving it as a check is precisely because it's there to resist the passions of the moment; it's there to resist popular passion, and that's why we want them to decide not wrongly; we try to hector them and criticize them if they think they're wrongly approached, but we want them to decide in a more calm atmosphere that's removed from what politicians and the public may think is desired at that time.²⁰

Testifying before the ABA Commission on the Separation of Powers and Judicial Independence, Drucilla S. Ramey, Executive Director and General Counsel of the Bar Association of San Francisco, explained how judicial independence is integral in safeguarding the rights of minorities:

¹⁷ Hearing on H.R. 1252, the Judicial Reform Act of 1997 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. 131 (1997) [heremafter Hearing on H.R. 1252] (statement of N. Lee Cooper).

¹⁸ ABA Hearings of the Comm'n, supra note 16 (Dec. 13, 1996) (statement of Chief Justice Shirley Abrahmson).

¹⁹ Gordon Berman & Russell R. Wheeler, Federal Judges and the Judicial Branch: Their Independence and Accountability, 46 MERCER L. REV 835, 856 n.104 (1995) (quoting FRANK M. COFFIN, THE WAYS OF A JUDGE 249 (1980)).

²⁰ Judicial Misconduct and Discipline, supra note 1, at 53 (testimony of Bruce Fein).

[W]e as a class have had to depend on brave and independent judges and in an independent judiciary to measure and, when appropriate, strike down laws. And while sometimes over the years, especially in the 1800s, judges have failed us as well in failing to find that it was unconstitutional to bar women from juries or from the vote or lucrative jobs, more often the courts really have served as the last refuge for those without political or social power whose rights are too often trammeled upon by the tyranny of the majority. So it has really been the courts to whom we have turned to weigh statutes and voter initiatives and find them in appropriate cases wanting.²¹

Those who created the constitutional system of the United States addressed these concerns with preserving judicial independence by guaranteeing in Article III of the Constitution that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." According to Judge Tacha of the Tenth Circuit, "life tenure symbolizes the individual judge's ability to resist any temptation to do the popular or politically correct thing and to conform to the case or controversy requirement and other judicial constraints."

L. Ralph Mecham, Director of the Administrative Office of United States Courts, states that judicial independence is dependent on more than life tenure and salary protection and extends "to encompass those conditions in which and under which a judge decides the cases. These ancillary elements of individual judicial independence, including security, facilities, support, workload, rules of procedure, and case management, normally do not impact upon judicial independence but under extreme circumstances may do so."²⁴ In engaging in attacks on the courts and the judiciary, the ultraconservative activists and members of the political branches often levy charges that jurists are rendering judicial activist decisions.

Justifying his attacks by claiming the need to weed out judicial activists, Tom Jipping, Director of the Free Congress Foundation's Judicial

²¹ ABA Hearings of the Comm'n, supra note 16 (Feb. 21, 1997) (testimony of Drucilla S. Ramey).

²² U.S. CONST. art. III, § 1.

²³ Tacha, *supra* note 12, at 646.

²⁴ Mecham, supra note 11, at 638.

Selection Monitoring Project, suggests that judges have only themselves to blame for any attacks on judicial independence. He notes that

judges cannot make up the very law they must enforce. Judges today routinely exceed their power, in part because Congress has not used the checks and balances at its disposal, including impeachment. Judges must act independently to be independent. The threat to judicial independence is as much from inside the judiciary as from outside. This is the only formula that will maintain law as something more than politics, and at the same time preserve liberty and self-government.²⁵

B. Judicial Activism

"Judicial activism" is often defined according to the ideological beliefs of the beholder. As Alfred Goodwin, a senior judge on the United States Court of Appeals for the Ninth Circuit, notes, "If the court makes a decision someone likes, it's applauded as 'judicial statesmanship.' If not, it's called 'judicial activism,' a very bad word these days. Which label is attached all depends on whose ox is gored." The ABA's Jerome Shestack shares this belief—"Every time someone disagrees with a decision, they call that judicial activism. Sometimes legislation is overturned by the Supreme Court and that isn't called activist, but when a lower court overturns something, it's called 'activist.' I don't put much faith in those labels." In recent decades, judicial activism has usually become a mantra for conservative scorn of decisions perceived as liberal.

While there is no precise definition for "judicial activism," there are some core ideas which are routinely included in the term. In his book Judicial Activism: Bulwark of Freedom or Precarious Security, Christopher Wolfe states that "judges ought to decide cases, not avoid them, and thereby use their power broadly to further justice—that is to protect human dignity—especially by expanding equality and personal liberty "28 Wolfe categorizes activist judges as those who are not restrained by constitutional

²⁵ Judicial Misconduct and Discipline, supra note 1, at 42 (testimony of Tom Jipping).

²⁶ Carol M. Ostrom, Fuming Senators Ready to Carve Up 9th Circuit, SEATTLE TIMES, Nov. 2, 1997, at A1.

²⁷ Deborah Mathis, Federal Courts Clogged as Judicial Vacancies Mount, GANNET NEWS SERV., Aug. 22, 1997, available in 1997 WL 8835099.

²⁸ CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY 3 (1997).

interpretation of the framers or by determinate meaning of the words of the Constitution. Under this interpretation, activist judges are those who tend to place less emphasis on adherence to precedent, give less deference to political decisionmakers, issue broad decisions that extend beyond the narrow contours of litigation, and are more likely to rely on remedial powers.²⁹

According to Stephen Halpern and Charles M. Lamb, "the core element of judicial activism is the notion that judges should decide cases, not avoid them, and that judicial power should be used broadly "30 Activist judges are result oriented and are willing to decide cases at the "periphery of justiciability," and "an activist Court is willing to decide tough and/or novel questions."31

Politicians of all stripes constantly toss around the term "judicial activism" in an effort to justify their criticisms of the judiciary Senate Judiciary Committee Chairman Orrin Hatch (R-Utah), in a speech to the Utah Federalist Society said:

A judicial activist is, simply put, a judge who exceeds the proper limits of his or her authority and usurps the authority delegated to another branch (or institution) of government. In its most basic sense, activism is when judges make the law instead of applying it. The limits on judicial authority are fairly simple in principle, but vitally important in a constitutional democracy such as ours.³²

He then spoke of his disgust of the harm caused by judicial activist judges:

When judges twist the language of legislation to enact the policies they prefer, they usurp the role of our popular elected legislators. And, when they read their own preferences and political agendas into the Constitution to strike down legislation duly enacted by elected representatives, judges directly thwart the will of the people. What's worse, voters effectively have no recourse. The public doesn't have the option of voting these judges out of office, but instead is stuck with the policies these

²⁹ See 1d. at 4.

³⁰ STEPHEN HALPERN & CHARLES M. LAMB, SUPREME COURT ACTIVISM AND RESTRAINT 45 (1982).

³¹ Id. at 45-47

³² Orrın Hatch, Address to University of Utah Federal Society Chapter (Feb. 18, 1997), available in 1997 WL 4429673.

judges have forced upon them. As a result, entire spheres of policy making are, in effect, ruled off limits from democratic majorities, and instead are handed over to self-styled, all-knowing guardians of justice. This is judicial activism, and it represents a direct attack on the democratic principles that are central to our constitutional system.³³

Hatch's counterpart, Representative Henry Hyde (R-Ill.), Chairman of the House Judiciary Committee, has an analogous interpretation of judicial activism:

My own view is that judicial activism is conduct by a judge that egregiously trespasses into legislation. When [judges] run school districts, when they run jail systems and order legislative acts to be initiated that cannot avoid raising taxes, questions arise whether they are not beyond their charter. In truth, you look at each case individually.³⁴

Representative Howard Coble, Chairman of the House Judiciary Subcommittee on Courts and Intellectual Property, which has conducted hearings on judicial activism, believes that

the fundamental job of any jurist is to interpret the law and apply it impartially to the affected litigants in a given case. The worst thing a judge can do — is to appropriate the role of a legislator by creating law; that is, by reading personally-held convictions of a social or political nature into a decision that is otherwise not founded or may not be founded on legislative intent or case law precedent.³⁵

Representative Mel Watt (D-N.C.) has a different interpretation, conceptualizing judicial activism in terms of respect for the law and courtroom etiquette:

[T]he ultimate act of judicial activism is standing in a courtroom and having a judge look down at you and call you "nigger" and tell you that your client's opinion in a case don't mean anything because your client happens to be black, or tell the bailiff not to call you and tell you that your

³⁴ Interview with Henry Hyde, Hyde on Judging Judges-And Presidents, INVESTOR'S BUS. DAILY, June 16, 1997, at A32.

³³ Id.

³⁵ Judicial Misconduct and Discipline, supra note 1, at 1 (statement of Howard Coble).

case is coming up for trial and start the trial without you being there, simply because you represent an interest that the judge is out of step with. That is the ultimate act of judicial activism—acts which I have seen in my practice of law. So one thing I have come to understand is that judicial activism is much like beauty it's in the eye of the beholder.³⁶

C. Scapegoating Jurists

Almost thirty years after Earl Warren retired as Chief Justice of the United States, conservatives continue to disparage the Warren Court as the archetype of judicial activism. Under this analysis, the liberal majority then on the high court, and for some years thereafter, led this country astray by creating constitutional rights where none existed. Allegedly these include the right to privacy,³⁷ welfare rights and expansion of due process,³⁸ student rights,³⁹ rights of the accused in criminal cases such as state-paid counsel in felony trials,⁴⁰ and protection against coerced confessions.⁴¹

For many, the landmark civil rights case Brown v. Board of Education⁴² was a focal point of anger and divisiveness against judicial activism. Wade Henderson, Executive Director of the Leadership Conference for Civil Rights, placed the current attacks on judicial activism in historical context by referring to the Brown decision. He stated:

Many Americans have short memories when it comes to our Nation's recent history, and to those of us in the civil rights community, the attacks on the courts today that we are hearing remind us all too chillingly of the deplorable period in our Nation's history some 40 years ago. You may recall that when Chief Justice Earl Warren wrote the unanimous Supreme Court decision striking down State-mandated school segregation in *Brown*, defenders of segregation cried "judicial activism." ⁴³

³⁶ Hearing on H.R. 1252, supra note 17, at 32 (statement of Rep. Mel Watt).

³⁷ See *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its progeny involving abortion. *See also* Roe v. Wade, 410 U.S. 113 (1973).

³⁸ See Goldberg v. Kelly, 397 U.S. 254 (1970).

³⁹ See Tinker v Des Moines Sch. Dist., 393 U.S. 503 (1969).

⁴⁰ See Gideon v. Wainwright, 372 U.S. 335 (1963).

⁴¹ See Miranda v. Arizona, 384 U.S. 436 (1966).

⁴² Brown v. Board of Educ., 347 U.S. 483 (1954).

⁴³ Judicial Misconduct and Discipline, supra note 1, at 65 (testimony of Wade Henderson).

One hundred members of Congress signed a Southern Manifesto on March 12, 1956, condemning the *Brown* decision, and some sought to impeach Chief Justice Warren. The Manifesto claimed that the Justices.

with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal and social ideas for the established law of the land, a clear abuse of judicial power climaxing a trend in the Federal judiciary to legislate and encroach upon the reserved rights of the people.⁴⁴

While he supports the Court's ruling in *Brown*, University of Southern California law professor Erwin Chemerinsky argues that it is absurd to focus on judicial activism:

Perhaps the height of judicial activism was the Supreme Court's decision in *Brown v. Board of Education* in 1954. There the Supreme Court overturned a precedent that was 58 years old. There the Supreme Court invalidated laws that existed in every southern state and many of the border states. And yet I would hope that none among us today would deny that was a triumph of the judiciary even though it was judicial activism. My point here is it's meaningless to talk about judicial activism.⁴⁵

Senator Edward Kennedy (D-Mass.) agrees, believing that "[o]ur Republican colleagues in Congress are taking an Alice-in-Wonderland view of the federal judiciary What was once respected as 'judicial independence,' they now call 'judicial activism.' What were once hailed as 'landmark decisions' are now condemned as 'legislating from the bench.'"

The Warren era ended decades ago, and it has been twelve years since the Burger Court was succeeded by the Rehnquist Court. Even after the Reagan and Bush administrations packed the federal courts with right-wing idealogues, certain ultraconservatives argue that the courts remain stocked with judicial activists. Gary Bauer, Director of the Family Research Council and a domestic policy advisor in the Reagan administration, has said:

⁴⁴ Judicial Activism, supra note 6, at 161 (statement of Elliot Mincberg, quoting the Southern Manifesto).

⁴⁵ ABA Hearings of the Comm'n, supra note 16 (Feb. 21, 1997) (statement of Prof. Erwin Chemerinsky).

⁴⁶ Senator Edward Kennedy, Alliance for Justice Luncheon Key Note Speech (Apr. 30, 1997).

By adopting an understanding of the Constitution as a "living" document, our judges have given themselves a license to twist the Constitution into any form. The Constitution no longer means what it actually says but some derivative, based on what judges think it should say. The rejection of an interpretation of the law as it was written and originally understood invites arbitrary decisions of a tyrannical nature and is contrary to our democratic constitutional system.⁴⁷

According to conservative commentator and Republican presidential hopeful Patrick Buchanan,

The Supreme Court—not the majority—decides what is right and what is wrong. The court may find a quote "constitutional right" and decide the majority's plan violates that right. End of majority plan. To revise Lincoln's words: We today have a government of the judiciary, by the judiciary, and for the judiciary. The court then centralized power here in Washington and exercised that power without democratic consensus. Led by the court, the country has set off on a 30-year experiment with non-democratic government. Now we get one kind of society when decisions are made by the majority. We get another kind when decisions are made by judges—what Jefferson called the despotism of an oligarchy.⁴⁸

Referring to the Supreme Court, these idealogues look askance at recent decisions protecting (more or less) the right to have an abortion,⁴⁹ supposedly granting gays "special rights" by overturning Colorado Initiative 2 (a 1992 referendum which prohibited governmental action designed to protect homosexuals from discrimination),⁵⁰ and at other

⁴⁷ Gary Bauer, *Displacing Judicial Tyranny*, WASH. TIMES, June 7, 1997, at

⁴⁸ Patrick Buchanan, Speech to the Heritage Foundation (Jan. 29, 1996) (transcript on file with author).

⁴⁹ See Planned Parenthood v. Casey, 505 U.S. 833 (1992); Webster v Reproductive Health Servs., 492 U.S. 490 (1989).

⁵⁰ See Romer v. Evans, 517 U.S. 620 (1996). In describing *Romer*, former Reagan Administration Attorney General Ed Meese stated:

It is hard not to regard the *Romer* decision as the pinnacle of judicial arrogance: Six appointed justices struck down a law passed by 54 percent of a state's voters in a direct election, the most democratic of all procedures. In one of the most egregious usurpations of power in constitutional history, the Court not only desecrates the principle of self-government, but

decisions in which the Court's more liberal wing was able to form a majority

Some politicians like Representative John N. Hostettler (R-Ind.) do not even acknowledge that the courts have a paramount role in interpreting constitutional questions. Hostettler observes:

It is interesting to me that there is today such awe—indeed, almost reverence—for the pronouncements of the judiciary. Their opinions are held by many to be unchallengeable, almost divine. When a court declares, for example, that Congress does not have the power to ban pornography in its military commissaries, it is as if God himself has spoken. I believe that the present practice of the legislative branch bowing to judicial supremacy does not square with the U.S. Constitution or its history ⁵¹

Lino A. Graglia, noted conservative and professor of constitutional law at the University of Texas at Austin, also attacks the Supreme Court, noting:

Over the last 40 years, almost every fundamental issue of social policy—abortion, capital punishment, criminal procedure, prayer in the schools, government aid to religious schools, public displays of religious symbols, pornography, libel, vagrancy control, discrimination on the basis of sex, alienage and illegitimacy, busing for school racial balance, and so on—every basic issue of social policy has been decided not by elected legislators, State or Federal, but for the Nation as a whole by a majority vote of the nine lawyers making up the Supreme Court. And on almost every issue the Court has worked a social revolution by, for example, removing prayers from the schools and prohibiting most restrictions on pornography ⁵²

In decisions where the conservative wing of the Supreme Court struck down statutes passed by congressional action, ultraconservatives did not label these actions judicial activism. For example, the Court substantially limited the applicability of the Commerce Clause, in decisions reminiscent of the economic conservatism expressed by members of the Court in the

appointed itself the moral arbiter of the nation's values.

Judicial Activism, supra note 6, at 23-24 (statement of Ed Meese).

⁵¹ Judicial Misconduct and Discipline, supra note 1, at 11 (statement of Rep. John Hostettler).

⁵² Id. at 78-79 (testimony of Prof. Lino A. Graglia).

1930s. 53 Representative William D. Delahunt (D-Mass.) commented on this oddity

What is interesting about the current campaign against "activist" judges is that today many of those activist judges are conservatives who take an extremely narrow view of the scope of congressional authority under the commerce clause and an equally broad view of the powers reserved to the States under the 10th Amendment. Those conservatives who recognize this have been slow to enlist in the crusade.⁵⁴

University of Southern California law professor Erwin Chemerinsky agrees that there is inconsistency in conservative attacks:

[I]t's particularly ironic to hear attacks on judicial activism today from conservatives because the traditional activism of the 1990s is all in a conservative direction. I'm not exactly sure what the phrase "judicial activism" means. My sense is that it's a label that's used to attack decisions that one does not like. But if I was to formulate some operational definition of "judicial activism," it would probably include overruling precedent and overruling the decisions of popular elected officials. Well, where has the Rehnquist court been activist? For the first time in 60 years, in *Lopez v. United States*, the Supreme Court declared unconstitutional a Federal law as exceeding the scope of Congress's clause on authority.⁵⁵

⁵³ See, e.g., Reno v. ACLU, 117 S. Ct. 2329 (1997) (finding provisions of the Communications Decency Act unconstitutional as content-based restrictions of speech); City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (finding the Religious Freedom Restoration Act of 1993 unconstitutional because Congress had exceeded its enforcement powers under the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549 (1995) (finding the Gun-Free School Zones act unconstitutional for exceeding Congress's commerce clause authority because possession of a gun on school premises did not constitute economic activity which substantially affected interstate commerce). As Washington College of Law professor Herman Schwartz, in speaking about Lopez and Reno v. ACLU, said: "The conservative rulings thus represent an extreme case of 'judicial activism,' just the kind of disregard of democratically elected officials for which right-wing states' righters assail 'liberal' judges. Yet, no criticism has been heard from them about these decisions." Herman Schwartz, High Court Has a Selective Regard for States' Rights, HOUSTON CHRON., Oct. 8, 1997, at 27

⁵⁴ Judicial Misconduct and Discipline, supra note 1, at 15 (statement of Rep. William D. Delahunt).

⁵⁵ ABA Hearings of the Comm'n, supra note 16 (Feb. 21, 1997) (statement of Prof. Erwin Chemerinsky).

Most conservatives have reserved their ire for the lower federal courts and particularly the decisions of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit often rules on the constitutionality of laws passed by ballot initiative. On November 8, 1994, after a divisive campaign, the California electorate approved Proposition 187 by a margin of fifty-nine percent to forty-one percent. This voter referendum required state officials to verify the immigration status of persons with whom they come into contact, report those they suspect of illegal immigrant status, and deny illegal immigrants educational benefits, health care, and social services.

United States District Court Judge Marianne Pfaelzer enjoined enforcement of the new law and granted partial summary judgment for the League of United Latin American Citizens on preemption and equal protection grounds.⁵⁷ Following litigation involving multiple parties, multiple attempts to intervene, and multiple decisions, Judge Pfaelzer was criticized for retaining jurisdiction over the case and waiting several years before issuing a final ruling on the merits of Proposition 187 In March 1998, she found the law unconstitutional as a violation of the Supremacy Clause.⁵⁸

California State Senator Richard L. Mountjoy, one of the authors of Proposition 187, criticized Judge Pfaelzer's actions prior to the issuance of the final ruling:

What has happened to proposition 187 I think is a travesty of justice. That proposition has not been released today. We're asking that court just to make a finding, if she will, just make a finding on the unconstitutionality of that amendment by the people—that initiative by the people of California, and let us move on to the next court. But she is denying justice by delaying justice.⁵⁹

Senator John Ashcroft (R-Mo.) also was highly critical of the delay, stating:

⁵⁶ See Howard Breuer, Outcry Quells Prop. 187, L.A. DAILY NEWS, Nov. 28, 1994, at N1.

⁵⁷ See League of United Latin Am. Citizens v. Wilson, 908 F Supp. 755 (C.D. Cal. 1995).

⁵⁸ See League of United Latin Am. Citizens v. Wilson, 1998 WL 141325, at *2 (C.D. Cal. Mar. 13, 1998).

⁵⁹ Hearing on H.R. 1252, supra note 17, at 95 (testimony of Cal. Sen. Richard L. Mountjoy).

The saying, "Justice delayed is justice denied" applies here. Over three years ago, the people of California voted to end certain public aid to illegal aliens. Within days of the election, a judge put the will of the people "on hold." Three years later, nothing has changed. No benefits have been withdrawn. The will of the people has been totally frustrated. Now over three years after the people voted, the federal judge assigned to the case has finally issued an opinion, holding the law unconstitutional. The state will appeal, and the legal process will grind on, but enforcement of the law will remain on hold. This is not democratic self-government. There is nothing democratic about sending a law into the void for years on end with enforcement prevented until a judge put the final touches on the final decision. Even if Judge Pfaelzer had upheld the law in its entirety, three years with no enforcement and no appealable decision is a travesty ⁶⁰

Proposition 209 was adopted by referendum of the California voters (fifty-four percent to forty-six percent) on November 5, 1996.⁶¹ It added a provision to the California state constitution which prohibited race-based and gender-based affirmative action. United States District Judge Thelton Henderson issued a preliminary injunction denying enforcement on the basis that the law appeared unconstitutional on equal protection grounds.⁶²

Even though the decision was based on a careful analysis of Supreme Court and Ninth Circuit precedent, it was severely criticized. Tom DeLay (R-Tex.), the Majority Whip in the United States House of Representatives, said:

In a ruling that turned common sense and our Constitution on it's [sic] head, Judge Henderson ruled that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State had violated the Fourteenth Amendment. Mr. Chairman, we all recognize that a law which parallels the Fourteenth Amendment and Title VII of the 1964 Civil Rights Act, and which forbids discrimination, is hardly unconstitu-

⁶⁰ Senator John Ashcroft, 'Justice Delayed is Justice Denied;' Calls 3-Year Court Case an Insult to Voters, Press Release, Nov. 20, 1997, available in 1997 WL 12104976.

⁶¹ See Tim Cornwell, American Election, INDEPENDENT (London), Nov. 7, 1996, available in 1996 WL 13500461.

⁶² See Coalition for Econ. Equity v. Wilson, 946 F Supp. 1480, 1492 (N.D. Cal. 1996), vacated, 110 F.3d 1431 (9th Cir.), and amended and superseded on denial of reh'g, 122 F.3d 692 (9th Cir.), cert. denied, 118 S. Ct. 397 (1997).

tional. Only a judge who chooses to willfully ignore the Constitution could arrive at such a conclusion.⁶³

Senator Robert Smith (R-N.H.) added:

Federal district judges have repeatedly abused their authority by blocking the implementation of entirely constitutional measures enacted through State ballot referenda simply because they disagree with the policy judgments of the voters. . [A] single Federal district judge, who had been an activist with the ACLU before going on the bench, blocked the implementation of the California civil rights initiative. However you feel about the initiative, for or against, isn't the issue. The California voters passed it in the State.⁶⁴

Proponents of Proposition 209 appealed Judge Henderson's decision, seeking a stay of the injunction. A Ninth Circuit panel reversed, stating that "[a] system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy" ²⁶⁵

misstated the issue because they have constantly couched judicial activism as a matter of the judiciary standing athwart the majority. That is exactly what the judiciary is charged to do, for the most part, sitting as a constitutional court. Its job is to review the other two branches to make sure that they're acting within their authority.

Judicial Misconduct and Discipline, supra note 1, at 69 (testimony of Roger Pilon). In response to a speech by California Governor Pete Wilson in which the governor attacked "activist" judges for continuing holdups on California mitiatives, David Oppenheimer, a law professor at Golden Gate University, called the attack "hype and demagoguery. We have relied on the principle of judicial review for almost 200 years as the cornerstone of constitutional democracy. If we remove the judiciary from the balance of power, there will be no protection for minority rights." Dan Smith, Wilson Rips Judicial Activists, Backs Reform, SACRAMENTO BEE, May 23, 1997, at A4.

65 Coalition for Econ. Equity v Wilson, 110 F.3d 1431, 1437 (9th Cir.), vacated, 122 F.3d 692, cert. denied, 118 S. Ct. 397 (1997). In fact, the Ninth

⁶³ Judicial Misconduct and Discipline, supra note 1, at 19 (statement of Rep. Tom DeLay).

⁶⁴ 144 CONG. REC. S3723 (daily ed. Apr. 25, 1997) (statement of Sen. Robert Smith). Under Senator Smith's view, it appears that the possible unconstitutionality of Proposition 209 was of no relevance if a majority of voters approved the measure. As libertarian and Cato Institute Legal Director Roger Pilon has stated, critics of "judicial activism" have

Testifying before the Senate Judiciary Committee, Gail Heriot, co-chair of the "Yes on Proposition 209 Campaign," opined that "when U.S. District Judge Thelton Henderson enjoined [enforcement], he was following his own political predilections, not any plausible interpretation of the Constitution. When the Ninth Circuit Court of Appeals reversed his ruling no well-informed court watcher could claim to be surprised." 66

The Ninth Circuit declined to rehear the case *en banc*, although four judges dissented from this refusal. Judge William Norris said that the panel neglected its duty

in favor of a path of conservative judicial activism. As a political manifesto, the panel's opinion could comfortably assume a place on one side of that debate. As a document that purports to apply the Constitution as interpreted by the Supreme Court, however, the opinion fails at its appointed task.⁶⁷

Proposition 209 went into effect on August 28, 1997, after Justice Sandra Day O'Connor denied an emergency stay application. California Attorney General Dan Lundgren said that this final action "signals recognition by both this court and the 9th Circuit that a state and its people suffer

Circuit panel that heard the appeal in the Proposition 209 case was acting contrary to Ninth Circuit precedent. Conservative judges Diarmuid F O'Scannlam, Edward Leavy, and Andrew J. Kleinfeld had been assigned motion duty in February 1997. the month in which the appellants appealed the preliminary injunction issued by Judge Thelton Henderson. The panel should have ruled only on whether to issue a stay on the injunction, which would have remained in effect until a merits panel heard the case. However, the motions panel transformed itself into a merits panel and ultimately ruled on the constitutionality of the underlying law. By failing to remand the case to the district court for an investigation on the merits, the panel precluded a full trial on the divisive issues contained within Proposition 209. According to Professor Chemerinsky, "[f]or decades, conservatives have railed against judicial activism. The 9th Circuit's decision upholding Proposition 209 only can be understood as conservative judicial activism of the most aggressive sort." Erwin Chemerinsky, Appellate Decision Went Too Far: Prop. 209: The Three-Judge Panel Was Not Directed to Rule on the Constitutionality Question, L.A. TIMES, Apr. 10, 1997, at B9.

⁶⁶ Judicial Activism, supra note 6, at 99 (July 15, 1997) (testimony of Gail Heriot).

⁶⁷ Larry D. Hatfield & Robert Salladay, *ACLU Asks High Court to Block Prop.* 209, S.F. EXAMINER, Aug. 29, 1997, at A1.

irreparable harm when the democratic process is thwarted by judicial activism disguised as constitutional interpretation."68

Sometimes ultraconservatives direct their comments against decisions addressing specific issues: the constitutional challenges to California voter initiatives, desegregation of the Kansas City schools, ⁶⁹ physician-assisted suicide, ⁷⁰ stays of execution, ⁷¹ and prison system consent

Judge Clark decided to create a magnet school system. Under his theory, high quality schools would help to break down the vestiges of discrimination by attracting students of all races. Accordingly, he ordered a willing Kansas City School District to construct hundreds of millions of dollars worth of new facilities. construction of which was financed in large part by the state of Missouri. At one point in the lengthy litigation, Judge Clark ordered a recalcitrant Missouri state government to raise taxes in order to offset construction costs. See Missouri v. Jenkins, 672 F Supp. 400, 411 (W.D. Mo. 1987). This decision was overruled in part by the Eighth Circuit, which noted that the imposition of a state tax obligation exceeded the power of the district court. See Jenkins by Agyei v. Missouri, 855 F.2d 1295, 1315 (8th Cir. 1988). Writing for the Supreme Court, Justice White agreed with the appellate court. See Missouri v. Jenkins, 495 U.S. 33 (1990). The Supreme Court held that Judge Clark had no authority to require Missouri to pay for the remedy because the thrust of Milliken was the voluntary attraction of suburban students as a cure for de facto and de jure school segregation. See id. at 35, 50-56.

⁷⁰ See Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc) (holding that a statutory prohibition on aiding another person to commit suicide violated the Due Process Clause when applied to terminally ill patients who wished to hasten their own deaths with medication prescribed by their physicians), rev'd sub nom. Washington v Glucksberg, 117 S. Ct. 2258 (1997).

⁷¹ Senior Judge John T. Nixon of the Middle District of Tennessee was described by Charlotte Ann Stout, the mother of a girl whose killer had his death sentence overturned by Judge Nixon,

[as a] Federal Judge who's appointed for life [and] holding the citizens [of Tennessee] "hostage" to his conscientious beliefs. He does have the right to his beliefs. But when these beliefs interfere with the administration of justice and the performance of this duties as an officer of the court, he should be removed.

⁶⁸ Frank J. Murray, Supreme Court Refuses to Block California End to Set-Asides, WASH. TIMES, Sept. 5, 1997, at A3.

⁶⁹ Judge Russell Clark of the Western District of Missouri has overseen a school desegregation case in Kansas City since 1977. Prior to the *Brown* decision, Kansas City and the state of Missouri had established two school systems divided by race and in the intervening years had failed to eliminate the vestiges of that discrimination. The Supreme Court expressed disfavor for interdistrict remedies to achieve desegregation in *Milliken v. Bradley*, 418 U.S. 717 (1974), unless all districts had been involved in the illegal segregation.

decrees.⁷² More often, politicians and interest groups expressing these views refer generically to a judiciary that is "out of control."⁷³

Judicial Misconduct and Discipline, supra note 1, at 29 (testimony of Charlotte Ann Stout); see, e.g., Groseclose v. Bell, 895 F Supp. 935 (M.D. Tenn. 1995) (vacating death sentence conviction because of ineffective assistance of counsel), aff'd, 130 F.3d 1161 (6th Cir. 1997); Rickman v. Dutton, 864 F Supp. 686 (M.D. Tenn. 1994) (vacating death sentence conviction because of ineffective assistance of counsel and other claims), aff'd, 131 F.3d 1150 (6th Cir. 1997).

⁷² See Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) (denying motion to modify consent decree requiring construction of new jail); Hook v. Arizona Dep't of Corrections, 107 F.3d 1397 (9th Cir. 1996) (denying motion to vacate consent decree after new statute prohibited payment of fees incurred by special masters), cert. denied, 118 S. Ct. 171 (1997).

⁷³ According to Majority Whip Tom DeLay (R-Tex.), judges have thrown out the Constitution to advance their own political views. Far too many of our policies—on education, on justice, on morality—are the result of judicial decree. Congress has given up its responsibility to be a check on the court system, and we ought to start exercising it.

Katharine Q. Seelye, *House GOP Begins Listing a Few Judges to Impeach*, N.Y. TIMES, Mar. 14, 1997, at A24. Representative Bob Barr (R-Ga.) stated:

In recent years, many of us-and millions of our constituents-have become alarmed at the number and brazenness of Federal judges who use the opportunity of rendering decisions to implement their personal or political agenda. In many respects, these judges are assuming for themselves the powers and responsibilities of legislators or executives. This has blurred, if not eradicated, the separation of powers foundation of our system of government; it has resulted in a number of blatantly political 'judicial' decisions; and, literally in some instances, endangered the lives of our citizens.

Judicial Misconduct and Discipline, supra note 1, at 7 (statement of Rep. Bob Barr). Senator John Ashcroft (R-Mo.) has said that

here in America today, can it still be said that "the people govern?" Can it still be said that citizens control that which matters most? Or have people's lives and fortunes been relinquished to renegade judges, a robed, contemptuous intellectual elite fulfilling Patrick Henry's prophecy, that of turning the courts into "nurseries of vice and the bane of liberty?"

John Ashcroft, Courting Disaster: Judicial Despotism in the Age of Russell Clark, CPAC Annual Meeting, Mar. 6, 1997, available in 1997 WL 10024388. According to James Dobson, the founder of Focus on the Family, "I sense that the judiciary's day of unchallenged authoritarianism is coming to a close. The people will eventually demand relief from the other branches of government." PEOPLE FOR THE AMERICAN WAY, JUSTICE DELAYED, JUSTICE DENIED: THE RIGHT WING ATTACK ON THE INDEPENDENT JUDICIARY 2 (1997).

When decrying judicial activism, these same critics rarely refer to decisions by the conservative wing of the Supreme Court that favor a more conservative political agenda. One example is an injunction issued to prevent enforcement of a ballot initiative allowing physician-assisted suicide. Another decision struck down as unconstitutional the Violence

Others, like Senator Hatch, promised to do all they could to rein in the judiciary.

I am serving notice around here that we are not going to continue to sit back and tolerate these activist judges. Many of these nominees have come in here and said we are not going to be activist judges; we are not going to usurp the powers of the executive and legislative branches of Government.

. All of them mouth that kind of language, but when it comes right down to it, a significant number of them are, on the bench, engaging in patently activist judging and usurping powers that they do not have. So I am just serving notice that we are on to the games these nominees are playing, and do not intend to let this game go on. We are going to do what it takes to weed out those nominees who pay lip service to judicial restraint, but then think they can do anything they want to once they don their robes.

143 CONG. REC. S848 (daily ed. Jan. 30, 1997) (statement of Sen. Orrin Hatch). According to Representative William D. Delahunt,

There is a big difference between reasonable criticism and irresponsible attacks that distort the judge's record and focus on the result in a single case usually without looking at the underlying facts and legal precedents. Most conscientious judges, regardless of their political views, will eventually be confronted with a situation in which the law requires that evidence be thrown out or a death sentence be overturned. Yet a judge who follows the law in such cases is labeled "soft on crime" and accused of "letting murderers go free." This kind of intimidation has its intended effect.

Judicial Misconduct and Discipline, supra note 1, at 22 (statement of Rep. William D. Delahunt).

⁷⁴ In *Lee v. Oregon*, 891 F Supp. 1429 (D. Or. 1995), Chief Judge Michael Hogan struck down the Oregon Death with Dignity Act. This ballot initiative, approved by the Oregon voters in 1994, allowed a terminally ill adult to obtain a doctor's prescription for a fatal drug dose that would end his or her life. Judge Hogan found the initiative unconstitutional on equal protection grounds because it "singles out terminally ill persons who want to commit suicide and excludes them from protection of Oregon laws that apply to others." *Id.* at 1483. Representative Barney Frank (D-Mass.) later referred to this decision:

What happens is my friends on the other side have this curious memory problem. Every time they talk about the judges who invalidated assisted suicide bans somehow they forgot to mention the judge who invalidated an assisted suicide referendum which allowed it. That is, we have a single

Against Women Act.⁷⁵ One judge also added a previously uncontemplated moral requirement to the Freedom of Access to Clinic Entrances Act,⁷⁶ but this action provoked little criticism from those who expressed fundamental disagreement with the underlying legislation.⁷⁷ Bruce Fein referred to this

Judge in the state of Oregon who outlawed a referendum allowing for this. Somehow that's slipped their minds.

Hearing on H.R. 1252, supra note 16, at 18 (statement of Rep. Barney Frank). The Ninth Circuit reversed Judge Hogan in Lee v. Oregon, 107 F.3d 1382 (9th Cir.), cert. denied sub nom. Lee v. Harcleroad, 118 S. Ct. 328 (1997), ruling that the plaintiffs had not established standing to enjoin the Death with Dying Act. The Act went into effect late in 1997

⁷⁵ Chief Judge Jackson Kiser of the Western District of Virginia found the Violence Against Women Act ("VAWA"), 42 U.S.C. § 13981 (1994), unconstitutional. See Brzonkala v. Virginia Polytechnic & State Univ., 935 F Supp. 779 (W.D. Va. 1996). In Brzonkala, the plaintiff was raped by two members of Virginia Tech's football team. One of her attackers later confessed to sexual assault and admitted that the woman had said "no," but no one was ever prosecuted by the state of Virginia. The plaintiff sued for civil damages under VAWA, and Judge Kiser found that she had stated a claim under the Act. The Judge denied relief, however, because he concluded the law was unconstitutional. See id. at 801. Under his interpretation, VAWA was beyond congressional authority and did not have an impact on interstate commerce. The Fourth Circuit reversed, see Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997), finding that in four years of extensive hearings, Congress had demonstrated the impact that violence against women has on interstate commerce. See id. at 964. The Fourth Circuit then granted an en banc rehearing of the case, and the full court concluded that the lower court decision should be reinstated. See Bronzkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc). The en banc decision agreed with Judge Kiser that the VAWA exceeded Congress's power under the Commerce Clause and also exceeded Congress's power to compel state enforcement of federal legislation under the Fourteenth Amendment. See id. at 825.

76 18 U.S.C. § 248 (1994).

The United States v. Lynch, 952 F. Supp. 167 (S.D.N.Y. 1997), Judge John Sprizzo of the Southern District of New York entered a permanent injunction against two anti-abortion protesters who had blockaded a women's health clinic in violation of the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248. Defendants knowingly violated the injunction, and the United States brought criminal contempt charges. Judge Sprizzo, at his own initiative, asked "the parties to brief whether it is a defense to a criminal contempt charge that a person act with a sincere religious belief that he is acting to save a human life." Lynch, 952 F. Supp. at 169. Judge Sprizzo then answered his own question in the affirmative and concluded that neither defendant could be prosecuted for criminal contempt

tendency in criticizing Republican House Majority Whip Tom DeLay, who

because they both acted out of a "sincere religious belief." *Id.* at 172. He continued: The facts presented here both by sworn testimony and a videotape depicting an elderly bishop and a young monk quietly praying with rosary beads in

the Clinic's driveway clearly call for that exercise of the prerogative of lenience which a fact-finder has to refuse to convict a defendant, even if the circumstances would otherwise be sufficient to convict.

Id. at 171. Contrary to Judge Sprizzo's assertion, FACE only required a knowing and willful violation for criminal penalties to apply, and sincerely held religious beliefs were not intended to undermine such a finding. See 18 U.S.C. § 248(a).

The decision surprised those on both sides of the abortion debate. A. Lawrence Washburn, Jr., lawyer for one of the defendants, noted that "he [Sprizzo] surprised us all. Judge Sprizzo has pointed the way." Jan Hoffman, *Judge Acquits Abortion Protesters on Basis of Religious Beliefs*, N.Y. TIMES, Jan. 19, 1997, at 25. Randi Fallor, director of the Women's Medical Pavilion in Dobbs Ferry, New York, which was subjected to the blockade, now wondered where the decision would lead: "Is it O.K. for them now to block our door? For them to place bombs in the clinic? For them to shoot us, as long as they're sincere in their moral beliefs." *Id.* at 30. Reacting to the ruling, Representative Nita Lowey (D-N.Y.) stated:

It is not a judge's role to weave a moral code for how and when a law should be applied. Those of us who fought hard for the protection of the Freedom of Access to Clinics Act fear that Judge Sprizzo's decision will embolden protesters and lead to more tragedy and violence. And the ruling shows a callous disregard for the rule of law when lives and liberties are at stake. Yet, despite my outrage at Judge Sprizzo's decision, I am not calling for his impeachment.

Judicial Misconduct and Discipline, supra note 1, at 9 (statement of Rep. Nita Lowey). Bruce Fein observed that

the two defendant churchmen confessed that they violated the law. They said "we did it. We wanted to block access to the clinic." And Judge Sprizzo writes an opinion in which he says "Well, judges don't really have to enforce positive law if it's morally offensive," indicating that the fugitive slave law he would have ignored because he would not have wanted to assist the southern slave owners in recapturing fugitive slaves from Boston or otherwise. Now you may agree or disagree with his moral sentiment, but surely that is a prime case, if there ever was one, where a judge simply states he is above the law, except those that accord with his moral sentiments—he didn't say only those that accord with the Constitution of the United States—as positive law.

Id. at 33-34 (statement of Bruce Fein). Because Judge Sprizzo found the defendants innocent, his decision in the case was unreviewable.

had recently announced that he planned to impeach activist judges:

But in [DeLay's] denunciations of Federal judges he cites only rulings he disagrees with-those that are pro-choice and in favor of affirmative action. For all of DeLay's concerns about judicial activism, he has not uttered a word of criticism about a couple of recent cases that represent frightening assaults on the rule of law.⁷⁸

III. PRACTICE: JUDICIAL INDEPENDENCE UNDER ATTACK

A. The 1996 Presidential Campaign

The selection of federal judges became a central topic in the 1996 presidential election as Senator Robert Dole (R-Kan.) attempted to use this issue as a wedge to differentiate himself from incumbent President William Jefferson Clinton. Dole acknowledged this on the *Lehrer News Hour* on April 17, 1996, observing:

You know the judicial branch never gets discussed much, but I find, and I think polls will, will underscore this, there's a lot of concern about federal judges. We just finished a survey. The numbers are way up there in the 80's and 90's on judges should be accountable.⁷⁹

Senator Dole stirred up his campaign with a general attack on judicial activism. He opined:

Of course, the American people rightfully expect that Federal judges will respect the text of the Constitution and apply the law as it is written. Some members of the Federal bench, however, have displayed a disturbing willingness to sidestep the Constitution and inject their own ideological agenda into the individual cases that come before them. What the American people may not realize is the number of other startling ways in which activist judges reach out to change our daily lives. Through their rulings, Federal judges not only help determine whether criminals walk the streets or stay behind bars, but also whether racial quotas or merit govern hiring decisions; whether businesses can function, prosper and

⁷⁸ Bruce Fein, It's Folly to Impeach "Activist" Judges: Just Another Way to Disagree on Issues, MINNEAPOLIS-ST. PAUL STAR-TRIB., May 11, 1997, at 21A.

⁷⁹ Democratic National Committee, *Press Release*, DEMOCRATIC NEWS (Apr. 19, 1996).

create jobs without being subject to baseless litigation; and whether parents can control the content of their children's education. Today, Federal judges micro-manage schools, hospitals, even prisons. The bottom line is that Federal judges wield enormous power, often at great cost to the American people. Federal judges must be persons of considerable intellect and unquestioned integrity. But they also must be faithful to the text of the Constitution and committed to applying the law as written, not rewriting it by substituting their own policy judgements.⁸⁰

In particular, Senator Dole hoped that raising the issue of future appointments to the Supreme Court would galvanize voters, because "[i]f we give President Clinton the opportunity to make just one more appointment to the Supreme Court, we could end up with the most liberal court since the Warren Court of the sixties."81

Dole soon focused on Clinton's lower court appointments. In a major speech to the American Society of Newspaper Editors, he singled out four Clinton appointees—"Do we really want the majority of judges on the Federal bench to think like Judges Barkett, Baer, Brinkema, and Sarokin—an all-star team of liberal leniency—judges who seem intent on disman-

The large majority of the Clinton nominees are very solid, mainstream people. None of them have been identified as liberal activists in terms of public persona or in terms of writings. The Clinton Administration and Clinton himself have been very careful to lower the ideological temperature of the judicial appointment process. They have nominated mainstream people.

⁸⁰ Bob Dole, *Dole Tells How He Would Pick Judges*, INSIGHT, Apr. 29, 1996, at 10-11 [hereinafter Dole, *Dole Tells How*].

⁸¹ Id. Given that by the time of the 1996 election there were only two Democratic appointees on the Supreme Court and that neither the Burger nor the Rehnquist Courts could be viewed as liberal, this issue did not appear to resonate with voters.

While Senator Dole's comments about judges during the campaign were attributable to political posturing, by most accounts the judges appointed by President Clinton are quite moderate. Robert Carp, a University of Houston political scientist who has studied opinions of federal judges for 25 years, found that based on a study of more than 15,000 opinions written by Clinton's appointees, "there is no empirical evidence that [Clinton appointees] are inordinately disposed toward criminal defendants or inordinately liberal. They are kind of moderate to moderately liberal." Jamie Dettmer & Lisa Leiter, *Judicial Choices Raise Objections*, INSIGHT, Apr. 29, 1996, at 12. University of Massachusetts judicial expert Sheldon Goldman, who for 20 years has published respected biannual studies of the presidents' judicial appointments in *Judicature*, agrees:

Morning Edition: Federal Judge Shortage (Nat'l Public Radio broadcast, Sept. 22, 1997).

William Leuchtenburg, court scholar and historian, observed, "What most people say is how moderate [President Clinton's judges] have been. [Clinton] has not taken advantage of his tenure as President to offset the decidedly ideological appointments that Reagan and Bush made in the 1980s." Katharine Q. Seelye, *Dole Citing Crisis in the Courts Attacks Appointments by Clinton*, N.Y. TIMES, Apr. 20, 1996, at A10. In a similar vein, Nan Aron, president of the Alliance for Justice, said, "One would have hoped that this President would use his power to begin to put some fresh perspectives and voices on these circuit courts. That is something he has chosen not to do." *Morning Edition: Federal Judge Shortage* (Nat'l Public Radio broadcast, Sept. 25, 1997). Molly Ivins, a columnist with the *Fort Worth Star-Telegram*, is more caustic in her description of the typical Clinton judge:

Clinton's nominees don't fit anyone's description of 'liberal activist.' He has nominated the most bland-vanilla set of appointees imaginable, any question raised about any of them means that the White House pulls down the nomination, no fight. Clinton has yet to waste a particle of political muscle backing a judicial nominee.

Molly Ivins, *Politicians' Assault on Judiciary Misses Mark*, SIOUX FALLS ARGUS LEADER, Aug. 15, 1997, at 14.

Clint Bolick, the Legal Director for the Institute for Justice, like many conservative activists, disagrees that President Clinton's judicial appointments are moderates. He notes:

Clinton judges generally are more likely to favor defendants in criminal cases and plaintiffs in civil rights and civil liability cases and to view the power of the federal courts more expansively than judges appointed by Ronald Reagan or George Bush. Clinton's appointments have made the federal courts more liberal, moving them perceptibly toward the kind of judicial activism that characterized the federal courts before the election of Ronald Reagan.

Clint Bolick, *Clinton's Judges: A Preliminary Analysis*, 1996 GOLDWATER INSTITUTE ISSUE ANALYSIS REPORT 3. Senator Chuck Grassley (R-Iowa) echoes Bolick's opinion.

I believe that the current administration has then done a disservice to the American people by gathering liberal activists from every coffee house and every street corner in America and nominating them to some of the most important and influential Federal courts in America. Until the President came on to the scene, I thought that we had turned a corner on that sort of Warren Court thinking. I had thought there was a broad consensus that law enforcement should not have their hands tied by highly technical rules. I had thought that there was a broad consensus that serving time in prison for committing crimes should be punishment and not a blissful vacation at taxpayers' expense. But, Mr. President, I was wrong. President Clinton has

tling the rule of law from the bench."83

Senator Dole disparaged Harold Baer, Jr., a Clinton appointee to the Southern District of New York, for a single evidentiary ruling in which Baer had suppressed a large quantity of cocaine after he found that the police had no reason to stop some suspects. Senator Dole criticized Judge Leonie Brinkema of the Eastern District of Virginia for departing from the sentencing guidelines. He criticized Judge Rosemary Barkett of the Eleventh Circuit for a death penalty ruling she had made while serving as Chief Justice of the Florida Supreme Court. He later commented that "as a member of the 11th Circuit Court of Appeals, Judge Barkett has had the opportunity to write opinions in seven criminal cases. And guess what in all seven cases Judge Barkett has sided with the criminal defendant." Referring to Lee Sarokin, then a judge on the Third Circuit Court of Appeals, Senator Dole said:

This judge, who twists the constitution to impose his liberal views of social policy, whose bias in the courtroom is so blatant that he had to be removed from a case—this judge was hand-picked by President Clinton to

sent up a number of law professors and liberal activists to sit on the Federal bench and impose their preconceived, unrealistic ideas on the rest of America

142 CONG. REC. S3699-3700 (daily ed. Apr. 19, 1996).

⁸³ Bob Dole, *Verbatim, Dole Strafes Clinton Judges, ABA*, LEGAL TIMES, Apr. 22, 1996, at 19 [hereinafter Dole, *Verbatim*]. George Stephanopoulos, one of President Clinton's spokespersons, responded, "We're not going to get into a tit for tat. For every Clinton judge they can pull out, we can pull out a Reagan or Bush judge who might have made a similar isolated decision." Seelye, *supra* note 82, at 10.

⁸⁴ See United States v. Bayless, 913 F Supp. 232, 238 (S.D.N.Y.), opinion vacated on reconsideration, 921 F Supp. 211 (S.D.N.Y. 1996). Ultraconservatives like Tom Jipping of the Free Congress Foundation picked up on the Baer refrain, commenting, "Baer's appointment says Clinton's nominees are out-of-touch, soft-on-crime judges, and yet the Senate confirms them. Senatorial courtesy is the single most perverse factor in the selection process. It has been the reason for the [Republican] code of silence [on Clinton's judicial nominees]." Dettmer & Leiter, supra note 82, at 9.

85 See Charles W Hall, Lawyers Defend Virginia Judge Mocked by Dole, WASH. POST, Apr. 23, 1996, at B3.

⁸⁶ See Gil Klein, Two State Judges Cited in Dole's Blast at Clinton: Liberal Judicial Hall of Shame, RICHMOND TIMES-DISPATCH (Richmond, Va.), Apr. 20, 1996, at A-2.

87 Dole, Dole Tells How, supra note 80, at 10-11.

sit on the 3rd Circuit Court of Appeals, the second highest court in the land—and the very court that had removed him for bias earlier. I voted against confirming Judge Sarokin. I have profound questions whether such a man should be sitting on the federal bench, let alone one of the highest courts in the land.⁸⁸

Senate Judiciary Chairman Orrin Hatch had laid the groundwork for these comments a few weeks earlier when he said, "Judge Sarokin has repeatedly come down on the side of criminals and prisoners in a series of cases and he recently voted to overturn the death sentences of two Delaware men who, in separate cases, killed several elderly people." ²⁸⁹

Senator Dole, of course, was somewhat hypocritical for attacking the Clinton judges. He had only voted against two: Lee Sarokin for the Third Circuit and Rosemary Barkett for the Eleventh Circuit. 90 According to Fred Graham, chief anchor of Court TV

You'll recall that the media very quickly discovered that Senator Dole had voted for almost all of these judges he was then criticizing; that, in fact. they went out to Kansas and they found out that Senator Dole's selections were very much like the Clinton nominees, sort of middle-of-the-road, smart, well qualified Federal judges. And then they dug around and, of course, inevitably they found a nutty-looking decision by one of Senator Dole's judicial appointees, and they pointed out how by grabbing at one isolated opinion, you could make almost any judge look a little kooky.⁹¹

Kim Wells, who advised Dole on judicial nominees and chaired his 1996 presidential campaign in Kansas, said that "Dole did not use a litmus test [for nominations]. He never has. I'd characterize his choices as mainstream." Lawrence Berkowitz, a Kansas lawyer and Democrat

⁸⁸ Dole, Verbatim, supra note 83, at 19.

^{89 142} CONG. REC. S2790 (daily ed. Mar. 25, 1996).

⁹⁰ See Senate Rollcall Vote 319, 103d Cong. 2d Sess. (Oct. 4, 1994) (Sarokın); Senate Rollcall Vote 92, 103d Cong. 2d Sess. (Apr. 4, 1994) (Barkett). Senator Dole also voted to recommit the nomination of James Dennis to the Fifth Circuit Court of Appeals, sending it back to the Judiciary Committee. See Senate Rollcall Vote 473, 104th Cong. 1st Sess. (Sept. 28, 1995).

⁹¹ ABA Hearings of the Comm'n, supra note 16 (Oct. 11, 1996) (statement of Fred Graham).

⁹² Jonathan Groner, *As Judge-Picker, Dole Is No Ronald Reagan*, LEGAL TIMES, Apr. 1, 1996, at 13.

agreed. "These judges are very case-oriented, fact-oriented. They are qualified lawvers who are not ideological at all." 33

Judge Baer became the subject of unending criticism and repeated calls for his impeachment. Referring to Baer, Senator Dole said the presidential election was a choice "between a candidate who will appoint conservative judges to the court and a candidate who appoints liberal judges who bend the laws to let drug dealers free." President Clinton even entered into this verbal war, suggesting through his spokesperson that Baer might want to resign from the bench. Fafter months of criticism, including a letter from 150 members of Congress who insisted that President Clinton ask for Judge Baer's resignation, Baer conducted a second hearing on the suppression issue and reversed his decision on April 1, 1996. According to Senator Hatch,

[i]t took literally weeks of criticism by the Republican leaders of the House and Senate to force Judge Baer to reconsider his ill-conceived ruling. Unfortunately, this sort of attention cannot be brought to bear in all of the other soft-on-crime decisions issued by the other judicial activists that President Clinton has appointed to the federal bench.⁹⁷

During this onslaught, Baer received support from some members of the Second Circuit, in which the Southern District of New York resides. Chief Judge Jon O. Newman and three former chief judges, J. Edward Lumbard, Wilfred Weinberg, and James Oakes, wrote a public letter to Senator Dole:

[T]here is an important line between legitimate criticism of a decision and illegitimate attacks on a judge. Criticism of a decision can illuminate issues and sometimes point the way toward better decisions. Attacks on a judge risk inhibition of all judges as they conscientiously endeavor to discharge their duties. [Judges] have endured attacks, both verbal and physical, and they have established a tradition of judicial independence and faithful regard for the Constitution that is the envy of the world. We

⁹³ T.A

⁹⁴ Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at B3.

⁹⁵ See 1d.

⁹⁶ See United States v. Bayless, 921 F Supp. 211 (S.D.N.Y. 1996).

⁹⁷ Warren P Strobel, *Clinton, Dole Hit for Judge Bashing*, WASH. TIMES, Apr. 3, 1996, at A4.

are confident that they will remain steadfast to that tradition. Rather, we argue that attacks on a judge of our Circuit should cease because of the disservice they do to the Constitution and the danger they create of seriously misleading the American public as to the proper functioning of the federal judiciary.⁹⁸

Third Circuit Judge Lee Sarokin resigned from the bench on July 31, 1996, after serving in that capacity for only twenty-two months. Following his resignation, he claimed that the political attacks levied against him during the 1996 campaign limited his ability to render independent decisions. In a letter to his Third Circuit colleagues, he said "I see my life's work and reputation being disparaged on an almost daily basis, and I find myself unable to ignore it." In his letter of resignation to President Clinton, he wrote, "In the current political campaign, enforcement of constitutional rights is equated with being soft on crime and, indeed, even causing it. [T]o hold judges responsible for crime is like blaming doctors for disease." Learning of Sarokin's resignation, Yale Law School legal history professor Robert W Gordon said,

In most cases the attackers think they won't do any damage. . But when you get a weak judge who actually changes his mind, it becomes hostage negotiation. If judges send a signal that this kind of criticism can get to them, perfectly competent but thin-skinned judges will be hounded off the bench. ¹⁰¹

⁹⁸ Jon O. Newman, *The Judge Baer Controversy: Correspondence from the White House, Senator Dole, Congressmen and Judges*, 80 JUDICATURE 156, 158-59 (1997).

⁹⁹ Neil MacFarquhar, Federal Judge to Resign Citing Political Attacks on Judiciary, N.Y. TIMES, June 5, 1996, at B1. Largely because of prior rulings during his tenure on the district court for the District of New Jersey, which labeled him soft on crime, Sarokin became the subject of one of President Clinton's most difficult judicial nomination fights of 1994. Three weeks before his resignation, Sarokin had sought to transfer his chambers from Newark, New Jersey, to California to be closer to his family as he prepared to take senior status. His colleagues rejected that request, and Sarokin soon opted to resign. He denied that the rejection of his move weighed in his decision, stating, "my tenure on the court has become so politicized that I do not feel that I can serve effectively." Id. at B4.

¹⁰¹ David E. Rovella, *Judge Sarokin Decries Criticism of Bench, Quits*, NAT'L L.J., June 17, 1996, at A10.

More than a year later, Lee Sarokin wrote that he

thought that by stepping down from the court and making my concerns public I would convey the gravity of this dangerous course. Now a year later, I concede that my grand gesture was a complete fizzle, and indeed, rather than dissuade the practice, seems to have emboldened it since it has been followed by demands led by Representatives Tom DeLay and Bob Barr to impeach judges for unpopular decisions. ¹⁰²

While many commented on the impropriety of attacking a sitting judge for his or her rulings, some also wondered whether the attacks had led to Judge Baer's reversal of his initial suppression decision. According to Representative William Delahunt (D-Mass.):

Judge Harold Baer was pilloried by the press and the Presidential candidates of both parties for a case in which he excluded drug evidence seized by the police. A few weeks later, the judge reversed his ruling. We will never know whether he did so because he had genuinely changed his mind or because of the relentless criticism he endured. But the perception will remain that a Federal judge was forced to back down under political pressure. That is hardly the way to increase public confidence in the courts. ¹⁰³

Nan Aron, president of the Alliance for Justice, expressed similar concerns:

I can't say with any certainty that Judge Baer changed [his] ruling[] because [he] succumbed to political pressure. The problem is we don't know why [he] changed [his] rulings. The difficulty is that it fuels the public perception that courts make their decisions because of political pressure and not because of the facts and the law presented to them, and it undermines, it seems to me, the public's faith in the judiciary 104

Abner Mikva, a former White House Counsel and a former judge on the United States Court of Appeals for the District of Columbia Circuit,

¹⁰² Lee Sarokin, Public Letter, NATION, Oct. 13, 1997, at 15-16.

¹⁰³ Judicial Misconduct and Discipline, supra note 1, at 22 (statement of Rep. William D. Delahunt).

¹⁰⁴ ABA Hearings of the Comm'n, supra note 16 (Oct. 11, 1996) (statement of Nan Aron).

referred to a typical judicial aspiration in which judges hope to be elevated to a higher court. He placed this within the context of the attacks on Judge Baer:

Most judges do think about promotion. They spend some time when they're hearing these dull arguments wondering what will happen if the phone rings and the President of the United States asks, how would you like to go upstairs?

They think about that, and clearly the Baer incident, the way it came out, both with the threats, the political speeches, maybe asking for his resignation, his impeachment, and then his reversing himself, has to send a message to every trial judge and everybody else who ever deals with the exclusionary rule, be careful. If you ever want to go anywhere else than where you are, don't get on the wrong side of one of these hot-button cases, and that does chill the independence of the judiciary ¹⁰⁵

While many believed that Judge Baer's second *Bayless* decision resulted in part from calls for his resignation and was a worrisome attack on judicial independence, others have a different interpretation. For instance, Fred Graham of Court TV said,

It seemed to me that what we saw there was that Judge Baer had issued a decision which certainly appeared—most people thought was foolish and wrong-headed. He apparently came to that conclusion after some reflection and maybe a little jaw-boning from Senator Dole and the White House because he changed his mind. He had another hearing, but he changed his mind, and I think that it was a good thing for probably the judiciary, the federal judiciary and all of us, that was ventilated and that we all saw that there were decisions being made by competent, smart judges that the average person thought were ridiculous and that, on reflection, in fact, was overturned, and I thought that was pretty healthy. ¹⁰⁶

Judge David F Levi of the Eastern District of California believes that this type of criticism poses little threat to judicial independence.

As I define the term, I would say that it takes two to tango on this one. There is pressure. The threats are only threats if the judges perceive them

¹⁰⁵ Id. (statement of Abner Mikva).

¹⁰⁶ Id. (statement of Fred Graham).

that way and respond to them. And I don't see this happening, at least in the federal system that I know best. I don't believe that any judge would think that his or her ability to decide cases impartially has been impaired by anything that has happened recently. 107

B. Impeachment

On March 11, 1997, Tom DeLay, the Majority Whip of the House of Representatives, casually announced that he favored impeachment of "activist" federal judges. He noted:

The articles of impeachment are being written right now. As part of our conservative efforts against judicial activism, we are going after judges. Congress has given up its responsibility in [overseeing] judges and their performances on the bench, and we intend to revive that and go after them in a big way ¹⁰⁸

He did not announce specific judges who might be candidates for impeachment, but those names were soon forthcoming. According to DeLay, "We are receiving nominations from all across the country [for judges] that could be a prime candidate for impeachment under our approach." 109

He then explained in the New York Times that

I advocate impeaching judges who consistently ignore their constitutional role, violate their oath of office and breach the separation of powers. The Framers provided the tool of impeachment to keep the power of the judiciary in check. It is a tool Congress should explore using. 110

He later defined an "impeachable offense" as "whatever a majority of the House of Representatives considers it to be at a given moment in

¹⁰⁷ ABA Panel, Judicial Independence: Real Threat or Feeling Threatened, JUDGES J., Winter 1998, at 46.

¹⁰⁸ Ralph Z. Hallow, Republicans Out to Impeach Activist Jurists, WASH. TIMES, Mar. 12, 1997, at A1.

¹⁰⁹ Mike Dorning, New GOP Target: Liberal Judges' Right-Wing Support Appears to Be Growing, CHI. TRIB., May 16, 1997, at 3.

¹¹⁰ Tom DeLay, Letter to the Editor, Impeachment Is a Valid Answer to a Judiciary Run Amok, N.Y. TIMES, Apr. 6, 1997, at 18.

history "111 DeLay and his allies soon suggested a number of possible candidates for judicial impeachments, including William Justice, 112 Fred Biery, 113 Harold Baer, 114 Thelton Henderson, 115 and John T. Nixon. 116 A few weeks later, DeLay repeated his position on the House floor.

Mr. Speaker, an independent judiciary is the anchor of our democracy. A despotic judiciary may very well lead to the downfall of our democracy. I just urge my colleagues to consider all the tools within our constitutional authority as we, the Congress, take on a very real problem of judicial despotism. One of those tools is impeachment. Despite the barrage of criticism that myself and my colleagues have suffered over the last few weeks, I think impeachment is a tool that we should consider using. 117

¹¹¹ Herman Schwartz, *The War Against Judicial Independence*, L.A. TIMES, May 11, 1997, at M2.

Judge William Wayne Justice of the Eastern District of Texas was a candidate for impeachment because he had asserted control over a Texas prison system in a 20-year-old inmate lawsuit. See Ruiz v. Estelle, 503 F Supp. 1265 (E.D. Tex. 1980), aff'd in part, rev'd in part, 679 F.2d 1115, and amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982).

he had postponed the swearing in of a Republican sheriff and a Republican county commissioner in Val Verde County, Texas. The two men had won election through 800 absentee ballots mailed in by military personnel who had not lived in the county for many years but retained Texas addresses because of inexpensive public universities and the absence of a state income tax. See Casarez v. Val Verde County, 957 F Supp. 847 (W.D. Texas 1997).

¹¹⁴ Judge Harold Baer prominently made the list for suppressing evidence in a Washington Heights drug case in 1996, saying police had no reason to stop the suspects. See United States v. Bayless, 913 F Supp. 232 (S.D.N.Y.), opinion vacated on reconsideration, 921 F Supp. 211 (S.D.N.Y. 1996); see also supra notes 84, 94-98 and accompanying text.

¹¹⁵ Judge Thelton Henderson was mentioned for enjoining Proposition 209. See Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996), vacated, 122 F.3d 692 (9th Cir. 1997); see also supra notes 61-68 and accompanying text.

blocking executions in capital cases. See, e.g., Coe v. Bell, 161 F.3d 320 (6th Cir. 1998); Groseclose v. Bell, 130 F.3d 1161 (6th Cir. 1997), cert. denied, 118 S. Ct. 1826 (1998); see also Viveca Novak, Empty Bench Syndrome, TIME, May 26, 1997, at 38. See generally Katharine Q. Seelye, Republicans Identify Federal Judges for Impeachment, FRESNO BEE, Mar. 14, 1997, at F16.

^{117 143} CONG. REC. H1587 (daily ed. Apr. 16, 1997).

On May 15, 1997, the House held a hearing to consider judicial misconduct and discipline. DeLay expanded on his prior remarks, expounding on his impeachment theory.

When is impeachment a legitimate tool? Can Congress impeach a public official for noncriminal acts? I think the answer is yes. The category of impeachable offenses is much larger than the category of indictable offenses. Article II of the Constitution states that all Federal civil officers may be impeached for "treason, bribery or other high crimes and misdemeanors." The mistaken assumption is that impeachment requires a statutory crime. That has never been the case.

I am not-and I repeat-I am not suggesting that impeachment be used for partisan purposes, but when judges exercise power not delegated to them by the Constitution, I think impeachment is a proper tool. And I submit to the committee that judges who abuse their power, violate their constitutional oath, and breach our Government's separation of powers can be impeached as readily as judges who violate statutory law. Anyone can be impeached that has a majority of the House and removed from office with two-thirds vote from the Senate. Judges who violate the separation of powers damage and discredit our system of government as much as judges guilty of offenses defined in the statute books. 118

¹¹⁸ Judicial Misconduct and Discipline, supra note 1, at 16-17 (statement of Rep. Tom DeLay). In the history of the Republic, the House has voted to impeach only 13 judges. Eleven were tried, but only seven were convicted and removed from office by the Senate. The first was the 1803 conviction of New Hampshire District Judge John Pickering for breaches of statutory duty, alcoholism, and blasphemy. According to Louis H. Pollak, Senior Judge in the Eastern District of Pennsylvania,

energized by the success with Pickering, the Jeffersonians went ahead to try to impeach Justice Chase, who was an obvious target. And as we all know, that effort almost succeeded, but it did not, and the understanding has been

that Justice Chase was being pursued for political reasons, though many of them related to his conduct on the bench, and the failure to convict was regarded as a defeat for those who thought that impeachment could serve purposes that in English law frequently had been accomplished by measures of address in parliament to get rid of judges who were simply unpopular with the prevailing political regime.

ABA Hearings for the Comm'n, supra note 16 (Oct. 11, 1996) (statement of Senior Judge Louis H. Pollak). In the spring of 1996, Chief Justice Rehnquist referred to the Chase proceedings and his subsequent acquittal as providing "assurance to federal judges that their judicial acts—their rulings from the bench—would not be a

DeLay's call for impeachment was supported by his most conservative colleagues in the House of Representatives. A spokesman for Representative Ed Bryant (R-Tenn.) said that "[Bryant] considers impeachment of [Judge John] Nixon a viable possibility and is giving it thought." Republican Representative Sam Johnson of Texas contemplated drawing up articles of impeachment against Texas District Judge Fred Biery 120 Representative Bob Barr (R-Ga.) believes impeachment is a viable option when it comes to Federal judges, suggesting

basis for removal from office by impeachment and conviction. And that has been the guiding principle of the House of Representatives and the Senate from that day to this." William H. Rehnquist, *The Future of the Federal Courts*, 46 AM. U. L. REV 263, 273 (1996).

After Pickering, the few judicial convictions by the Senate included the 1861 conviction of Tennessee District Judge West H. Humphreys for conduct that amounted to treason, the 1912 conviction of Associate Judge Robert W. Archbald of the United States Commerce Court for willfully accepting bribes and corrupting his office for illegal personal gain, and the 1936 conviction of Judge Halsted Ritter of the Southern District of Florida for accepting kickbacks and tax evasion. Fifty years later, three other impeachment convictions occurred. Nevada District Judge Harry E. Claiborne was convicted by the Senate in 1986 for tax evasion that had resulted in a felony criminal conviction. In 1989, Florida District Judge (now United States Representative) Alcee Hastings was convicted for perjury stemming from an indictment based on the solicitation of a bribe. Mississippi District Judge Walter L. Nixon was convicted for lying to a federal grand jury investigating a bribery scheme. See Steven W Fitschen, Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny, 10 REGENT U. L. REV 111, 123-25 & tbl. 1 (1998).

Bruce Fein insists that "[i]t speaks volumes—that Congress answered the flagrantly erroneous opinion—in *Dred Scott* with a constitutional amendment, not impeachment of justices voting with the majority." Harvey Berkman, *Some Republicans Declare Open Season*, NAT'L L.J., June 30, 1997, at A11. While politicians have raised the possibility of impeachment against jurists with whom they disagreed, these rare instances have not led to Senate convictions. For example, Southern segregationists considered impeachment of Chief Justice Earl Warren in the wake of the *Brown* decision. *See* Fitschen, *supra*, at 122. Justice Douglas was the target of an impeachment campaign by Representative W M. Wheeler (D-Ga.) in 1953, for granting a brief stay of execution to Julius and Ethel Rosenberg. *See id.* at 137 Douglas was targeted again in 1970, attacked by House Minority Leader Gerald Ford (R-Mich.) for reasons of "character." *See id.* at 142.

¹¹⁹ Jeff Amy, Nixon Foes Hail Efforts to Impeach Texas Judge, NASHVILLE BANNER, Mar. 13, 1997, at A1.

¹²⁰ See Laurie Kellman, Republicans Rally 'Round Judge-Impeachment Idea, WASH. TIMES, Mar. 13, 1997, at A1.

[t]hat doesn't mean we should do it, but it certainly means that it is something that is on the minds of our constituents and we ought to sit up and take notice of it. [T]he possibility of looking at some of the terminology that is used in our constitutions such as "good behavior" and looking at perhaps defining that, trying to come to grips with, What does that mean? We know it doesn't mean "bad behavior," but beyond that, what does it mean? And I don't think we should be at all afraid to start thinking about these things. ¹²¹

Ultraconservative activists also appreciated the Whip's comments. 122 Tom Pendleton of the Free Congress Foundation said, "We support impeachment for those judges who violate their oath of office. They've violated it because they are sworn to administer the law, not their law they make up as they please, but the law "123 Tom Jipping, director of the Judicial Selection Monitoring Project, discounts the idea that threatening judges with impeachment is an attack on judicial independence. He states that impeachment is merely another tool in the congressional arsenal of appropriate controls on the judiciary

The judiciary does not have any claim to be able to operate in isolation while operation of the governmental structure of which it is a part is somehow put on hold. This category would include Congress' authority to make appropriations, and even to establish, abolish, or reallocate judgeships and judicial resources. It would also include Congress' authority to determine the appellate jurisdiction of the courts. It would even include, I would argue, impeachment of judges. Impeachment of judges has occurred about two dozen times in American history. Each of these may be pursued for excessively partisan or ideological reasons, something that should actively be part of those debates. But it cannot be said that Congress doing what the Constitution empowers it to do necessarily threatens judicial independence. That would ascribe to the

¹²¹ Judicial Misconduct and Discipline, supra note 1, at 7 (statement of Rep. Bob Barr). Barr, in fact, was the first House member to introduce a bill to impeach President Clinton. See H.R. Res. 304, 105th Cong. (1997).

¹²² David Barton, a conservative activist, provided some of the underpinnings for DeLay's ideas. In 1996, he published *Impeachment! Restraining an Overactive Judiciary*, a fifty-page pamphlet explaining why conservatives should push for the impeachment of federal judges with whose decisions they disagree. He noted that even if judges are not impeached, the threat "serves as a deterrent," causing judges to "become much more restrained." DAVID BARTON, IMPEACHMENT! RESTRAINING AN OVERACTIVE JUDICIARY 53 (1996) (text on file with author).

¹²³ Amy, supra note 119, at A1.

judiciary a degree or a kind of independence that, at least in this country under the governmental structure created by its founders, does not exist. 124

While not embracing the calls for impeachment, Senate Majority Leader Trent Lott (R-Miss.) would not rule out its use to censure "activist" judges:

I don't think there is going to be a plan to look at [impeachment] as a way to express our opinion on their rulings. [Impeachment] should be based on improper conduct. I think we should look at judges very carefully if they're nominated or if their nominations come to the floor of the Senate. Once they are on the bench, if they act improperly and the judiciary does not act on its own, then Congress does have the impeachment vehicle. 125

Most observers were outraged at this series of comments favoring impeachment. They noted that the only examples cited of "impeachable" judges happened to be those who had written opinions with which DeLay and his allies disagreed. On May 13, 1997, the deans of 110 law schools wrote to Speaker Newt Gingrich (R-Ga.):

Comments by various members of Congress suggest that impeachment is an appropriate mechanism to restrain an "overactive" judiciary and that, even though it is unlikely that impeachment will result in conviction, bringing impeachment proceedings against certain federal judges will have a deterrent effect on the substance of their subsequent ruling from the bench. These rationales mis-characterize the purpose of impeachment and only encourage Congress to abuse its extraordinary power to remove a federal judge from office.

Impeachment was never intended to be used-and never should be used-against a judge who issues an opinion with which members of the other branches disagree. We urge you to adhere to the long-standing precedent established by your congressional colleagues over the years to use the extraordinary impeachment remedy only in extraordinary circumstances of judicial misconduct. 126

¹²⁴ ABA Hearings of the Comm'n, supra note 16 (Oct. 11, 1996) (statement of Tom Jipping).

¹²⁵ Brian Blomquist, *Lott Won't Use Rulings to Topple Federal Judges*, WASH. TIMES, Mar. 18, 1997, at A4.

¹²⁶ Letter from Dean Richard L. Aynes et al. to Speaker Newt Gingrich, reprinted in Judicial Misconduct and Discipline, supra note 1, at 57-58.

According to Laura Murphy of the American Civil Liberties Union, "[t]his is a coordinated and sophisticated strategy of intimidation. You are not talking about someone accepting bribes or personally being convicted of a crime. This is a very dangerous trend that should be taken into account along with the slowdown in the confirmation of federal judges by the Senate." Senator Patrick Leahy (D-Vt.), the ranking member on the Senate Judiciary Committee, said,

The Founders of this country did not consider disagreement with a Member of the House of Representatives as an impeachable offense. In fact, the Founders of this country would have laughed that one right out. Can you imagine? I suggested some read the Constitution and, I must admit, in a moment of exasperation, I suggested perhaps some who were making these claims had never read a book at all. But of course, they have. There is one by Lewis Carroll. It is called *Alice in Wonderland*. The queen had a couple of different points she made. One, of course, if all else failed was "Off with their heads." The other is, "The law is what I say the law is." 128

The Clinton administration expressed outrage, and Attorney General Janet Reno noted:

We must all work to ensure that these judges' and all federal judges' independence is not chilled by threats of impeachment. Respect for our system of government is critical to its continued legitimacy. Ongoing challenges to the judiciary's independence has the potential not only to undermine citizens' respect for the judicial branch but, even more broadly, to undermine their respect for our government as a whole. 129

N. Lee Cooper, then president of the American Bar Association, suggested that "[i]f impeachment just becomes another avenue of judicial review, sort of a legislative referendum on the quality of judicial decision-making, then we have really turned our back on the Constitution and in effect have made three branches of government two by ripping up our Constitution." ¹³⁰

¹²⁷ Hallow, supra note 108, at A1.

¹²⁸ 143 CONG. REC. S2525 (daily ed. Mar. 19, 1997).

¹²⁹ Janet Reno, Speech to the ABA House of Delegates, ABA 1997 Summer Meeting (Aug. 5, 1997) (transcript on file with author).

¹³⁰ Michelle Mittelstadt, *DeLay Seeks Impeachment of U.S. Judge*, CORPUS CHRISTI CALLET TIMES, Mar. 13, 1997, at B4.

Even many conservatives were appalled that this subject arose, and they were concerned about the impact that it might have on judicial independence. Justice Antonia Scalia, in a May 19, 1997, speech to the Anti-Defamation League, criticized the calls for impeachment, saying, "I think it shouldn't go anywhere. I think we have enough respect for our courts, enough understanding in the country that if you let the legislature intrude too much on the judiciary we'll be in trouble." House Judiciary Committee Chairman Henry Hyde (R-III.) agreed:

I do not believe that impeachment can or should be based upon a judge's decision on the merits of any particular case or upon the judge's political philosophy. There is no precedence for such an approach, and for good reason. Instances of systematic abuse of power and aggressive legislating from the bench must be addressed, possibly by impeachment. However, the remedy for an incorrect decision, no matter how wrong, is not impeachment, 132 but an appeal to a higher court or the enactment of legislation. 133

[w]hen members of the Court usurp legislative powers or attempt to exercise political power, they lay themselves open to the charge of having lapsed from that "good behavior" which determines the period of their official life. But, if you say, the process of impeachment is difficult and uncertain, the answer is, the people made it so when they framed the Constitution. It is not for us, the servants of the people, the instruments of the Constitution, to find a more easy way to do that which our masters made difficult.

But, if the fault of the judges is not so grievous as to warrant impeachment, if their offense is merely that they have grown old, and we feel, therefore, that there should be a "constant infusion of new blood," then obviously the way to achieve that result is by constitutional amendment fixing definite terms for the members of the judiciary or making mandatory their retirement at a given age. Such a provision would indeed provide for the constant infusion of new blood, not only now but at all times in the future.

REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP No. 75-711, at 10 (1937).

¹³¹ Richard Carelli, *Scalia Speaks Out Against Impeaching Activist Judges*, LEGAL INTELLIGENCER, May 21, 1997, at 4.

¹³² In response to the complaint that the impeachment process was too difficult to use to punish an errant judge, the Senate Judiciary Committee, in considering President Roosevelt's court packing plan in 1937, stated that

¹³³ Berkman, supra note 118, at A1.

Chairman Hyde also recognized that "[a]n impeachment under these circumstances [for decisions rendered] would gravely threaten the independence of the judiciary" ¹³⁴ In response, Bruce Fein suggested that

the independent judgment of the judges that we secure by preventing their opinions from forming a foundation as an impeachable offense is the price that we pay for having a genuine, rather than a phony or bogus, check on other branches of government. Can it be abused? Of course it can. All authority can be abused. But I think it's clear the Founding Fathers thought that independent judges would be more safe custodians of this power of interpretation than alternate branches. And it's hard for me to see how this Congress could exercise impeachment power for allegedly wrongful decisions, how that process could unfold without the Congress themselves then sitting and having hearings and saying "Well, was this opinion supported by the language, the legislative history," and acting basically as a 435-member supreme court itself. I don't think that is a forum that was designed to yield reason and deliberation, as opposed to more passionate and impulsive responses. 135

Analogizing DeLay's calls for impeachment to President Roosevelt's claim that the aged Supreme Court in 1937 was unable to keep abreast of its work, Fein posits:

Now today it seems to me that we're confronting a similar situation. I know that those who are encouraging the use of the impeachment power to sanction a judge or a Justice for an allegedly wayward opinion insist that this has nothing to do with politics, nothing to do with the results—that all they're trying to do is constrain the courts to acting within their oath of office. But I think that is no more sincere than Roosevelt's insistence that he was worried about the geniatric stress of the Justices when he proposed his Court-packing scheme. ¹³⁶

After the media had lost interest in his comments on impeachment, DeLay again made news by telling the *Washington Post* that "[t]he judges need to be intimidated. They need to uphold the Constitution. If they

¹³⁴ Dorning, supra note 109, at 3.

¹³⁵ Judicial Misconduct and Discipline, supra note 1, at 34 (statement of Bruce Fein).

¹³⁶ Id. at 33 (statement of Bruce Fein).

don't behave we're going to go after them in a big way "137 When asked about DeLay's statement, Senate Majority Leader Lott said he agreed with its underlying sentiment. He explained,

it sounds like a good idea to me. I mean, you know who some of the most unpopular people in America are, I think they've got, you know, they maybe are at the top of the list. When I go home, nobody says, oh, please, give us some more federal judges. A lot of them say, these people are out of control and they are goin' beyond what the Constitution intended. ¹³⁸

His counterpart, Senate Democratic Leader Tom Daschle (D-S.D.), rebuked Lott-

That kind of statement is as strong a challenge to our form of government as anything I've heard in the United States Senate. So we now know, as this becomes more clear to all of us, the Republicans are holding up judgeships, causing extraordinary delays of justice in many parts of our country because we don't have judges, in order to intimidate the judiciary. ¹³⁹

Patrick Leahy agreed with his leader:

I have never known a time when the leadership of the Senate would tolerate partisan and ideological politics so diverting this institution from its constitutional responsibilities with respect to the third constitutionally coequal branch of Government [T]he American people must know that not only is the Senate leadership allowing these efforts, it is condoning them.¹⁴⁰

Leahy then told a reporter, "I defy anybody to find any time in our history where a concentrated effort like this has been done to intimidate judges. If it continues, it becomes a real constitutional crisis of damaging the independence and the integrity of the federal judiciary ¹⁴¹

¹³⁷ Biskupic, supra note 9, at A1.

¹³⁸ Morning Edition: Judicial Intimidation (Nat'l Public Radio broadcast, Sept. 26, 1997).

¹³⁹ TA

^{140 143} CONG. REC. S9723 (daily ed. Sept. 19, 1997).

¹⁴¹ John Aloysius Farrell, Republicans Take Aim at the Federal Judiciary, BOSTON GLOBE, Sept. 24, 1997, at A1.

The attacks on judges were an effective way for conservative members of Congress to win allegiance from their followers without affirmatively passing legislation. According to People for the American Way Legal Director Elliot Mincberg, "[i]t's one way they can please their most rabid supporters by literally doing nothing." Tom DeLay acknowledged that the right-wingers "love[] it: they think I'm a god on this one." Clint Bolick, Director of the Institute for Justice, admitted that there is no downside to attacking the judiciary. "Some of these rulings have inflamed mainstream America. So when the G.O.P elevates this issue, it is seen as a winner."

C. Hearings on Judicial Activism

Senator John Ashcroft (R-Mo.) is chairman of the Senate Judiciary Committee's Subcommittee on the Constitution, Federalism and Property Rights. In that context, he has an on-going interest in the federal courts. 145

I know what the character of judicial activism is and the threat that it poses. I know this firsthand after what happened in my home state of Jenkins with the Kansas City school district. A lawsuit was filed in the court of Federal Judge Russell Clark in 1977, and since that time the school district has been run by the Federal courts rather than the local school board.

As Judge Clark candidly admitted, he "allowed the district planners to dream" and "provided the mechanism for those dreams to be realized."

Because these extravagant orders were not funded through the normal political process, Judge Clark took the extraordinary step of ordering tax increases to fund his plans.

Now if the power of the judiciary includes the uniquely legislative power to tax, one wonders if there is anything that it does not include. Judge Clark certainly showed me and the whole State of Missouri the dangers of judicial activism: the powers of all three branches combined in a single Federal judge, the power to tax, the power to run the school system, and the power to consider legal challenges concerning the school system.

¹⁴² Dan Carney, More Challenges to Clinton Nominees Cause Judicial Stalemate, CQ, Nov. 22, 1997, at 2912, 2912.

¹⁴³ Molly Ivins, *Politicians Assault on Judges Continues*, SIOUX FALLS ARGUS LEADER, Oct. 15, 1997, at 1.

¹⁴⁴ Novak, *supra* note 116, at 38.

¹⁴⁵ Ashcroft states that *Missouri v. Jenkins*, 672 F Supp. 400 (W.D. Mo. 1987), aff'd in part, rev'd in part, 495 U.S. 33 (1990), was his major motivation for attacking "judicial activists."

He had hoped to use this interest as one launching pad in his quest for the Republican presidential nomination in 2000. 146 During the first session of the 105th Congress, Ashcroft's subcommittee held a series of hearings on judicial activism. 147 Ashcroft claimed that the purpose of the hearings was "to find out the extent of the problem, look at situations where statutes and referendums of the people, from Washington State to Arkansas, from Hawaii to the East Coast, where the people's will has been set aside by the courts." 148

Senator Orrin Hatch, Chairman of the Judiciary Committee, supported these hearings and denied that they would exacerbate the threats to judicial independence. He noted:

There are some who have, and will, denounce any effort, including these hearings, to discuss and examine the problem of judicial activism, and who will raise the shield of judicial independence to suggest that judicial decisions, and the judiciary generally, should somehow be insulated from any criticism. While in candor I would concede that there have recently been occasional statements or complaints that might be construed as "court-bashing" or as threats to judicial independence, let me emphasize that reasoned discourse and examination regarding judicial decision making and the proper role of courts is anything but a threat to judicial independence. Indeed, I would suggest that it is not only appropriate for Congress to examine these issues, but that we have an obligation, established by Article III of the Constitution itself, to do so. And I would hope that the participants in, and observers of this examination, are able to distinguish between reasoned inquiry regarding constitutional principle, as opposed to an attack on judicial independence or hostility to the courts generally.149

Judicial Activism, supra note 6, at 2 (statement of Sen. John Ashcroft); see supra note 69.

¹⁴⁶ See B. Drummond Ayres, Jr., Political Briefing; Early and Often Is 2000 Strategy, N.Y. TIMES, Apr. 6, 1998, at A16.

¹⁴⁷ See Judicial Activism: Defining the Problem and Its Impact: Hearings on S.J. Res. 26 Before the Subcomm. on the Constitution, Federalism and Property Rights of the Senate Comm. on the Judiciary, 105th Cong., 1st Sess. (1997). The hearings were split into three phases. The first, held on June 11, 1997, was entitled "Judicial Activism: Defining the Problem and its Impact." The second phase, held on July 15, 1997, was entitled "Judicial Activism: Assessing the Impact." The final stage, held on July 29, 1997, was entitled "Judicial Activism: Potential Responses."

¹⁴⁸ Dana Fields, Senator Blasts Judicial 'Activism,' Plans Hearings, ASSOC. PRESS POL. SERV., Mar. 6, 1997, available in 1997 WL 2506353.

¹⁴⁹ Judicial Activism, supra note 6, at 8 (June 11, 1997) (statement of Sen. Orrin Hatch).

The hearings were hardly fora for "reasoned inquiry" At the first hearing, Philadelphia Police Detective Patrick Boyle was summoned to testify about his son, a fellow police officer, who was killed. Detective Boyle blamed a federal judge.

Gentlemen, Danny's killer was arrested, tried, and convicted of first degree murder. At the end of the trial the presiding judge informed us in open court that this murder should never have happened that Danny should be with us today; that this killer who was arrested and convicted of killing my son Danny, was released time and time again because of this prison cap in Philadelphia. This federal court order was not necessary and failed to protect the public. Other types of federal court cases can have similar harmful effects. Congress should establish controls to prevent unnecessary court orders that can harm the public. 150

Unsurprisingly, Senator Ashcroft used Boyle's grief to comment:

At our first hearing, we also heard testimony from individuals who have experienced the impact of judicial activism firsthand. I don't think any of us who were here could forget the testimony of Detective Pat Boyle, who told us how his son was killed by a dangerous criminal who was out on the street because of a Federal court order issued by a judge who, I believe was inappropriately judicially active. Detective Boyle's testimony demonstrates that the problem of judicial activism is not some theoretical concern about the separation of powers alone, but a problem with sometimes tragic, real-world consequences. Today's hearings will help to demonstrate other ways in which activist judges and their decisions have affected all of us.¹⁵¹

On May 15, 1997, the Subcommittee on Courts and Intellectual Property in the House also conducted a hearing on judicial activism. The hearing, entitled "Judicial Misconduct and Discipline," considered various remedies, including impeaching federal judges and stripping away their life tenure. The very title of this hearing suggested that judges had done something wrong and that Congress was going to fix the problems caused by judges.

¹⁵⁰ Id. at 46-47 (statement of Patrick Boyle).

¹⁵¹ Id. at 63 (statement of Sen. John Ashcroft).

According to Elliot Mincberg, "[b]y using such emotionally laden phrases as 'judicial misconduct' and 'judicial activism' to attack the federal courts, conservatives are working to erode the great American institution of an independent judiciary. The fact is, judicial independence works to protect our rights—and some conservatives in Congress can't stand that." ¹⁵²

Representative Barney Frank (D-Mass.) also commented on the name of the hearing:

[B]eginning in 1990, the U.S. Supreme Court has invalidated a large number of statutes—12, since 1990. Now, the fact is that if you look at the appointees there, overwhelmingly these 12 statutes have been invalidated by the appointees of Republican Presidents. And I do not think that anybody ought to imply that there's any misconduct when the Supreme Court Justices strike down a statute. I think that's their job. It is sometimes the fault of the Congress that has legislated sloppily or in the face of some short-term public pressure, ignoring the constraints. 153

During this hearing, John Conyers (D-Mich.), the ranking member of the Committee, agreed. He stated:

Now if you were to examine this hearing not in the totality of other things that the American legislature is doing, this could be a perfectly reasonable proceeding. If, however, you examine what is going on in a slightly larger context, I'm afraid you may get a different picture. You see this unbridled attack on the judiciary is part of a larger, conservative, Republican plan engineered by the leader of the Republican Congress.

We can isolate these pieces of legislation and criticize them constructively or we can see it as part of a colossal, arrogant, unprecedented attack on the Constitution of the United States of America. 154

¹⁵² People for the American Way, Assault on Justice, Conservatives Launch Attack on Independent Judiciary, M2 PRESS WIRE, May 16, 1997, available in 1997 WL 10369002.

¹⁵³ Judicial Misconduct and Discipline, supra note 1, at 2 (statement of Rep. Barney Frank).

¹⁵⁴ Hearing on H.R. 1252, supra note 17, at 70 (statement of Rep. John Conyers).

Henry Hyde disagreed, stating this hearing was "a discussion of ways to discipline judges whose conduct needs some corrective measure. This gives an opportunity for people to vent their concerns." Afterwards, he continued,

I think there is a recognition that [federal judges] have unlimited power and it is unaccountable. I don't think judges should just be able to do anything they want to do and not be criticized. What we are doing is criticizing—we have a right to do it, and we have a duty to do it. 156

On January 29, 1998, Charles T. Canady, Chairman of the House Judiciary Subcommittee on the Constitution, hosted a hearing entitled "Congress, the Court and the Constitution." Canady opened the hearing by stating

that the framers of our Constitution expected the Congress to play an important role in debating and legislating on constitutional issues. It is important for the Congress to ask itself if deference to the Supreme Court is always the order of the day. We have a responsibility to consider the circumstances under which the Congress should or should not defer to the Supreme Court in making constitutional interpretations. And we have a duty to ensure that the requirements of the Constitution are consistently recognized and honored in the legislative process. ¹⁵⁷

Representative John Hostettler (R-Ind.) was the first witness at the hearing. In contrast to the chairman's view, he directly challenged the prerogative of the Supreme Court to rule on the constitutionality of legislation approved by the Congress. He claimed that the present practice "of the elected branches bowing to judicial supremacy in interpreting the Constitution squares neither with the Constitution nor with American history" He went on to state that

the Court makes a valuable contribution to the understanding of our nation's laws, and, of course, it is essential in the resolution of disputes

¹⁵⁵ Penny Bender, *Judges Futures in Jeopardy*, DES MOINES REG., May 16, 1997, at 5.

¹⁵⁶ Kirk Victor, Bashing the Bench, NAT'L L.J., May 31, 1997, at 17

¹⁵⁷ Congress, the Court and the Constitution: Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. (1998) (visited Feb. 27, 1999) http://www.house.gov/judiciary/22361.htm (statement of Rep. Charles T. Canady).

¹⁵⁸ *Id.* at (statement of Rep. John Hostettler).

between litigants. But a mere opinion on constitutionality by one branch is not, and only recently has been, considered supreme and binding on the It can be politically expedient to place the great policy decisions of our times in the hands of an unelected elite rather than to be held accountable to the voters back home. Nevertheless, it is time to put the doctrine of judicial supremacy to rest. We all take oaths to uphold the Constitution. Where the legislative branch disagrees with a statutory construction of the Supreme Court, we must make haste to correct the wrong. If it be a Constitutional error by the Court, we must first do what we can to negate the impact. Where the Court's opinion is truly an egregious constitutional error, we must refuse to allow the Executive branch to carry out the Court's orders. In such cases, the People will ultimately decide the issue in the next election when they face the opposing views. This, my colleagues, is the paramount issue. Is it the People's Constitution? Is it the People's government? Chairman, we must never resign our government-that government of the People, by the People and for the People-in the hands of the Supreme Court or any lower court. 159

This truly revolutionary statement, while contrary to constitutional principles going back to the seminal case of *Marbury v. Madison*, ¹⁶⁰ is not atypical of the variety of vindictive attacks on judicial independence made by legislators in the past two Congresses. According to retired Judge Charles B. Renfrew,

in the last year we have had an extraordinary number of what I term inappropriate and unfair criticisms. The Constitution and our society contemplate vigorous criticism as an important part in the daily life in the republic. Inappropriate criticism may be difficult to define as Justice Stewart said of pornography, and yet its consequences are apparent. Such criticism erodes the public confidence in the judiciary and without such confidence, the functioning of the courts is severely affected and impaired. Where governmental officials, the President and a Senator involved in a Presidential campaign, refer to a specific decision as the basis for either forcing resignation or commencement of impeachment proceedings, this goes beyond the appropriate bounds. This brings the judicial process into disrepute.¹⁶¹

¹⁵⁹ Id. (statement of Rep. John Hostettler).

¹⁶⁰ Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

¹⁶¹ ABA Hearings of the Comm'n, supra note 16 (Oct. 11, 1996) (statement of retired Judge Charles B. Renfrew).

D. Grabbing Procedure and Substance

As part of their efforts to attack "judicial activists" and in response to particular types of "outrageous decisions," the Republican congressional majorities have attempted to strip substantive jurisdiction, judicial procedure, and judicial remedies from federal judges. In part, they have been successful, and their attacks have certainly had an impact on judicial independence. In the months leading up to the 1996 election, Congress curtailed federal court jurisdiction in the areas of habeas corpus relief and immigration proceedings. ¹⁶² Congress also seriously considered additional legislation in these areas in 1997 and 1998.

1. Court-Stripping Legislation

In the spring of 1996, Congress passed four pieces of legislation that significantly limited the jurisdiction of the federal courts. The court-stripping bills include the Prison Reform Litigation Act, ¹⁶³ restrictions on the Legal Services Corporation, ¹⁶⁴ the Antiterrorism and Effective Death Penalty Act, ¹⁶⁵ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. ¹⁶⁶ A major threat to the independence of the federal judiciary, this group of bills diminished the power of the courts to curtail legislative and executive actions that violate the Constitution.

The Prison Litigation Reform Act ("PLRA") was a cynical response to "activist" judges who supposedly stretched the applicability of the Eighth Amendment's prohibition on cruel and unusual punishment and hamstrung the jobs of prison officials and state officers. It was enacted as part of a supplemental appropriations bill and was adopted by a conference committee without receiving the benefit of public debate, hearings, or even a separate vote. The PLRA limits the remedies that a judge can provide in civil litigation relating to prison conditions. Judges are told to give "substantial weight to any adverse impact on public safety or the operation

¹⁶² See infra notes 163-275 and accompanying text (discussing legislative reforms).

¹⁶³ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Title VIII, Pub. L. No. 104-134, 110 Stat. 1321-66.

¹⁶⁴ Omnibus Consolidated Rescissions and Appropriations Act of 1996 § 504, Pub. L. No. 104-134, 110 Stat. 1321-53.

¹⁶⁵ Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214.

¹⁶⁶ Department of Defense Appropriations Act, Division C, 1997, Pub. L. No. 104-208, 110 Stat. 3009-546.

of a criminal justice system caused by the relief."¹⁶⁷ Under the legislation, preliminary injunctions are effective for only 90 days, courts are limited in their use of special masters to oversee prison litigation, attorney fee awards are constricted, and most prisoners will have to pay court costs because the PLRA limits the applicability of the *in forma pauperis* statute. ¹⁶⁸ Circuit courts addressing challenges to the PLRA have upheld its constitutionality ¹⁶⁹

Prior to passage, many suits brought by prisoners alleging unconstitutional conditions were settled through pre-trial consent decrees where, without admitting liability, officials agreed to change the conditions at issue. The PLRA now requires officials to admit they violated constitutional rights of prisoners before agreeing to a consent decree, and these admissions expose the officials to personal liability ¹⁷⁰ Because of the PLRA, more cases will go to trial, and regardless of whether a judgment is issued at trial or through a consent decree, it will only be effective for two years. Most prison consent decrees entered into before the adoption of the PLRA are now of questionable validity, and two years is little time to both clean up prison conditions and maintain court oversight to determine whether all parties are complying with a consent decree.

Restrictions on the Legal Services Corporation ("LSC") were included as part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA") and in continuing restrictions under subsequent appropriations bills. Even if private funds are used to pay for legal representation, LSC attorneys are now barred from handling abortion cases¹⁷¹ and from participating "in any litigation on behalf of a person

¹⁶⁷ Prison Litigation Reform Act [hereinafter PLRA] § 802(a)(1)(a).

¹⁶⁸ See id. §§ 803(d), 804.

¹⁶⁹ See, e.g., Hadix v. Johnson, 133 F.3d 940 (6th Cir.) (holding that PLRA termination provisions of consent decree does not violate separation of powers), cert. denied sub nom. Hadix v. McGinnis, 118 S. Ct. 2368 (1998); Zehner v Trigg, 133 F.3d 459 (7th Cir. 1997) (finding provision limiting recovery for emotional injury if there was no physical harm did not violate equal protection or separation of powers); Nicholas v. Tucker, 114 F.3d 17 (2d Cir. 1997) (holding that requirement that prisoners pay court fees did not violate equal protection), cert. denied, 118 S. Ct. 1812 (1998); Roller v Gunn, 107 F.3d 227 (4th Cir.) (finding PLRA did not unconstitutionally bar access to courts), cert. denied, 118 S. Ct. 192 (1997); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996) (holding that PLRA's provision ending consent decrees did not violate due process, equal protection, or the separation of powers).

¹⁷⁰ See PLRA § 802(b)(2), (3).

¹⁷¹ See Omnibus Consolidated Rescissions and Appropriations Act of 1996 [hereinafter OCRAA] § 504(a)(14).

incarcerated in a federal, state, or local prison."¹⁷² LSC attorneys are also unable to litigate class action lawsuits, ¹⁷³ arguably the most effective means by which an attorney can seek to remedy systemic problems. The LSC is banned from lobbying and political advocacy ¹⁷⁴ Finally, LSC attorneys are prohibited from participating in any "effort to reform a Federal or State welfare system [or] challenge existing law"¹⁷⁵

One court in Hawaii granted a preliminary injunction on February 14, 1997, prohibiting the LSC from enforcing its restrictions on the use of non-LSC funds. The court found this to be an unconstitutional constraint whereby plaintiffs would relinquish First Amendment rights in exchange for federal funding. The Ultimately, the same court granted summary judgment for LSC on the basis that the regulations did not impermissibly burden due process or equal protection rights of indigent clients and that there was no significant burden on their First Amendment rights. A second suit, in New York, challenged the restrictions on the use of federal funds, and the court held that the LSC restrictions on the use of its nonfederal funds do not impermissibly intrude on the lawyer-client relationship. An appeal in the case is now pending before the Second Circuit.

Passed in the wake of heightened public concerns posed by the 1995 Oklahoma City bombing and prompted by disgust for death penalty cases that lasted for years, the Antiterrorism and Effective Death Penalty Act of

None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity that. attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative or any similar procedure of the Congress or State or local legislative body.

¹⁷² Id. § 504(a)(15).

¹⁷³ See id. § 504(a)(7).

¹⁷⁴ The Act notes:

Id. § 504(a)(4).

¹⁷⁵ Id. § 504(a)(16).

¹⁷⁶ See Legal Aid Soc'y v. Legal Servs. Corp., 961 F Supp. 1402, 1408 (D. Haw. 1997).

¹⁷⁷ See 1d. at 1405.

¹⁷⁸ See Legal Aid Soc'y v Legal Servs. Corp., 981 F Supp. 1288, 1294 (D. Haw. 1997), aff'd in part and vacated in part, 145 F.3d 1017 (9th Cir.), cert. denied, 119 S. Ct. 539 (1998).

¹⁷⁹ See Velazquez v. Legal Servs. Corp., 985 F Supp. 323 (E.D.N.Y. 1997), aff'd in part and vacated in part, No. 98-6006, 1999 WL 5300 (2d Cir. Jan. 7, 1999).

1996 ("AEDPA")¹⁸⁰ diminishes much of the effectiveness of the writ of habeas corpus.¹⁸¹ Under this law, the federal judiciary cannot grant the Great Writ unless the state court decision upon which the prisoner's conviction was based was "unreasonably" wrong or directly violates established Supreme Court precedent.¹⁸²

The Supreme Court upheld the constitutionality of the AEDPA in Felker v. Turpin, 183 a death penalty case that challenged the restrictions on habeas corpus contained within the Act. Felker's lawyers had argued in their brief that

[w]hatever the ultimate scope of congressional power to regulate this court's appellate jurisdiction, we submit that when an individual suffers a severe deprivation of liberty and asserts a claim that he is being confined pursuant to rulings and practices that violate the Constitution of the United States, such a claim cannot be wholly withdrawn from the cognizance of this Court. 184

Despite this assertion, the Supreme Court held that "the provisions of the [Act] do not violate the Suspension Clause of the Constitution, Article I, § 9"¹⁸⁵ The habeas corpus restriction provisions included in the statute limit federal court review of death penalty cases to one year after the conviction becomes final. ¹⁸⁶

The statute also restricts rights provided to immigrants, resident aliens, and those seeking access to this country. It provides that "any final order of deportation against an alien who is deportable by reason of [specific

¹⁸⁰ 18 U.S.C. § 1 Note (1996).

¹⁸¹ According to Carol Wolchok, staff liaison for the ABA's Coordinating Committee on Immigration Law, "only a handful of people knew these provisions were slipped in there, and were changing a law that's been around for decades." Richard C. Reuben, McDeportation: The New Anti-Terrorism Law Allows Border Guards to Summarily Exclude Aliens Without Documents, A.B.A. J., Aug. 1996, at 6, 34. "The legislation was quickly approved 'so that it could be announced on the anniversary of the Oklahoma City bombing." Id.

¹⁸² See 28 U.S.C. § 2244 (b)(1)-(3) (1996).

¹⁸³ Felker v. Turpin, 518 U.S. 651 (1996).

¹⁸⁴ Rhonda Cook, *Death-Row Inmate the Focus of High-Court Turf War*, ATLANTA J.-CONST., June 2, 1996, at C1.

¹⁸⁵ Felker, 518 U.S. at 654.

¹⁸⁶ See 28 U.S.C. § 2244(d)(1).

criminal grounds] shall not be subject to review by any court." Ironically, according to one immigration attorney,

"[s]uspected terrorists under the act have the right to appointed counsel, the right to bond proceedings, the right to a court hearing and the right to judicial review in removal proceedings while the same law takes away all of those rights for long-term permanent residents who have had even a minor criminal violation, with no possibility for relief from deportation." 188

The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")¹⁸⁹ substantially eliminates class action suits for illegal immigrants and limits the role of federal courts in reviewing decisions involving deportation and political asylum. Support for this legislation arose because of the perception that "'[t]here has been too much legislating from the judicial bench in which advocates for immigrants go around shopping for a judge and finding some pretext to overturn the will of Congress.' "190 IIRIRA prevents courts from hearing cases brought by illegal aliens who have failed to comply with amnesty deadlines in earlier legislation. ¹⁹¹

As IIRIRA was being debated in 1996, Representative Bill McCollum (R-Fla.), one of its chief sponsors, said, "Well the intent is to try to make sure that when we deport somebody, they're not able to hang around forever, looking at procedural devices to stay in this country" As Congress considered the legislation, ninety law professors argued that "[t]hese proposals grant agency authority to take constitutionally questionable action and raise issues of constitutional dimensions wholly apart from the immigration context and the rights of immigrants. The most basic

¹⁸⁷ Antiterrorism and Effective Death Penalty Act of 1996 [hereinafter AEDPA] § 440(a), 8 U.S.C. § 1105(a)(10) (1996).

¹⁸⁸ Reuben, *supra* note 181, at 34 (quoting Brian K. Bates, an immigration lawyer with the law firm of Quan, Burdette & Perez in Houston).

¹⁸⁹ Illegal Immigration Reform and Immigrant Responsibility Act [hereinafter IIRIRA], 8 U.S.C. §§ 1101-1259 (1996).

¹⁹⁰ Patrick J. McDonnell, *Panel Upholds Deadline for Amnesty Seekers*, L.A. TIMES, May 1, 1997, at A3 [hereinafter McDonnell, *Panel Upholds Deadline*] (quoting Ira Mehlman of the Federation for American Immigration Reform).

¹⁹¹ See IIRIRA, § 440(c), 8 U.S.C. § 1252(a)(2)(c).

¹⁹² Weekend Edition Saturday (Nat'l Public Radio broadcast, Sept. 28, 1996).

safeguards of due process are threatened."¹⁹³ According to Dick Day, chief counsel to the Immigration Subcommittee of the Senate Judiciary Committee which helped write these provisions, a major motivation for the legislation was that "[w]e're tired of these suits every time you don't give out benefits to as many people as some lawyers think you should."¹⁹⁴

Asked why "Congress want[ed] to sharply cut back on judicial review of immigration cases," Lucas Guttentag, Director of the ACLU Immigration Rights Project, responded:

I think there was a misperception among some Members of Congress that the courts were playing too large a role in reviewing the government's immigration policies and orders. But more fundamentally, the new restrictions on the courts are part of a larger hostility to the independence of the judiciary.

Congress has the power to change the jurisdiction of the federal courts and to decide which court will hear which types of claims. But there are constitutional limits to how far Congress can go, and it cannot bar judicial review altogether when the liberty of an individual is at stake. Deportation orders necessarily involve the rights and liberties of individuals. Therefore judicial review of those orders is constitutionally required. ¹⁹⁵

Under IIRIRA, decisions made by Immigration and Naturalization Service employees are effectively shielded from administrative or judicial review. For instance, when immigrants flee their countries without sufficient paperwork, upon arrival at a point of entry into the United States they must convince an INS official that they have a legitimate fear of persecution. ¹⁹⁶ Under IIRIRA, they will no longer have a right to a hearing

¹⁹³ Letter from Anna William Shavers, Associate Professor of Law, University of Nebraska et al., to members of the House/Senate Conference Committee on the IIRIRA (July 29, 1996) (copy on file with author).

¹⁹⁴ Patrick J. McDonnell, New Law Could End Immigrants' Amnesty Hopes, L.A. TIMES, Oct. 9, 1996, at A16 [hereinafter McDonnell, New Law Could End Immigrants' Amnesty Hopes].

¹⁹⁵ New Immigration Law Threatens People and Principles, an Interview with Lucas Guttentag, TEX. LAW., Jan. 12, 1998, at 24 [hereinafter New Immigration Law].

¹⁹⁶ See IIRIRA, § 440(h), 8 U.S.C. § 1101(a)(42) (1996).

before an immigration judge or review by the federal courts.¹⁹⁷ Under this law, federal courts other than the Supreme Court are prohibited from issuing broad injunctions against the INS, effectively stripping a remedy from the courts in handling class actions. ¹⁹⁸ Judicial review of discretionary decisions made by the Attorney General, who can waive deportation for aliens demonstrating they should be permitted to stay for reasons of equity, is also eliminated. ¹⁹⁹

Georgetown law professor David Cole, counsel for ten Palestinians who the government is seeking to deport under the new law, said:

Perhaps the most basic principle of our government is that we are governed by a rule of law and that no one is above the law. What this provision would do is essentially put the INS above the law because they would not be subject to judicial review for any decisions to commence deportation proceedings.²⁰⁰

According to Cole, IIRIRA "is a remarkable act of chutzpa on behalf of an agency, the INS, that has probably been found by the courts to have violated the law more than any other Federal agency "201 Referring to broad new powers granted to the Immigration and Naturalization Service, Jeanne Butterfield, executive director of the American Immigration Lawyers Association, said, "[W]hen you have an agency with unbridled discretion,

¹⁹⁷ See 1d. § 440(c).

¹⁹⁸ See 1d.

¹⁹⁹ The Ninth Circuit has held that while IIRIRA applies retroactively, it does not remove federal court jurisdiction from a case in which aliens have filed suit challenging deportation proceedings on constitutional grounds before a final order of deportation has been issued. See American-Arab Anti-Discrimination Comm. v Reno, 119 F.3d 1367 (9th Cir. 1997), J. vacated, 119 S. Ct. 936 (1999). See also Ramallo v. Reno, 114 F.3d 1210 (D.C. Cir. 1997), cert. denied, 119 S. Ct. 1139 (1999) (holding that exclusive jurisdiction provision of IIRIRA depriving courts of jurisdiction over claims arising from removal orders was constitutional where habeas corpus review remained available). But see Auguste v Attorney General, 118 F.3d 723 (1997), opinion withdrawn and superseded on reh'g, 152 F.3d 1325 (11th Cir. 1998) (holding that statute restricting judicial review of removal orders did not deny aliens due process).

²⁰⁰ Weekend Edition Saturday (Nat'l Public Radio Broadcast, Sept. 28, 1996).

²⁰¹ McDonnell, New Law Could End Immigrants' Amnesty Hopes, supra note 194, at A16.

there is no way to prevent abuse. It's making the tolltaker on the freeway both the judge and jury 202

While opponents claim this court-stripping law violates the separation of powers, the Ninth Circuit upheld the provision in *Alviedo v. INS*, ²⁰³ dismissing a class action lawsuit filed on behalf of hundreds of thousands of illegal immigrants who had missed the amnesty deadline. ²⁰⁴ According to Lucas Guttentag, this decision was "very narrow, but very significant. It's a question of whether these are essentially back-door amendments to the Constitution."

In the seminal case of *Marbury v. Madison*,²⁰⁶ the Supreme Court concluded that the federal courts and not Congress determine the constitutionality of particular legislation because the Constitution "is a superior paramount law, unchangeable by ordinary means,"²⁰⁷ and when the Constitution conflicts with legislation, "it is emphatically the province and duty of the judicial department to say what the law is."²⁰⁸ In contrast, Congress controls most federal court jurisdiction. Article III, section 1 of the Constitution states that "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."²⁰⁹ The Constitution provides the Supreme Court with original jurisdiction in all cases affecting ambassadors, public ministers and counsels, and cases in which one of the states is a party ²¹⁰ In all other cases, the Supreme Court "shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."²²¹¹

Based on these provisions, the Supreme Court in the mid-nineteenth century first held that "having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers." Congressional power in this area is not absolute, however, because courts must be able to hear core constitutional claims.

²⁰² McDonnell, Panel Upholds Deadline, supra note 190, at A23.

²⁰³ Alviedo v. INS, No. 96-70161, 1997 WL 222306 (9th Cir. Apr. 30, 1997).

²⁰⁴ See 1d. at *2.

²⁰⁵ Illegal-Immigrants Who Missed Amnesty Period Lose Suit Again, N.Y. TIMES, May 4, 1997, at 25.

²⁰⁶ Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

²⁰⁷ Id. at 177

²⁰⁸ Id.

²⁰⁹ U.S. CONST. art. III, § 1.

²¹⁰ *Id.* art. III, § 2.

²¹¹ Id.

²¹² Sheldon v. Sill, 49 U.S. 441, 449 (1850).

Before 1996, Congress had adopted only two provisions which stripped jurisdiction from the courts in response to judicial decisions it disfavored. One provision involved an 1867 law in which Congress revoked the Supreme Court's appellate review of habeas corpus decisions in cases involving Civil War Reconstruction statutes. Based on this legislation, the Supreme Court dismissed a pending case on procedural grounds in *Exparte McCardle*.²¹³ In the late 1930s, after the Supreme Court had shifted its jurisprudential philosophy in the wake of President Roosevelt's court packing scheme, the Court upheld a provision of the Norris-LaGuardia Act²¹⁴ that restricted the power of inferior federal courts to issue injunctions in any case involving a labor dispute.²¹⁵

Similar legislation was introduced in response to decisions by the Supreme Court in the 1950s and 1960s. One example was aimed at limiting federal court jurisdiction in proceedings against those charged with contempt of Congress or under federal anti-subversion statutes. ²¹⁶ Another example concerned apportionment of representation in state legislatures. ²¹⁷ A final target was the warning requirement placed by *Miranda v. Arizona*. ²¹⁸ All of these measures failed to pass Congress.

In the early 1980s, numerous bills were introduced that would have removed federal court jurisdiction in the areas of abortion, ²¹⁹ prayer in

²¹³ Ex parte McCardle, 74 U.S. (1 Wall.) 506, 512 (1868).

²¹⁴ 29 U.S.C. § 107 (1932).

²¹⁵ See Lauf v E.G. Shinner & Co., 303 U.S. 323, 327 (1938) (holding that an injunction could not be issued absent requisite findings of fact).

²¹⁶ The proposed bill was S. 2646, 85th Cong. (1957). For its effects, see *Service v. Dulles*, 354 U.S. 363 (1957) (holding employee discharge proper and court without power to review) and *Watkins v. United States*, 354 U.S. 178 (1957) (holding valid charge of contempt of Congress).

and sought to remove federal jurisdiction from apportionment cases in the wake of the decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964). The bill was passed by the House in 1964 but was not considered by the Senate. *See* 110 CONG. REC. 20,300 (1964). One hundred thirty similar bills were introduced in the wake of these cases but never made it out of committee. *See* Alfred H. Kelly & Winfred A. Harbison, The American Constitution: Its Origins and Development 948 (5th ed. 1976).

²¹⁸ Miranda v. Arızona, 384 U.S. 436 (1966). In response to *Miranda*, an amendment was included in the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 107 The amendment sought to reverse the *Miranda* decision, but it was not adopted. *See id*.

²¹⁹ See S. 1741, 97th Cong. (1981) (eliminating federal court jurisdiction to issue orders in any case involving a state or local law regulating abortion or

school,²²⁰ school bussing for racial integration,²²¹ and issues relating to the composition of the armed services.²²² None of these controversial measures prevailed, due in part to support from Republicans such as former Senator Barry Goldwater (R-Ariz.), who called them a "frontal assault on the

providing funding or other assistance for abortions); S. 583, 97th Cong. (1981) (prohibiting any federal court (excluding the Supreme Court) from issuing injunctive relief in any case arising out of federal, state, or local law prohibiting or regulating abortion); S. 158, 97th Cong. (1981) (prohibiting inferior federal courts from issuing injunctive relief in any case arising out of state or local law prohibiting or regulating abortion); H.R. 900, 97th Cong. (1981) (prohibiting inferior federal courts from issuing injunctive relief in any case arising out of state or local law prohibiting or regulating abortion); H.R. 73, 97th Cong. (1981) (prohibiting any federal court (excluding the Supreme Court) from issuing injunctive relief in any case arising out of federal, state, or local law prohibiting or regulating abortion).

²²⁰ See S. 481, 97th Cong. (1981) (eliminating all federal court jurisdiction to review and hear any case arising out of state law relating to voluntary prayer in public buildings and schools); H.R. 2347, 97th Cong. (1981) (same); H.R. 1335, 97th Cong. (1981) (same); H.R. 989, 97th Cong. (1981) (same); H.R. 865, 97th Cong. (1981) (same); H.R. 408, 97th Cong. (1981) (removing federal court jurisdiction to hear cases arising out of federal or state law interpreting or enforcing a state law relating to voluntary prayer in public buildings and schools); H.R. 72, 97th Cong. (1981) (eliminating all federal court jurisdiction to review and hear any case arising out of state law relating to voluntary prayer in public buildings and schools); H.R. 466, 96th Cong. (1979) (same).

²²¹ See S. 1147, 97th Cong. (1981) (declaring that students shall have school assignment determined in a racially neutral manner); S. 1005, 97th Cong. (1981) (amending Civil Rights Act of 1964 to prevent federal government from using federal funds to alter composition of student body in public schools); H.R. 1180, 97th Cong. (1981) (eliminating federal court jurisdiction to issue orders requiring individuals to attend particular schools); H.R. 1079, 97th Cong. (1981) (same); H.R. 761, 97th Cong. (1981) (same); H.R. 340, 97th Cong. (1981) (eliminating federal court jurisdiction regarding assignment of pupils to school based on membership in a protected class); H.R. 327, 97th Cong. (1981) (amending Title IV of Civil Rights Act of 1964 to prohibit federal government from assigning teachers or students to school based on membership in a protected class).

²²² See H.R. 2791, 97th Cong. (1981) (removing federal court jurisdiction regarding constitutionality of federal statutes providing "different treatment on the basis of sex in the Armed Forces or in criteria for induction, for training or for service in the Armed Forces"); H.R. 2365, 97th Cong. (1981) (eliminating federal court jurisdiction regarding validity of federal statutes providing for registration or induction into the armed services of males but not females).

independence of the federal courts [which] is a dangerous blow to the foundations of a free society "223"

Senator John Ashcroft sees stripping jurisdiction from the federal courts as "a threat to the scope of judicial activity, but not to the independence of judicial activity" Lucas Guttentag disagrees:

In the recent past other proposals to strip the courts of their jurisdiction over controversial issues were defeated. In each instance, they were recognized for what they are: a back door amendment to the Constitution. Congress was trying to eliminate basic rights by prohibiting the courts' ability to enforce those rights.²²⁵

Boston University law professor Lawrence Yackle recognizes the overarching historical importance of what has happened in recent years, noting that

[t]his is the first time court-stripping laws have actually gone into effect. It's not something to ignore. People may not see the importance of an independent judiciary in the abstract, especially when it comes to unpopular groups like criminals. But the fact is, we have these courts to hold other branches of the system in check.²²⁶

Given their treatment to date by the federal courts, it seems unlikely that any of these four measures will be found unconstitutional. This raises the question of why they passed congressional muster and were able to limit access to the courts where so many of these predecessors had failed. Perhaps the answer lies in the fact that they are directed against three of America's most despised and least politically powerful constituencies: prisoners, immigrants, and the poor.

2. H.R. 1252, the Judicial Reform Act

In January of 1997, Speaker Newt Gingrich (R-Ga.) asked Judiciary Committee Chairman Henry Hyde to "look at the issue of judicial

²²³ 132 CONG. REC. S15140 (daily ed. Oct. 6, 1986).

²²⁴ Judicial Activism, supra note 6, at 123 (statement of Sen. John Ashcroft).

²²⁵ New Immigration Law, supra note 195, at 24.

²²⁶ Robert Marquand, *Justified or Pernicious Limits? New Judicial Curbs Draw Fire*, CHRISTIAN SCI. MONITOR, Nov. 15, 1996, at 1, 1.

activism" and produce a bill that would respond to Republican concerns.²²⁷ The result was H.R. 1252, the so-called Judicial Reform Act of 1997 ²²⁸ This omnibus procedural bill was designed to combat specific instances of judicial activism by modifying certain judicial procedures. One key provision would have required a three-judge district court panel to enjoin constitutional challenges of state referenda instead of a single judge.²²⁹ Another would have prohibited a judge from issuing any order to require a tax increase.²³⁰ One section would have allowed either party in litigation to obtain a new presiding judge as a matter of right,²³¹ and a provision adopted on the floor of the House would have prevented judges from releasing prisoners to comply with a prison cap.²³²

As he introduced the bill in committee, Chairman Hyde described it as "a modest proposal limited in scope. It reforms the procedures of the federal courts to ensure fairness in the hearing of cases, without stripping jurisdiction or reclaiming any powers granted by Congress to the lower courts." As H.R. 1252 was being considered by the full House, floor manager Howard Coble (R-N.C.) claimed that it

is a restrained but purposeful effort to combat specific areas of abuse that exist within the Federal judiciary. This bill perhaps goes too far for some Members, not far enough for others. But that is not unlike much legislation that we consider in this hall. Before describing what the bill does, however, let me emphasize what it does not do; namely, it will not compromise the independence of the Federal judiciary, which is an indispensable attribute for that branch of the Federal Government, nor is H.R. 1252 an attempt to influence or overturn legal disputes. Above all, we most certainly are not creating a novel, more lenient standard of impeachment to remove particular judges from the Federal bench without cause or to intimidate them with a threat of doing so. That said, the Judiciary Reform Act of 1998 is largely an amalgam of ideas developed

²²⁷ Louis Fisher, *Have U.S. Courts Overreached?*, L.A. TIMES, Feb. 2, 1997, at M1.

²²⁸ H.R. 1252, 105th Cong. (1997).

²²⁹ See id. § 2 ("3 Judge Court for Certain Injunctions").

²³⁰ See id. § 5 ("Limitation on Court Imposed Taxes").

²³¹ See id. § 6 ("Reassignment of Case as of Right").

²³² See id. § 12 ("Limitation on Prisoner Release Orders"); see also 144 CONG. REC. H2272-73 (daily ed. Apr. 23, 1998).

²³³ Robert Schmidt, *GOP Measure Chips Away at Judicial Power, Discretion*, LEGAL TIMES, May 26, 1997, at 19.

by various Members of Congress that will curtail certain abusive practices within our Federal court system. 234

Representative Howard Berman (D-Cal.) argued that "[i]t is simply wrong to manipulate court jurisdiction and procedure as this bill would do, to try to make it more or less likely that the federal courts will reach particular results."²³⁵

Elliot Mincberg, legal director of People for the American Way, explained why the bill constituted court-stripping:

Congress can define the court's jurisdiction, but there may yet be constitutional limits to that because, for example, there have been proposals to eliminate the courts' jurisdiction over the issue of school desegregation, and that, it was argued by many legal scholars, conservatives among them, it would violate the due process clause by essentially providing for a constitutional right with absolutely no remedy. So while, as a general matter, Congress does set the jurisdiction of the courts, there may well be constitutional limits if Congress were to try to do that.²³⁶

The late Representative Sonny Bono (R-Cal.) became the chief proponent to require three-judge panels for suits seeking to enjoin challenges of state initiatives. Bono was reacting to the failure of California's federal judges to enforce three highly publicized referenda enjoined by federal judges: Proposition 140, requiring term limits for legislatures; Proposition 187, stopping benefits for immigrants; and Proposition 209, ending affirmative action in state programs. During the 104th Congress, Bono sponsored a free-standing three-judge court panel bill, which passed the House 266 to 159 but did not progress through the Senate.²³⁷ When Chairman Hyde introduced H.R. 1252, he proclaimed that the three-judge provision²³⁸ would ensure that "where the entire populace

²³⁴ 144 CONG. REC. H2243-44 (daily ed. Apr. 23, 1998).

²³⁵ House Passes "Judicial Activism" Bill, THIRD BRANCH, May 1998, at 1, 1.

²³⁶ Judicial Activism, supra note 6, at 174 (July 29, 1997) (statement of Elliot Mincberg).

²³⁷ See H.R. 1170, 104th Cong. (1995). For legislative history and vote, see 141 CONG. REC. H9627 (daily ed. Sept. 28, 1995).

²³⁸ Any application for anticipatory relief against the enforcement, operation or execution of a State law adopted by referendum shall not be granted by a United States district court or judge thereof upon the ground that the State law is repugnant to the Constitution, treaties, or laws of the United

of a state exercises a direct vote on an issue, a single federal judge will not be able to [issue an injunction] obstruct[ing] the will of the people of that State."²³⁹

Section 2 of H.R. 1252 sought to change the normal procedure whereby a claimant who opposes a state referendum attempts to obtain a federal injunction from a single judge. It substituted a three-judge panel with direct appeal to the Supreme Court.²⁴⁰ This would have led to a two-tier system of state law that decades of experience have shown to be cumbersome, inefficient, and confusing. At the beginning of the twentieth century, federal procedure permitted a judge to issue an *ex parte* injunction that could paralyze an important state statute without the possibility of a hearing on the merits.²⁴¹ The orders were deemed unappealable because they were interlocutory ²⁴² As one commentator noted:

It was the boast of representatives of the railroads that in 13 minutes after the governor had signed at Pierre [South Dakota in 1908] the act fixing passenger shares at 2 cents per mile [far lower than the customary rate], the Federal judge at Sioux Falls had signed his sweeping order restraining the Attorney General and all State attorneys from attempting to enforce it. ²⁴³

In response to the increased use of federal injunctions and procedural infirmities, Congress passed the Three-Judge Court Act of 1910,²⁴⁴ which provided that any lawsuit attempting to enjoin a state official from

States unless the application for anticipatory relief is heard and determined by a court of 3 judges

Any appeal of a determination on such application shall be to the Supreme Court.

H.R. 1252, 105th Cong. § 2(a) (1997).

²³⁹ Hearing on H.R. 1252, supra note 17, at 24 (statement of Rep. Henry Hyde). ²⁴⁰ See H.R. 1252, 105th Cong. § 2(a).

²⁴¹ See, e.g., Elliott S. Marks & Alan H. Schoem, The Applicability of Three-Judge Courts in Contemporary Law: A Viable Legal Procedure or a Legal Horsecart in a Jet Age?, 21 AMER. U. L. REV 417, 419-20 (1972); see also Exparte Young, 209 U.S. 123 (1908) (holding that federal courts have the power to enjoin state officials from enforcing state laws that violate the federal Constitution).

²⁴² See, e.g., Harris S. Ammerman, Three Judge Courts: See How They Run!, 52 F.R.D. 293, 293 (1971); David P Currie, The Three Judge District Court in Constitutional Litigation, 32 U. CHI. L. REV 1, 16 (1964).

²⁴³ Comment, *The Three-Judge Court Act of 1910: Purpose, Procedure and Alternatives*, 62 J. CRIM. L. CRIMINOLOGY & PENAL SCI. 205, 206 n.7 (1971).

²⁴⁴ Three-Judge Court Act of 1910, ch. 309, § 17, 36 Stat. 557 (1910).

enforcing a state statute on the ground that the law violated the Constitution must be decided by a district court composed of three judges, with the panel's decision subject to direct review by the Supreme Court.²⁴⁵

This rule remained in effect from 1910 through 1976. It was subjected to years of criticism and has been largely abolished by the Congress.²⁴⁶ The same reasons that led to its abolition militate against its revival: inefficiency of using a three-judge panel as a factfinder (the most labor intensive part of litigation); the awkward and unwieldy nature of conducting a trial with three judges; the increase in workload for the Supreme Court engendered by direct appeals, with resultant increase in summary affirmance or denial of panel decisions rather than meaningful appellate review; and the potential harm posed to Supreme Court decisionmaking by the lack of intermediate review Under H.R. 1252, three-judge court cases would have come to the Supreme Court without the filtering of facts and allegations normally applied by the courts of appeals. Moreover, referenda lack the legislative history materials that federal and state assemblies develop in the process of making laws. The lack of this material would give the Supreme Court even less information upon which to base an appellate opinion.

Drucilla S. Ramey, Executive Director of the Bar Association of San Francisco, is concerned about California's experience with direct democracy She notes:

We, in California, have a particularly troublesome history with respect to majoritarian excess, whether it is in the context of some of what I think to be real tragedies in the area of judicial elections in the Supreme Court area where Justices Bird, Riorden and Renfrew were voted out as a result of the unpopularity of some of their opinions, but most often in California the problem has been presented by judicial initiatives, voter initiatives which so often take sort of a meat axe approach to extremely complex issues and they often constitute sort of the crassest of bids to the lowest common denominator and to the human psyche, and the basic fears and insecurities of the citizenry and the electorate. And it really has been the courts over the course of the last many, many years which have continually sort of pulled us in California back from the abyss.²⁴⁷

²⁴⁵ See 1d.

²⁴⁶ See Warren Burger, The State of the Federal Judiciary–1972, 58 A.B.A. J. 1049, 1053 (1972).

²⁴⁷ ABA Hearings of the Comm'n, supra note 16 (Feb. 21, 1997) (statement of Drucilla S. Ramey).

Wade Henderson, Executive Director of the Leadership Conference for Civil Rights, agrees:

[F]ederally-protected constitutional rights cannot be determined by voter referendum. If the voters of a particular State, for example, elected to pass an initiative which sought to reinstate slavery as directed against selected members of society, surely no one would suggest that that voter initiative would carry or should carry constitutional weight.²⁴⁸

Representative Bono, however, contended that referenda deserved special protections.

The idea is not that three judges will give a better answer. I think the idea is that it would kind of enforce more of a fairness on referendums than having one judge that might be totally biased on an issue, which has occurred in our state. The point is not strictly that three judges will give the perfect answer where one judge can't. That wasn't the idea.²⁴⁹

Section 5 of H.R. 1252 would have prohibited a district court from entering an order or approving a settlement that "requires" a state or political subdivision to impose, increase, levy, or assess any tax for the purpose of enforcing any federal or state common law, statutory, or constitutional right or law unless the court finds by clear and convincing evidence that a number of enumerated conditions were met.²⁵⁰ At various

²⁴⁸ Judicial Misconduct and Discipline, supra note 1, at 65 (statement of Wade Henderson).

²⁴⁹ Hearing on H.R. 1252, supra note 17, at 79 (statement of Rep. Sonny Bono). ²⁵⁰ See H.R. 1252, 105th Cong. § 5 (as introduced Apr. 9, 1997). Section 5 states:

⁽¹⁾⁽a) LIMITATION ON COURT-IMPOSED TAXES.—(1) No district court may enter to approve any order or approve any settlement that requires any State, or political subdivision of a State, to impose, increase, levy, or assess any tax for the purpose of enforcing any Federal or State common law, statutory, or constitutional right or law, unless the court finds by clear and convincing evidence that—

⁽A)(i) there are no other means available to remedy the deprivation of rights or laws; and

⁽ii) the proposed imposition, increase, levying or assessment is narrowly tailored to remedy the specific deprivation at issue;

⁽B) the tax will not contribute to or exacerbate the deprivation intended to be remedied;

times in the committee and floor debates, the language was amended to restrict a judge from either "requiring" or "expressly directing" a tax increase.²⁵¹ The notion that federal judges routinely "expressly direct" a state or political subdivision to impose taxes is chimerical, but Representative Donald Manzullo (R-III.), the chief sponsor of this section of the bill, testified about a case in his district.

Here, a Federal judge issued an order having the effect of raising property taxes to pay for past desegregation injustices. Federal judges have ordered tax increases to build public housings and expand jails. Any state or local government is subject to such rulings from the Federal courts.²⁵²

In fact, beyond the context of nineteenth century municipal bond cases, ²⁵³ the federal courts have imposed a direct tax only in *Jenkins* v.

- (C) the proposed tax will not result in a loss of revenue for the political subdivision in which it is assessed, levied, or collected;
- (D) the proposed tax will not result in the loss or depreciation of property values of the taxpayers who are affected;
- (E) the proposed tax wil not conflict with the applicable laws with respect to the maximum rate of taxation as determined by the appropriate State or political subdivision thereof; and
- (F) plans submitted to the court by the State and local authorities will not effectively redress the deprivation at issue.
- (2) A finding under paragraph (1) shall be subject to immediate interlocutory de novo review.
- (3)(b) TERMINATION OF ORDERS—Notwithstanding any law or rule of procedure, any order of a district court requiring the imposition, increase, levy, or assessment of a tax imposed pursuant to subsection (a)(1) shall automatically terminate or expire on the date that is—
 - (1) 1 year after the date of imposition of the tax
- H.R. 1252, 97th Cong. §§ 5(1)(a)-(3)(b) (1995) (as introduced Apr. 9, 1997).

 251 The original language considered by the House Subcommittee on Courts and
- Intellectual Property used the term "require." This was amended to "expressly directs" at the subcommittee markup and back to "require" at the full committee markup. Finally, the full House voted 230 to 181 to change the language back to "expressly directs." See 144 Cong. Rec. H2262 (daily ed. Apr. 23, 1998). A subsequent amendment to change the relevant language again back to "require" failed by a vote of 174 to 236. See 1d. at H2284.
- ²⁵² Hearing on H.R. 1252, supra note 17, at 35 (statement of Rep. Donald Manzullo).
- ²⁵³ See, e.g., Heine v. Levee Comm'rs, 86 U.S. (19 Wall) 655 (1873) (holding that once a tax is levied, mandamus is the appropriate remedy to compel payment

Missouri.²⁵⁴ In reviewing the case, the Supreme Court unanimously prohibited the direct imposition of taxes by the federal courts.²⁵⁵ A majority of the Court upheld the power of courts to direct local government bodies to fund constitutional remedies for educational segregation, leaving it up to the community to determine how to pay ²⁵⁶ The "expressly direct" version of H.R. 1252 would have had no effect on this power given the Supreme Court's ruling in Missouri v. Jenkins.

If language prohibiting a district court from "requiring" taxes had been adopted, a key judicial remedial power would have been eliminated. Representative Manzullo objected not simply to the direct remedial power of the federal courts to impose taxes but also to all of the costs of complying with judicial orders. Chairman Hyde made equally clear that his intention was to restrict not only explicit judicial taxation but also any judicial remedy that was expensive and could require an elected government to raise taxes. According to Hyde, when a judge issues an order, "[i]n many cases, the locality has no choice but to raise taxes, so in practical effect, that judge has raised taxes."257 The prohibition against a judge "requiring" taxes would have vitiated a wide variety of federal court remedies. State or local authorities would have been able to argue that virtually any order or settlement requiring substantial expenditures to conform institutions to constitutional or federal statutory requirements would "require," if not explicitly impose, tax increases, thus triggering this provision.

Section 6 of the legislation would have allowed litigants to employ a peremptory strike not against a juror but against a judge, permitting either party in a lawsuit to remove a judge. In exercising this strike, the party would not have been required to make a showing, or even allege bias or prejudice, for which judges are already removable pursuant to 28 U.S.C. §§ 144 and 455. Due process guarantees an impartial and competent judge, not a specific judge whom a party favors. Because the strike would be exercised at the outset of a case in most instances, the decision was more

of bonds).

²⁵⁴ Jenkins v. Missouri, 672 F Supp. 400, 413 (W.D. Mo. 1987), aff'd in part, rev'd in part, 495 U.S. 33 (1990).

²⁵⁵ See Missouri v. Jenkins, 495 U.S. 33, 50-56 (1990).

²⁵⁶ See 1d. at 80.

²⁵⁷ Hearing on H.R. 1252, supra note 17, at 25 (statement of Rep. Henry Hyde).

²⁵⁸ See H.R. 1252, 105th Cong. § 6 (1997).

²⁵⁹ See id., see also 28 U.S.C. § 144 (1994) (allowing removal for bias or prejudice); Id. § 455 (other bases for disqualification).

likely to be based on a judge's race, gender, or experience before taking the bench than on a demonstrated bias for or against a particular party ²⁶⁰

As the provision was considered by the full House, Representative Mel Watt (D-N.C.) commented:

I cannot start changing every rule that sometimes cuts in my favor and sometimes cuts against me. There has to be a set of rules that governs any kind of organized system, and our court system has a set of rules that govern it.

So while I have experienced that frustration that some of my colleagues have talked about, what I have said to myself over and over and over again is that our system has to be protected. Otherwise, there is no rule of law; there can be no justice. We substantially undercut it when we start selectively trying to take some result and change it by changing the whole process under which we operate.

That is what this bill does in substantial measure. It gives every citizen the opportunity to come in and say, I don't like this judge because I don't like what color he is or what gender she is or what political perspective they have, and therefore I am going to exercise a peremptory challenge, just like we do in a jury pool.

That is an unprecedented change in our system. One, which I would have loved to have had on many occasions, but I have understood would undermine the system of justice that we have substantially in our country 261

The prospects of judge-shopping allowed by the peremptory strike provision would have chilled judicial decisions in difficult or controversial

²⁶⁰ Under this proposal, parties joined in the case after the initial filings would have a right to seek reassignment within 20 days after service of the complaint or other pleading. See id. § 6(b). As drafted, the section contained broad loopholes that would have allowed challenges to be made at many stages of the proceedings, even after the court had made substantive rulings. See id. § 6(b)(2)(A)-(C). Because of the liberal rules for joinder of parties within the Federal Rules of Civil Procedure, the right of reassignment under this proposal would have been applicable at all stages of the case, leading to gamesmanship where litigants would be encouraged to add new parties or withhold an initial joinder of parties for the purpose of creating a new right of reassignment later in a case. This procedure would waste judicial resources and allow parties dissatisfied with the judge's ruling to select a new judge. To the extent that the reassignment statute is designed to increase public confidence in the judicial process, a provision that allows parties to change judges after receiving adverse rulings undermines such a goal.

261 144 Cong. Rec. H2251 (daily ed. Apr. 23, 1998).

cases. California Attorney General Daniel Lundgren, a supporter, argued that the mere existence of a peremptory challenge procedure "is perhaps most significant in its effect on judicial conduct." Thus, the peremptory challenge is intended, or is at least acknowledged, to be an attempt to influence future judicial behavior, including rulings on particular issues.

According to Frederick B. Lacey, a former U.S. Attorney and district judge in New Jersey who testified on parts of the legislation, "[e]very trial lawyer will 'judge-shop' if you permit it, and the strike promotes the practice, and I think it discredits the judicial system. It [also] poses a threat to the proper and fair case management." ²⁶³

Majority Whip Tom DeLay introduced an amendment to H.R. 1252 on the House floor which would have limited the authority of federal judges to remedy inhumane prison conditions. 264 It would prohibit any federal court from entering "any prisoner release order that would result in the release from or nonadmission to a prison, on the basis of prison conditions, of any person subject to incarceration, detention, or admission to a facility because of a conviction of a felony under the laws of the relevant jurisdiction." This would have also terminated any consent decree in effect before passage of the Prison Litigation Reform Act "that provides for remedies relating to prison conditions." 266

DeLay pushed for this provision purportedly because

some Federal judges have even made themselves the sovereigns of the cell blocks, micro-managing our State prisons, and forcing changes in prison operations that have resulted in the early release each year of literally hundreds of thousands of violent and/or repeat criminals out on our streets and the streets to plague our families.²⁶⁷

In particular, he pointed to Judge Norma Shapiro of the Eastern District of Pennsylvania, who

²⁶² Hearing on H.R. 1252, supra note 17, at 89 (statement of Daniel Lundgren).
²⁶³ Id. at 62 (statement of Frederick B. Lacey). Malcolm M. Lucas, the former Chief Justice of the California Supreme Court, notes that "the peremptory challenge in California is perceived by most Judges as a constant disruption of the efficient management of a court and is believed to be used often for frivolous

efficient management of a court and is believed to be used often for frivolous reasons, such as a delaying or disrupting tactic." *Id.* at 41 (quoting letter from Malcolm M. Lucas to Ann C. Williams (May 11, 1997)).

²⁶⁴ See H.R. 1252, 105th Cong. § 14(a) (1998).

²⁶⁵ Id. § 14(c)(1).

²⁶⁶ Id.

²⁶⁷ 144 CONG. REC. H2248 (daily ed. Apr. 23, 1998).

has used complaints filed by individual inmates, criminals, convicted criminals, to gain control over the prison system and establish a cap on the number of prisoners.

Federal Judge Shapiro put a cap on the number of prisoners in Pennsylvania. To meet that cap she ordered the release of 500 prisoners a week. In a 18-month period alone, 9,732 arrestees were out on the streets of Philadelphia on pretrial release because of her prison cap. They were arrested on second charges, including 79 murders, 90 rapes, 701 burglaries, 959 robberies, 1,113 assaults, 2,215 drug offenses and 2,748 thefts.

How does Judge Shapiro sleep at night? Each one of these crimes was committed against a person with a family, dreaming of a safe and peaceful future, a future that was snuffed out by a judge who has a perverted view of the Constitution.²⁶⁸

m which the petitioner complained of overcrowding in the Philadelphia jails. Judge Shapiro originally dismissed the petition on abstention grounds for lack of jurisdiction, Harris v. Pernsley (E.D. Pa., Dec. 30, 1983) (unpublished opinion). Her ruling was then reversed by the Third Circuit, see Harris v. Pernsley, 755 F.2d 338 (3d Cir. 1985), and she was told to accept jurisdiction. Judge Shapiro now believes that the Third Circuit "felt the state courts were inadequate to deal with this and it required Federal intervention to bring the jails into compliance with the Constitution." ABA Hearings of the Comm'n, supra note 16 (Dec. 13, 1996) (statement of Judge Norma Shapiro). In 1986, she was presented with a consent decree signed by the City of Philadelphia which included a cap on the prison population, and she has enforced that decree in the face of extensive criticism by politicians and the press. See Harris v. Reeves, 761 F Supp. 382 (E.D. Pa. 1991); Harris v Pernsley, 654 F Supp. 1042 (E.D. Pa. 1987).

The Philadelphia District Attorney's office publicly decried Judge Shapiro's efforts to comply with the prison cap and spoke out against her to the press. She noted, "I became a public enemy, ahead of all the murderers and rapists that everyone was worried about. And, indeed, some of those murders and rapes were attributed to me." ABA Hearings of the Comm'n, supra note 16 (Dec. 13, 1996) (statement of Judge Norma Shapiro). She continued:

I did allow pre-trial detainees to be released by signing their own bail instead of posting \$100 or \$200, which they could not afford. The city responded by never trying to apprehend the people who didn't show, and the number of bench warrants increased and the local newspaper had a page devoted to me every day with my picture and all the criminals who had committed offenses in the city of Philadelphia for which I was responsible.

Id. (statement of Judge Norma Shapiro).

According to Judge Shapiro, her prison litigation case,

DeLay went on to state that

[t]he courts have undone almost every major anticrime initiative passed by the legislative branch. In the 1980s, as many States passed mandatory minimum sentencing laws that the American people wanted to see happen around the country to keep these criminals in jail, judges checkmated the public by imposing prison caps on the amount of population that we can hold in prisons. When this Congress mandated the end of consent decrees regarding prison overcrowding in 1995, some courts just ignored our mandate. There is an activist judge behind each of most of the perverse failures of today's justice system. ²⁶⁹

Representative Barney Frank (D-Mass.), in opposing DeLay's provision, emphasized that even if a judge found an unconstitutional condition, the judge could not remedy it because

[i]t says prison conditions means conditions of confinement are the effect of actions by government officials on the lives of persons confined in prison. If in fact there are situations where particular prison officials have behaved in a outrageous fashion abusive of people's rights, may even have put these people in danger, and we are talking about nonviolent felons, I am not prepared to say that no judge ever ought to let them out.²⁷⁰

Exhibiting his general disdain for federal judges, Representative Donald Manzullo opined that

[t]he legislation takes a look at Congress, the elected branch, the representative branch of government, and says we are overseeing the court system to bring about a change when something has happened in the court system that violates the public good.

by luck of the draw, did affect my career. When at one time I thought I might be eligible for advancement to the court of appeals, it was made quite clear to me that that was not feasible, and I accepted that because I still believe that I am able to serve my country. But I do worry, as Judge Sarokin did, about whether the publicity affected my decisions. I did speak to other judges about whether this affects them and my colleagues have been free to say that they worry about being in a judicial hall of shame.

Id. (statement of Judge Norma Shapiro).

²⁶⁹ 144 CONG REC. H2273 (daily ed. Apr. 23, 1998).

²⁷⁰ Id. at H2273-74.

The public good to which the gentleman from Texas addresses himself is the fact that courts have overstepped their boundaries by releasing dangerous felons, who go out to kill, and to maim, and to peddle drugs to our little children, who ingest these drugs, and the little innocent ones, my children and children of all Americans, thus become susceptible to more people who the law enforcement people have in good faith put away, but which a Federal judge says they should be out.

So we are here today because the Constitution compels us to do so. It would do no good for me to reiterate the various travesties that have taken place in America because of what the Federal courts have done. But let us look upon this day in this Congress as being a responsible Congress and telling the American people that the courts have gone too far, and that Congress is exercising the jurisdiction and the authority envisioned by the founders of this republic in saying we are going to correct what is wrong with the court system.²⁷¹

To Representative Mel Watt, this was

an amendment which basically says we are going to go back retroactively and undo existing consent orders that have been entered into, that retroactively says we are going to undo orders that courts have entered in these cases, or even an amendment which, looking forward, says that even though the Constitution might, and we as a body of people in our country believe that nobody, no individual, ought to be put into conditions where they are subjected to rape or disease or whatever by overcrowding or failure of supervision, we cannot enforce that order to protect those people, is an amendment which, in my opinion, goes too far.²⁷²

Perceived as an amendment that would demonstrate a harsh stance against crime, the DeLay Amendment passed overwhelmingly by a vote of 367 to 52.²⁷³ Ultimately, the House adopted H.R. 1252 by voice

²⁷¹ Id. at H2273.

²⁷² Id. at H2276.

²⁷³ See id. at H2277 On the same day that H.R. 1252 passed the House, DeLay introduced a free-standing bill identical to his amendment to H.R. 1252. See H.R. 3718, 105th Cong. (1998). Without holding any hearings on the issue and bypassing the Judiciary Committee, the House majority leadership placed the bill on the suspension calendar, which limited debate but required a two-thirds vote to pass. On May 19, 1998, the House held a 30-minute debate on H.R. 3718 and voted to approve it by a 352-53 margin. See 144 Cong. Rec. H3461 (daily ed. May 19, 1998). Companion legislation was not considered by the Senate and the bill died

vote.²⁷⁴ While companion legislation was introduced in the Senate,²⁷⁵ it was not acted upon by the Judiciary Committee or the full Senate during the 105th Congress.

E. Constitutional Amendments

Between the 104th and 105th Congresses, more than 100 proposed constitutional amendments were introduced. These proposals ranged from old war horses which are perennially introduced but never acted upon²⁷⁶ to those issues currently in vogue, several of which received majority votes in one or both houses of Congress but failed to pass both chambers by the required two-thirds margin.²⁷⁷ As John Conyers (D-Mich.), ranking member of the House Judiciary Committee, noted:

We've had about every constitutional amendment that is totally useless offered up in great seriousness in both bodies of the Congress: tax limitation, term limits, balance the budget, you name it—let's put it in the Constitution, folks.

We have more constitutional amendments before this subcommittee than at any time in our history. Give the same judges that we are now going to allow every lawyer worth his salt to challenge coming in to send

Another example is H.J. Res. 159, 104th Cong. (1996), a proposed amendment to regulate tax increases by requiring their approval by a two-thirds majority of both houses. The measure failed by a vote of 243 to 177 on April 15, 1996. See 142 Cong. Rec. H3304 (daily ed. Apr. 15, 1995). The measure was reintroduced as H.J. Res. 61, 105th Cong. (1997); it failed by a vote of 233 to 190 on April 14, 1997 See 143 Cong. Rec. H1506 (daily ed. Apr. 14, 1997).

at the end of the 105th Congress.

²⁷⁴ See 144 CONG. REC. H2286 (daily ed. Apr. 23, 1998).

²⁷⁵ See S. 2163, 105th Cong. (1998).

²⁷⁶ See, e.g., S.J. Res. 24, 105th Cong. (1997) (equal rights amendment); H.R. Res. 13, 105th Cong. (1997) (right to life amendment).

²⁷⁷ See, e.g., H.J. Res. 1, 104th Cong. (1995) (balanced budget amendment). The balanced budget amendment passed the House on January 26, 1995, by a vote of 300 to 132, see 141 CONG. REC. H772 (daily ed. Jan. 26, 1995), but failed in the Senate on June 6, 1996, by a vote of 64 to 35, see 142 CONG. REC. H5903 (daily ed. June 6, 1996). This same legislation, cast as S.J. Res. 1, 105th Cong. (1997), failed in the Senate by a vote of 66 to 34 on March 4, 1997 See 143 CONG. REC. S1921 (Mar. 4, 1997).

this case to another judge-give the judges the role of deciding how to appropriate the tax money in this country, because we are not able to do it. So says this new leadership in Congress.²⁷⁸

In the 105th Congress, there were also five proposed constitutional amendments that directly related to the appointment, tenure, and duties of federal judges; four of these called for term limits for judges.²⁷⁹ None of the

Term limits are a popular topic. A constitutional amendment was proposed in the form of S.J. Res. 21, 104th Cong. (1995). The measure died after a failed cloture vote of 58 to 42 on April 23, 1996. See 142 CONG. REC. S3879 (daily ed. Apr. 23, 1996). The measure saw light again as H.J. Res. 2, 105th Cong. (1997), but failed in the House by a vote of 217 to 211. See 143 CONG. REC. H511 (daily ed. Feb. 12, 1997).

Congress sought to eliminate flag burnings by introducing S.J. Res. 31, 104th Cong. (1994), which prohibited physical desecration of the flag. The measure failed in the Senate by a vote of 63 to 36. See 141 Cong. Rec. S18395 (daily ed. Dec. 12, 1995). The House then introduced H.J. Res. 54, 105th Cong. (1997), on the same subject. The measure passed by a vote of 310 to 114 on June 12, 1997, but was not adopted by the Senate. See 143 Cong. Rec. H3755 (daily ed. June 12, 1997).

²⁷⁸ Hearing on H.R. 1252, supra note 17, at 19, 71 (statement of Rep. John Conyers).

²⁷⁹ Senator Bob Smith (R-N.H.) introduced Senate Joint Resolution 26, which would have limited the term of office of all federal judges to ten years with judges then eligible for reappointment. See S.J. Res. 26, 105th Cong. (1997). Representative Bill Paxon (R-N.Y.) introduced H.J. Res. 63, which would have required federal judges to be reconfirmed by the Senate every 12 years. See H.J. Res. 63, 105th Cong. (1997). This resolution only affected "a judge of an inferior court," presumably including all Article I and III judges except the Justices of the Supreme Court. See id. Judges "shall not continue in office, except with the consent of the Senate, given within the first 365 days at the beginning of each successive 12-year period after the judge first takes office." Id. Representative Joel Hefley (R-Colo.) introduced H.J. Res. 77, which would have limited all federal judges to ten years in office, unless the Senate consented to the continuance of that judge in office. See H.J. Res. 77, 105th Cong. (1997). Frank Riggs (R-Cal.) introduced H.J. Res. 74, which would have limited federal judges to eight year terms in office and did not provide for any subsequent extension. See H.J. Res. 74, 105th Cong. (1997). Finally, Representative Donald Manzullo (R-Ill.) introduced H.J. Res. 110, which would have forbidden any federal or state court in the United States from having "the power to instruct or order a State or political subdivision thereof, or an official of such State or political subdivision, to levy or increase taxes." H.J. Res. 110, 105th Cong. (1997).

proposals advanced through the legislative process, except that Senator Smith's Senate Joint Resolution 26 was discussed in the Judiciary Committee's Subcommittee on Constitution, Federalism and Property Rights hearing on judicial activism. Four other constitutional amendments were introduced in the 104th Congress that also related to the tenure and powers of federal judges. None of these joint resolutions was acted upon by the House Judiciary Committee and they all died at the end of the 104th Congress.

This plethora of proposed amendments to end life tenure for federal judges is unsurprising, because life tenure is unpopular and is viewed as undemocratic. As William W Schwarzer, Senior Judge on the Northern District of California and Director of the Federal Judicial Center, notes:

we ought in all humility acknowledge that were life tenure to come to a popular vote today, the chances of it passing are slim. So the exalted status we occupy today owes less to the continuing vitality of the historical argument than to the inertia of the political process—the hurdle that stands in the way of adoption of a constitutional amendment. And as a result, it is burdened by considerable public skepticism. The existence of that skepticism makes it imperative that life tenure be defended, that the case for it be made clear and convincing. But the defense of life tenure

Another proposal would have directly applied to judges. Senator Strom Thurmond (R-S.C.) introduced S.J. Res. 4, which would have required that any "officer of the United States appointed by the President with the advice and consent of the Senate, upon conviction of a felony involving moral turpitude, shall forfeit office and all prerogatives, benefits, or compensation thereof." S.J. Res. 4, 105th Cong. (1997). This would have conflicted with the Constitution's Article III, which states that judges serve during good behavior, interpreted to mean for life, unless they are convicted of an impeachable crime. See U.S. CONST. art. III.

have limited federal judges to ten-year terms, subject to reappointment with the consent of the Senate. See H.J. Res. 63, 104th Cong. (1995). Representative James Hayes (R-La.) introduced H.J. Res. 160, which would have limited federal judges to six-year terms. See H.J. Res. 160, 104th Cong. (1995). Representative Frank Riggs (R-Cal.) introduced H.J. Res. 164, which would have limited federal judges to eight-year terms. See H.J. Res. 164, 104th Cong. (1995). Finally, Representative James Talent (R-Mo.) introduced H.J. Res. 167, prohibiting "the judicial power of the United States from including the power to require States to levy or increase any tax." H.J. Res. 167, 104th Cong. (1995).

and judicial independence should not appear to be a self-serving exercise devoted more to the welfare of the judges than to the institution.²⁸¹

Political opponents of life tenure have astutely picked up on public disapproval for this undemocratic component of the judicial office. Idaho Republican Representative Helen Chenoweth spoke approvingly of proposals to end life tenure, but University of Idaho law professor Jim MacDonald, one critic who has followed Chenoweth's career, argued that "[t]he idea of the founding fathers was exactly to prevent what Representative Chenoweth is trying to do. She is trying to get at the independence of the judiciary and bend it towards her will. It's the same old right-wing blather."

As he introduced his term limit proposal in a press conference on April 23, 1997, Senator Bob Smith said:

In recent years activist Federal judges have repeatedly abused their authority by blocking the implementation of constitutional measures—enacted through state ballot referenda—simply because they disagree with the policy judgements of the voters. Term limits for judges would establish a responsible and appropriate constitutional check on activist judges.²⁸³

Two days later, when he presented the proposed amendment on the Senate floor, he explained that

the modern-day judiciary is too independent and too unaccountable to the taxpayers and to the people who pay their salaries and pay for their courthouses all over America. They are insulated by life tenure and free, for all intents and purposes, from any threat of impeachment. You have to commit a high crime to be removed from office as a Federal judge; we all know that. Very few judges in history have had that happen. These activist judges, because of almost impunity, feel free to impose their political will on all of us, without having to answer to anybody. I believe that judges appointed for 10-year terms would be far more likely to follow that law rather than imposing their political will.²⁸⁴

²⁸¹ ABA Hearings of the Comm'n, supra note 16 (Feb. 21, 1997) (statement of Senior Judge William W Schwarzer).

²⁸² Frederika Schouten, Chenoweth May Try to Limit Terms of Federal Judges, GANNET NEWS SERV., Apr. 24, 1997, at 1, available in 1997 WL 8826425.

²⁸³ Bob Smith, Smith Introduces Bill Calling for Term Limits for Judges, Gov't Press Release, Apr. 23, 1997, available in 1997 WL 4431941.

²⁸⁴ 144 CONG. REC. S3724 (daily ed. Apr. 25, 1997).

Senator Smith, tried to place a moderate spin on his introduction of the constitutional amendment by contrasting it with other proposals:

Judicial activism has become such a severe problem that one of the leaders of the House, Representative Tom DeLay of Texas, has even suggested that we ought to consider using the constitutional power of impeachment to remove activist Federal judges from office. Now, I understand Congressman DeLay's concern. It is a justifiable concern, but I think there is a better way to do this, which is to limit their terms

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Serious consideration of these proposals to end life tenure by definition would unquestionably jeopardize judicial independence. According to Elliot Mincberg:

If you say to a judge, you have got a 20-year term, but after that you are going to have to go out and find yourself another job, the judge might very well be concerned about, particularly in the 18th year, rendering a decision that law firms might find unpopular. One of the reasons for lifetime tenure is to say to a Federal judge, you are removed from the political and other fray, assuming, of course, that you do what you are supposed to do, and you are there to be an arbiter of our most precious constitutional rights and to protect them, and not for other purposes.²⁸⁶

N. Lee Cooper, then president of the American Bar Association, testified on the ABA's position on terms for judges, stating "[w]e are inalterably opposed to all proposals to amend Article III, Section 1 of the Constitution by limiting the lifetime tenure of Article III judges during good behavior and establishing a term of years, subject to reappointment. Such action would eviscerate the concept and reality of judicial independence."²⁸⁷

Senator Russell Feingold (D-Wis.) summarized why a switch to judicial terms would be harmful to judicial independence.

I do think if we had term limits for Federal judges, we would have a very different system, a far less independent judiciary. The fact is that if you are a judge and you want to continue to be a judge and your term is

²⁸⁵ Id. at S3723.

²⁸⁶ Judicial Activism, supra note 6, at 174 (statement of Elliot Mincberg).

²⁸⁷ Hearing on H.R. 1252, supra note 17, at 131 (statement of N. Lee Cooper).

up, there are only two ways you can go. Either you have to run for reelection

[or] you have to be reappointed by the President. Now, what does one do if you are a Federal judge and you want to stay connected and you want to make sure you are in good with whoever is going to be the new President so you can continue to be a judge? Now, maybe that President is going to do the right thing and just reappoint every good judge, but recent history—suggests to me that other considerations could possibly play into the mind of the President and the judge. I think that can compromise judicial independence as well.²⁸⁸

While Article III judges in the federal system are appointed for life, in many states judges are selected through partisan elections or are appointed by an executive and then face the voters in retention elections. When he ran for president in 1996, Patrick Buchanan talked about the distinction between elected and appointed judges:

[H]ow do we reign in an out-of-control court? Not hard to do; here are several ideas—we could appoint federal judges for a term of years rather than for life. A term could be renewed if the president and Senate think they have done a good job. We should not delude ourselves that life terms keep judges above the political fray. They have joined the fray and they must have some accountability—[F]ederal judges at both the appellate and district court levels could be made subject to voter recall and removal as supreme court judges are in California, where Rose Bird and two colleagues overturned something like 39 straight death sentences and refused to allow the state to impose them. The voters put their names on the ballot, recalled them and fired them. I think that would be a way, a recourse, that individual middle-class citizens would have against federal judges.²⁸⁹

²⁸⁸ Judicial Activism, supra note 6, at 124 (statement of Sen. Russell Feingold).
²⁸⁹ Buchanan, supra note 48. In 38 states, judges are directly elected or need to face the public in some sort of retention procedure to stay in office. In a number of instances, judges and justices have lost reelections because of highly publicized and damaging campaigns which focus on a particular ruling, often a death penalty case.
The 1985 retention elections in California that ousted Supreme Court Chief Justice Rose Elizabeth Bird and two of her colleagues because of animus to their death penalty decisions was the modern invocation of the ballot box doctrine to

remove judges on the basis of their decision making. See Samuel Latham Grimes, Without Favor, Denial or Delay: Will North Carolina Finally Adopt Merit Selection of Judges?, 76 N.C. L. REV 2266, 2320 (1998).

In November of 1996, Justice Penny J. White of the Tennessee Supreme Court was defeated in a retention election after conservatives targeted her for her decision in one death penalty case. The Tennessee Conservative Union paid for advertisements to publicize a case involving Richard Odom, a man who stabbed and raped a 78-year-old woman. According to TCU, the murderer "won't be getting the punishment he deserves. Thanks to Penny White. [She] felt the crime wasn't hemous enough for the death penalty, so she struck it down." Colman McCarthy, Injustice Claims a Tennessee Judge, WASH. POST, Nov. 26, 1996, at C11. All five justices on the Tennessee Supreme Court found procedural errors during the trial that required reversal and a new sentencing hearing. See State v. Odom, 928 S.W.2d 18 (Tenn. 1996). This was the only death penalty case ruled upon by Justice White, and she did not write the majority, concurring, or dissenting opinions in the case. After White's defeat, Tennessee Governor Don Sundquist asked, "[S]hould a judge look over his shoulder [when deciding cases] about whether they're going to be thrown out of office? I hope so." Anthony Lewis, Politicians Play Politics to Intimidate Judges, Nominees, SUN-SENTINEL (Fort Lauderdale, Fla.), Apr. 1, 1997, at 11A.

A Texas judge also lost reelection in November of 1996 after her opponent advertised that the incumbent had once been a defense attorney in capital cases. See Colman McCarthy, Injustice Claims a Tennessee Judge, WASH. POST, Nov 26, 1996, at C11. In Maryland, a judge was defeated by a candidate who pledged to push for the death penalty as a sitting judge. See id. In Alabama, an incumbent judge won reelection after advertising the number of defendants he had sentenced to death, See id. In Washington State, the Chief Justice of the Supreme Court won her reelection, partially because she publicized the fact that her opponent had represented a defendant in a capital case, a case which the opponent had served in a pro bono capacity at the request of the appellate court. See ALLIANCE FOR JUSTICE, REPORT ON THE NOMINATION OF BARBARA DURHAM TO THE NINTH CIRCUIT COURT OF APPEALS (1999) (text on file with author). In the election of November 1998, incumbent Texas Criminal Court of Appeals Judge Charles Baird was defeated in large part because of his dissent from a death penalty case on ineffective assistance of counsel grounds. See McFarland v. Texas, 928 S.W.2d 482, 525 (Tex. Crim. App. 1996) (Baird, J., dissenting).

Andrew M. Coats, Dean of University of Oklahoma College of Law, relayed an odd twist to this pattern:

In my state judges at the trial level do not want to be mistaken for an incumbent. In fact, you don't see signs anymore that say "Keep Judge Smith" or "Re-elect Judge Jones." Always before in the history of our state,

Other politicians have proposed a constitutional restructuring with ideas that were first raised during the court packing fight of 1937 Testifying before Senator Ashcroft's Judiciary Subcommittee, Nebraska Attorney General Don Sternberg claimed that

incumbent judges were elected 90, 95 percent of the time, unless something really untoward happened. These days, if they discover that you're an incumbent, your chances of success are quite limited, and we've had two very fine judges recently who most would have thought were very strong law-and-order judges defeated by people who were mentally disturbed, but who happened to get on the ballot and were the outsider running against the incumbent. So, that is a circumstance out there that is quite remarkable.

ABA Hearings of the Comm'n, supra note 16 (Oct. 11, 1996) (statement of Andrew M. Coats).

University of Southern California law professor Erwin Chemerinsky believes that these examples show that

the standard for re-call of a judge [in states with re-call proceedings] should be the same as the standard for impeachment of a judge at the Federal level. If a state court judge has violated the law, abused the office in the sense of taking bribes as the San Diego judges were accused of, obviously re-call is appropriate. But I don't believe that a re-call is appropriate because people disagree with a particular decision of the judge. To me then there is a real threat to judicial independence because I worry then judges will decide cases to please the voters to stay in the prestigious office that they hold.

Id. (Feb. 21, 1997) (statement of Prof. Erwin Chemerinsky).

Judicial elections which can cost hundreds of thousands and sometimes millions of dollars can compromise a candidate's independence. Supreme Court Justice John Paul Stevens decries this recent trend:

Persons who undertake the task of administering justice impartially should not be required—indeed, they should not be permitted—to finance campaigns or to curry the favor of voters by making predictions or promises about how they will decide cases before they have heard any evidence or argument. A campaign promise to "be tough on crime," or to "enforce the death penalty," is evidence of bias that should disqualify a candidate from sitting in criminal cases. Moreover, making the retention of judicial office dependent on the popularity of the judge inevitably affects the decisional process in high visibility cases, no matter how competent and how conscientious the judge may be. My conviction that the practice of electing judges is profoundly unwise is one that I have held throughout my period of service as a Federal judge. I must confess, however, that my review of capital cases has reinforced that conviction because the emotional impact of those cases gives rise to a special risk of error.

John P Stevens, Opening Assembly Address at the ABA Annual Meeting (Aug. 3, 1996).

Congress has the constitutional power to restore the intended balance of power between the people's elected representatives and the Federal judiciary. It would be my recommendation that the Congress act through its powers granted in Article III, sections 1 and 2 of the U.S. Constitution, first, to eliminate the authority of the lower Federal courts to declare State and Federal laws unconstitutional, leaving that power solely in the hands of the U.S. Supreme Court and the State courts; and second, further provide that no State or Federal law may be declared unconstitutional by the U.S. Supreme Court except by a vote of three-fourths of the Justices of that court.²⁹⁰

Robert Bork, President Reagan's unsuccessful nominee to the Supreme Court, has recently proposed a constitutional amendment to allow federal and state court decisions to be overruled by a simple majority of one house of Congress.²⁹¹ Bork's former District of Columbia Circuit colleague Justice Antonin Scalia disagreed with this proposal, saying "Bork essentially has given up. I'm not so pessimistic. I'm not ready to throw in the towel. We can get back."²⁹²

F Gridlock in the Judicial Confirmation Process

During President Clinton's first two years in office, the Democratic-controlled Senate confirmed 129 Article III judges to the 843 member federal bench.²⁹³ Following change in control of the Senate, the confirmation rate for judges slowed dramatically to fifty-five in 1995, twenty in 1996, and thirty-six in 1997,²⁹⁴ while the acrimony and bitterness in the Senate process escalated. During the second session of the 104th Congress in 1996, the Senate confirmed only seventeen judges²⁹⁵ and none to the court of appeals, which was unprecedented in the post-World War II era. No one was confirmed after August 22, 1996. By the end of the 104th Congress, the Senate had failed to confirm a record twenty-eight of

²⁹⁰ Judicial Activism, supra note 6, at 54-54 (statement of Don Sternberg).

²⁹¹ See Herman Schwartz, GOP's Ideologic Court Cleansing Blocking New Judges Threatens Entire System, ARIZ. REPUBLIC, May 19, 1997, at B5.

²⁹² Richard Carelli, *Scalia: Don't Impeach Liberal Judges*, ASSOCIATED PRESS, May 19, 1997, *available in* 1997 WL 4866960.

²⁹³ See Administrative Office of U.S. Courts, Vacancy Summary, Federal Judicial Vacancy Report (1996).

²⁹⁴ See 1d.

²⁹⁵ Three judges, A. Wallace Tashima, Sidney Thomas, and John Martin, were confirmed on January 2, 1996, the last day of the first session of the 104th Congress. *See* 141 CONG. REC. S19344 (daily ed. Jan. 2, 1996).

President Clinton's nominees. While this might be dismissed as election year politics, in 1992 the Democratic Senate confirmed sixty-six judges, the most in any year of the Bush presidency, and many of them were in the final weeks of the Congress when President Bush was far behind in the polls. ²⁹⁶ By August of 1997, there were more than 100 vacancies on the federal courts, more than ten percent of the total seats. ²⁹⁷ According to Senator Patrick Leahy (D-Vt.), the ranking member of the Judiciary Committee, his Republican colleagues "tried to shut down the executive branch [at the end of 1995], and that didn't work. So they are aiming at judges, who are an easier target, and at the same time throwing red meat to their right wing." ²⁹⁸

The Republican majority has tried to alter the traditional judicial appointment process wherein the senior senator from the president's party makes recommendations for district court nominees by attempting to wrest control from the president and his Democratic advisors. The Republicans have ended the Senate's arrangement in which the American Bar Association assisted in screening judicial nominees and made formal presentations to the Senate Judiciary Committee. ²⁹⁹ Lower court nominees have been subjected to lengthy delays³⁰⁰ and have had to participate in multiple hearings by the Judiciary Committee. ³⁰¹ Nominees have had holds placed on them, even after they have been voted on to the Senate floor, and are now routinely approved through rollcall votes instead of by unanimous consent. They have faced unprecedented and intrusive questioning, which

²⁹⁶ See, e.g., SENATE DEMOCRATIC POLICY COMMITTEE, SHUTDOWN ON JUDGES: THE REPUBLICANS' DISMAL RECORD THREATENS THE JUDICIARY, PUB. No. SR-40-JUDICIARY (1996).

²⁹⁷ See Administrative Office of U.S. Courts, Vacancy Summary, Federal Judicial Vacancy Report (1997).

²⁹⁸ David A. Price, So Many Cases, So Few Judges, INVESTOR'S BUS. DAILY, Jan. 15, 1998, at A1.

²⁹⁹ See Letter from Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, to other members of the Committee (Feb. 24, 1997) (copy on file with author).

³⁰⁰ Nominees William Fletcher, Susan Oki Mollway, and Hilda Gloria Tagle all were forced to wait more than 30 months from the time they were nominated until they were finally confirmed respectively for the Ninth Circuit, the District of Hawaii, and the Southern District of Texas. See Alliance for Justice, Judicial Selection Project: Annual Report 1998, at 21-22 (1998).

³⁰¹ Nominees William Fletcher, Susan Oki Mollway, Margaret Morrow, Richard Paez, and Clarence Sundram all had to undergo two hearings by the Judiciary Committee in connection with their respective nominations to the Ninth Circuit, the District of Hawaii, the Central District of California, the Ninth Circuit, and the Northern District of New York. Paez and Sundram were not confirmed. See id.

is designed to weed out "judicial activists." Senator Jeff Sessions (R-Ala.), one of the more aggressive members of the Judiciary Committee, probes nominees, looking for examples of judicial activism. In a remarkable (but for him typical) line of questioning, he collected multiple views of the American Civil Liberties Union to ask whether a particular nominee agreed with the beliefs of the ACLU:

[I]t does adhere to a number of positions such as they oppose the death penalty, they oppose the "three strikes" sentencing laws, they are in opposition to school vouchers for sectarian schools, they oppose V-chips for television sets to limit what is shown, opposition to voluntary labeling of albums, and support of partial-birth abortion, support of the constitutionality on the issue of racial preferences and the decriminalization of drugs. [D]o you agree with all of those views?³⁰²

Court watchers like Sheldon Goldman, who has studied judicial confirmations since the 1960s, believe that the current gridlock has been unique—"[W]hat's unparalleled is to start so early with delay We've never had this done in a president's first year of a new term. Sure, people have played hardball in the past, but not on such a sustained level as they are doing now "303" President Clinton finally reacted to the threats to his appointment power by stating in a weekly radio address that "the Senate's failure to act on my nominations, or even to give many of my nominees a hearing, represents the worst of partisan politics. Under the pretense of preventing so-called judicial activism, they've taken aim at the very independence our founders sought to protect."

In his annual State of the Judiciary speech, presented on December 31, 1997, Chief Justice William Rehnquist also rebuked the Senate for the lengthy delays in the confirmation process. He observed that "[t]he Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down." The Senate finally appeared to heed this advice by confirming sixty-

³⁰² Confirmation Hearings on Federal Appointments Before the Committee on the Judiciary, 105th Cong. 79 (1998) (confirmation proceedings of Susan Graber).

³⁰³ Marcia Coyle, Confirmations at Last? The Stalemate Over Appointing Federal Judges May Finally Be Over, NAT'L L.J., Mar. 2, 1998, at A1.

³⁰⁴ President William J. Clinton, *Saturday Radio Address*, 33 WEEKLY COMP PRES. DOC. 1442-43 (Sept. 27, 1997).

³⁰⁵ William Rehnquist, 1997 Year-end Report on the Federal Judiciary (visited Feb. 21, 1999) http://www.uscourts.gov/cj97.htm

five judges in 1998 and bringing the number of vacant seats down to fifty 306

G. Court Unpacking Plans

While they have majorities in Congress but do not have control of the White House and its power to nominate right-thinking jurists, certain Republican members of Congress believe it appropriate not only to slow down the confirmation procedures for individual judicial nominees but also to decrease the total number of federal judges and change the structure of the federal courts to affect the outcome of cases. These members have engaged in "what we call court unpacking proposals," referring by comparison to President Roosevelt's court packing plan.

1. Grassley Hearings

Senator Charles Grassley (R-Iowa), Chairman of the Judiciary Subcommittee on Administrative Oversight and the Courts, has held a series of hearings in which he questioned whether every federal judgeship is needed. In 1996, Senator Grassley distributed a questionnaire to all Article III judges, the first of its kind, in which he sought information covering everything from the need for new judicial seats to more intrusive questions on how judges use their law clerks and the amount of travel time they take. According to Senator Grassley, "nearly 70 percent of the circuit and around 60 percent of the district judges responded, which I think is an impressive response rate." This questionnaire was distributed to 249 active and senior circuit court judges, 170 of whom responded, a 68.3%

³⁰⁶ See 144 CONG. REC. S12963 (daily ed. Oct. 21, 1998) (statement of Sen. Orrin Hatch).

³⁰⁷ Rex Bossert, *The Call for Dividing the 9th Circuit Grows*, NAT'L L.J., May 5, 1997, at A1 (quoting Deborah Lewis).

³⁰⁸ See Report on the January 1996 Judicial Survey, Part 1. U.S. Courts of Appeal, U.S. Senate Judiciary Subcomm. on Administrative Oversight and the Courts of the Comm. on the Judiciary, 104th Cong. at app. A (1996) [heremafter Report on the January 1996 Judicial Survey, Part 1].

³⁰⁹ Considering the Appropriate Allocation of Judgeships in the U.S. Courts of Appeals for the Fourth, Fifth, and Eleventh Circuits Before the Subcomm. on Administrative Oversight and the Courts of the Comm. on the Judiciary, 105th Cong. 3 (1997) [heremafter Considering the Appropriate Allocation of Judgeships] (statement of Sen. Charles Grassley).

I.

response rate,³¹⁰ and to 902 senior and active district court judges, 529 of whom responded, a 58.6% response rate. Responses were also received from 68 out of 90 chief judges, a 75.6% response.³¹¹ According to Senator Grassley,

[m]any issues were explored in this survey, including the need for judgeships. Partly as a result of the lines of communications opened up by this survey, I have received additional letters and comments from judges around the country who believe judgeships in their circuits or districts should be unfilled or eliminated.³¹²

Senator Grassley apparently believed that judges faced no coercion to answer the questions in any particular manner, because his letter attached to the survey, read:

[A]s Chairman of the subcommittee with jurisdiction over legislation affecting the courts, I have responsibility to communicate with, and elicit input from, the members of the Federal judiciary. Of course, as a member of a co-equal branch of government, you certainly are not required to respond to any of the enclosed questions. However, it is my hope that you will be eager to participate in this effort.³¹³

At least one judge was concerned about the effect of issuing this survey Judge Norma Shapiro of the Eastern District of Pennsylvania commented on Grassley's questionnaires, stating that while

no one resents Congress, in its proper role in supervising or in worrying about how much money we spend, making inquiry I don't know if any of you have read that questionnaire, but you couldn't read that questionnaire and think that it was other than designed to achieve a particular

³¹⁰ See Report on the January 1996 Judicial Survey, Part 1, supra note 308, at

³¹¹ See Report on the January 1996 Judicial Survey, Part 2: U.S. District Courts, U.S. Senate Judiciary Subcomm. on Administrative Oversight and the Courts of the Comm. on the Judiciary, 104th Cong. at I (1996) [hereinafter Report on the January 1996 Judiciary Survey, Part 2].

³¹² Considering the Appropriate Allocation of Judgeships, supra note 309, at 3 (statement of Sen. Charles Grassley).

³¹³ Charles E. Grassley, Memorandum to Article III Federal Judges on Judicial Survey (Jan. 26, 1996) (copy on file with author).

result.³¹⁴ Now, I've looked at the responses, those from the trial judges and the appellate judges, and I think the result achieved was not what was expected. And there was great consternation about whether it should be answered, but by and large it was answered and I don't think any harm was done. But it's just this sort of ripple effect of [sic] you don't want your judges to be paranoid that everyone is out to get them; at least I don't think you do.³¹⁵

Senator Grassley's articulated motivation for reviewing court staffing issues is fiscal conservativism. On several occasions he stated:

The taxpayers deserve to have their money spent judiciously. But when it comes to judicial seats, all that we have heard in the past from the Judicial Conference is that we should have more seats, that more is better. I want to make a revolutionary change in that mind set.

It is interesting to note that the Congress hasn't eliminated a judgeship since the Civil War era. So I want to resurrect a whole new way of thinking that I hope will become commonplace; that is, if we do end up creating seats in certain needy jurisdictions, we also need to be terminating, or at least not filling, open seats.³¹⁶

Since 1996, Senator Grassley has held oversight hearings on the District of Columbia, First, Second, Third, Fourth, Fifth, Eighth, Eleventh, and Federal Circuits. The results do not necessarily comport with Senator Grassley's theory that the number of judicial seats can be reduced and some vacancies should remain unfilled. The chief judges of the First,

³¹⁴ Besides focusing on the judge's opinion of the optimum size for courts, the questionnaire asks: "What is the typical recess period for your court," *id.* at A2a; "Do you believe that the location of circuit conferences should be restricted to the geographic boundaries of the circuit," *id.* at B1d; and, "Are you involved in extracurricular activities, such as teaching, lecturing, writing law review articles, and making public appearances? If so, how much time do you spend on these activities, including preparation and travel," *id.* at C1a, b.

³¹⁵ ABA Hearings for the Comm'n, supra note 16 (Dec. 13, 1996) (statement of Judge Norma Shapiro).

³¹⁶ Considering the Appropriate Allocation of Judgeships, supra note 309, at 2. Before his hearings began, Grassley emphasized to reporters that "since the Civil War the Federal judiciary has only expanded and has not contracted by a single seat." *Id.* He further noted that, "it all comes down to whether we are making wise use of taxpayers' dollars." Jamie Dettmer & Susan Crabtree, *A Judge Too Far*, INSIGHT, Apr. 29, 1996, at 6.

Second, Third, Eighth, Eleventh, District of Columbia, and Federal Circuits all testified, after polling their colleagues, that it was imperative to fill the vacancies on their courts and in some cases that it was necessary to expand the number of seats to fill growing backlogs. While Fourth Circuit Chief Judge J. Harvey Wilkinson³¹⁸ and Judges Patrick E. Higginbotham and Edith H. Jones of the Fifth Circuit testified that their courts did not need to expand or even fill existing vacancies, other judges on those courts, like Samuel J. Ervin, the former Chief Judge of the Fourth Circuit, disagreed.

Senator Grassley uses no standard methodology to determine how many judges are needed. Instead, he appears to examine a particular court from which he highlights random factors relevant to his determination, despite the fact that those factors may be unique to that court. In the introduction to his summary of survey responses from court of appeals judges, he acknowledges that "the questionnaire was never intended to result in a mere statistical compilation of data, as many of the questions in the survey did not lend themselves to such an analysis." Nonetheless, he ignores much of the information compiled in his own survey and throughout the hearings to conclude that fewer judges are needed for the federal bench.

³¹⁷ Chief Judge Harry Edwards of the District of Columbia Circuit testified that most of his colleagues favored the filling of the then twelfth seat on the court, but his colleague, Circuit Judge Lawrence Silberman, testified that filling the twelfth seat was unnecessary. *See* 143 CONG. REC. S2515 (daily ed. Mar. 19, 1997) (statement of Sen. Orrin Hatch).

³¹⁸ Senator Sessions referred to Chief Judge Wilkinson's testimony before the Grassley subcommittee:

Even Judge Harvey Wilkinson said even though they have 378 filings per judge in the fourth circuit, they do not need another judge. He also noted, and the records will bear it out, that the Fourth Circuit Court of Appeals has the fastest disposition rate, the shortest time between filing and decision, of any circuit in America, and they are the third busiest circuit in America. That is good judging. That is good administration. That is fidelity to the taxpayers' money, and they ought to be commended for that.

¹⁴³ CONG. REC. S2521 (daily ed. Mar. 19, 1997). Chief Judge Wilkinson, however, has also articulated grave doubts about any judicial expansions: "We've charted a course of unexamined growth over the past 25 years. We have ignored basic questions like what is the optimal size of a federal circuit and what kind of questions the Federal judiciary should be involved with." Carney, *supra* note 142, at 2914.

³¹⁹ Report on the January 1996 Judicial Survey, Part 1, supra note 308, at I.

Senator Grassley's statistical computations are disingenuous. For instance, in his summary for the U.S. Court of Appeals survey describing the "Need for More Judges," he begins:

Even though a large majority of the responding judges (70%) believed their caseload was increasing, the majority of these judges (53%) indicated either that the current number of judges in their court was sufficient or that less judges were needed. On the other hand 30.6% of responding judges answered it was their perception that their court necessitated more judges.³²⁰

However, in his section actually compiling the survey results, out of 170 responses to the question, "Given the overall workload and backlog of your court, is it your perception that the workload and backlog necessitate additional judges, or fewer judges?" Fifty-two (30.6%) answered "more judges," four (2.4%) answered "fewer judges," eighty-six (50.6%) answered "the current number of judges is sufficient," and twenty-eight (16.5%) answered they were unsure or did not answer.³²¹ In contrast to Senator Grassley's formulation, more than 80% of all judges who responded to the survey said the courts should not shrink or should actually grow ³²² More than 97% of the judges who actually answered this question said the same thing.³²³

Addressing the same issue in his summary of the district court surveys, Senator Grassley said:

Even though a near majority (44%) of the responding judges believed their caseload was increasing, a solid majority (63.5%) indicated either that the current number of judges in their court was sufficient or that less judges were needed. While only 18.9% of responding judges answered that it was their perception their court needed more judges, a mere 3.8% perceived their caseload to be unmanageable. 324

Again, Grassley's emphasis appears misplaced, because 79.2% believe the current number of judges needs to be expanded or is adequate. Out of 529 responses, 100 (18.9%) said more judges were needed, 17 (3.2%) said

³²⁰ Id at 5

³²¹ Id. at survey results section, no page number.

³²² See 1d.

³²³ See 1d.

³²⁴ Report on the January 1996 Judicial Survey, Part 2, supra note 311, at 5.

fewer judges were needed, and 319 (60.3%) said the number of current judges is sufficient. In the remaining 93 responses (17.6%), the respondent was not sure, did not answer, or the answer was unclear.³²⁵

The theme expressed by Senator Grassley has surfaced in the confirmations battles of certain circuit court nominees. James Beaty, a United States District Court judge from the Middle District of North Carolina, was nominated for a Fourth Circuit seat on December 22, 1995, at which point there were two vacancies on the fifteen-seat circuit. Beaty, an African-American, would have become the first non-white judge on the circuit. North Carolina, the state with the largest population in the Fourth Circuit, has only one active North Carolinian judge, as opposed to South Carolina, which has four, and Virginia, three.

Beaty, a well-respected former general practice attorney, was perceived as too liberal by North Carolina's two Republican senators, Jesse Helms and Lauch Faircloth. The two senators have sharply criticized Beaty on the basis of one case, *Sherman v. Smith.* Sitting by designation as part of a Fourth Circuit appellate panel, Judge Beaty joined a per curiam opinion overturning a criminal conviction and remanding the case for new trial. The basis for this ruling was that a trial juror, on his own initiative, had gone to the crime scene to inspect a tree where the murder weapon was found and then reported his findings to the other members of the jury the trial judge concluded this was harmless error and did not declare a mistrial, but the appellate panel disagreed. The Fourth Circuit, sitting en banc, reversed the panel decision. However, given the facts in evidence, the panel's decision was not unreasonable.

³²⁵ See id. at survey results section, no page number.

³²⁶ Senator Faircloth was defeated in his reelection bid in November 1998. See John Edwards Wins with a Message of Hope, GREENSBORO NEWS & REC., Nov. 5, 1998, at A14.

³²⁷ Sherman v. Smith, No. 94-6831, 1995 WL 709751 (4th Cir. Dec. 4, 1995) (un-published opinion), opinion vacated (4th Cir. Jan. 18, 1996), and on reh'g en banc, 89 F.3d 1134 (4th Cir. 1996).

³²⁸ See 1d. at *1.

³²⁹ See 1d.

³³⁰ See 1d.

³³¹ See Sherman v. Smith, 89 F.3d 1134, 1136-37 (4th Cir. 1996) (en banc).

³³² After President Clinton nominated Beaty, Senator Orrin Hatch accused him of being "soft on crime," and asked, "Will the President chastise Judge Beaty, or does he agree with his decision to release a convicted double murderer on a technicality?" 142 CONG. REC. S2790 (daily ed. Mar. 25, 1996). Andrew Frey, the defendant's lawyer and a former Deputy Solicitor General and Reagan nominee to

As partial justification for not pushing their home state nominee, the North Carolina senators also stated that based on the Grassley hearings, additional active Fourth Circuit judges were not necessary ³³³ The situation remained static until February of 1998, when one of the remaining active South Carolina Fourth Circuit judges died suddenly and a Fourth Circuit judge from West Virginia took senior status. ³³⁴ Receiving recommendations from the South Carolina and West Virginia senators, President Clinton named two moderate nominees for the Fourth Circuit, United States District Court Judge William Traxler of the District of South Carolina and former United States Attorney Robert King from West Virginia. The Senate quickly confirmed both nominees at the end of its session. ³³⁵ Judge Beaty's nomination was not acted upon and died at the close of the Congress.

More publicly, Senator Grassley's argument for fewer judges came to light during the confirmation of Merrick Garland, a 1995 nominee to the District of Columbia Circuit ("D.C. Circuit") who was not confirmed until March 19, 1997 There are twelve seats on the D.C. Circuit. Garland was nominated for the twelfth seat which became vacant when Judge Abner Mikva was appointed White House Counsel on September 19, 1994. The Republican controlled Senate would not advance Garland's nomination

the District of Columbia Circuit, wrote to Senator Hatch:

[F]ar more disturbing to proponents of judicial restraint (as I believe we both are) should be the action of the Fourth Circuit in granting rehearing of Tim Sherman's case *en banc*. As you may know, the panel decision in Tim's favor was an unpublished, non-precedential opinion that did not purport to create any new law or modify any existing legal principles.

The lack of any principled justification for an *en banc* rehearing suggests that the result-oriented judicial activism may be its cause.

Letter from Andrew Frey, defense counsel in *Sherman v. Smith*, to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee (Feb. 19, 1996) (copy on file with author).

³³³ See, e.g., Helms Should Unblock Circuit Court Appointees, GREENSBORO NEWS & REC., Feb. 19, 1997, at A10; N.C. May Lose Posts on Federal Court, GREENSBORO NEWS & REC., Feb. 18, 1997, at A3.

³³⁴ See Administrative Office of U.S. Courts, *Vacancies in the Federal Judiciary* (visited Mar. 17, 1998) http://www.uscourts.gov/vacancies/judgevacancy.htm

³³⁵ See United States Senate Comm. on the Judiciary, Alphabetical List of Judicial Nominees (visited Mar. 17, 1998) http://www.senate.gov/~judiciary/105alpha.htm. Judge Traxler was nominated on July 13, 1998, and confirmed on September 28, 1998. See id. Judge King was nominated on June 24, 1998, and confirmed on October 8, 1998. See id.

until D.C. Circuit Judge James Buckley took senior status on August 31, 1996.³³⁶ Even then, led by Senator Grassley, opponents argued that based solely on an analysis of the number of filings and terminations, the D.C. Circuit did not need an eleventh, let alone twelfth seat. A number of Republican senators articulated this rationale. Senator Grassley stated that

[a]s chairman of the Subcommittee on Administrative Oversight and the Courts, I have closely studied the D.C. circuit for over a year now. And I can confidently conclude that the D.C. circuit does not need 12 judges or even 11 judges. Filling either of these two seats would just be a waste of taxpayer money—to the tune of about \$1 million per year for each seat.

Abolishing judicial seats is completely nonpartisan. If a judicial seat is abolished, no President-Democrat or Republican-could fill it. As long as any judgeship exists, the temptation to nominate someone to fill the seat will be overwhelming-even with the outrageous cost to the American taxpayer.³³⁷

According to Senator John Ashcroft:

[E]nding the era of big Government includes all three branches of government. But if we cannot end big government where we have had declining demand for services, and where we are already over staffed, where can we end big government? To believe that the judicial branch should be excluded from the exercise of responsibility or should be over staffed or should ignore the trends in terms of case filings and should be overpopulated with individuals because there are slots available, in spite of the fact that the work or the caseload is not there to justify those slots, would be for us to deny a responsible position in this matter.³³⁸

Case filings from court to court are not identical, and the D.C. Circuit has the largest number of the most complicated cases and the smallest number of relatively simple cases of any of the regional circuit courts. As Senator Paul Sarbanes (D-Md.) stated in the floor debate on the Garland nomination,

³³⁶ See Administrative Office of U.S. Courts, *Vacancies in the Federal Judiciary* (visited Mar. 17, 1998) http://www.uscourts.gov/vacancies/judgevacancy.htm ³³⁷ 143 CONG. REC. S2522 (daily ed. Mar. 19, 1997).

³³⁸ Id. at S2535.

[the] mere case filing numbers do not tell the whole story with respect to the burdens that the court faces. The D.C. circuit receives, in complexity and importance, cases that do not come as a general rule before the other circuits across the country. It has had major, major cases that it has had to deal with as a routine matter, cases of great weight and importance to the nation.

The D.C. circuit also handles numerous appeals from administrative agency decisions that are characterized by voluminous records and complex fact patterns. In fact, almost half of the D.C. circuit's cases are these kind of administrative appeals—46 percent. The next highest circuit in this respect is the Ninth circuit with 9.6 percent of their cases being of this kind. The D.C. circuit also handles fewer of the least complex and time-consuming cases, criminal and diversity cases, than any of its sister circuits. Only 11 percent of its cases are diversity cases. No other circuit has less than 24 percent.³³⁹

By the end of the Merrick Garland proceedings, Senator Hatch, who led the floor debate on behalf of Garland, was angered by some of the language employed by his Republican colleagues:

As I suspected, nobody in this body is willing to challenge the merit of Merrick Garland's nomination. I have not heard one challenge to him yet. In fact, they openly concede that Mr. Garland is highly qualified to be an appellate judge. Rather, they use arguments that the D.C. circuit does not need 12 judges in order to oppose the confirmation of Mr. Garland for the 11th seat on this court.

My colleague from Alabama [Senator Sessions] circulated a letter saying confirming Merrick Garland would be a "ripoff" of the tax-payers. Having just led the fight for the balanced budget amendment, I do not think that is quite fair. I am never going to rip off the taxpayers. But I will tell you one thing, playing politics with judges is unfair, and I am sick of it, and, frankly, we are going to see what happens around here. A "ripoff" Let's be serious about this, folks. This is a serious matter.³⁴⁰

Garland was confirmed by a vote of 76 to 23, the largest number of votes received by any Clinton judicial appointee to that point in the 105th

³³⁹ Id. at S2527

³⁴⁰ Id. at S2536.

Congress.³⁴¹ The twelfth seat on the D.C. Circuit has remained vacant for almost three years with the Clinton Administration taking no efforts to fill it.

2. Judicial Expansion

Senator Grassley's contention that the authorized size of the federal courts has only expanded since the Civil War is accurate, except for the natural elimination of temporary judges.³⁴² However, the size and complexity of the federal docket, in both its civil and criminal components and at the trial and appellate levels, have increased significantly in recent years.

Congress has created new judgeships in every presidential administration since World War II, except for Gerald Ford's. The last two expansions were in 1984 and 1990 when the size of the judiciary was expanded by eighty-five positions at each instance.³⁴³ The eight years since the last expansion is the longest time that the size of the judiciary has remained fixed in at least fifty years. Since 1992, civil and criminal filings in the district courts have increased by 16.9%, from 265,612 to 310,504,³⁴⁴ and appeals have increased by 11.3%, from 47,013 to 52,319 during this period.³⁴⁵ While a substantial part of the backlog can be attributed to the confirmation gridlock caused by the Senate, many parts of the country desperately need new judicial positions, quite apart from any unfilled judicial vacancies.

³⁴¹ See 1d.

of cases or an unexpectedly high new number of filings after legislation is approved in both houses of Congress and signed by the president. Temporary judges are appointed as full-fledged Article III judges with life tenure and salary protection, but at the end of five years, the next vacant judicial seat in that district is automatically extinguished, unless Congress votes to extend the duration of the temporary judgeship or to convert it into a permanent judicial seat. See Pub. L. No. 105-53, 111 Stat. 1174 (1997) (codified as amended at 28 U.S.C. § 133 (1997)).

³⁴³ See Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. § 151 Note (1990)); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended at 28 U.S.C. § 1334 (1984)).

³⁴⁴ See Administrative Office of U.S. Courts, Federal Court Management Statistics 167 (1997) [hereinafter 1997 Federal Court Management Statistics].

³⁴⁵ See 1d. at 31.

The Northern and Southern Districts of Texas have suffered from a large increase in drug and immigration crimes. Jerry Buchmeyer, Chief Judge of the Northern District of Texas, said late in 1997 that

[p]eople run out of desire and steam. It's one thing to keep going when there's help right around the corner. But the corner keeps getting longer. They're kind enough to give us more work by creating additional federal crimes. It would be nice to have some help to take care of all this new business.³⁴⁶

George Kazen, Buchmeyer's counterpart in the Southern District of Texas, said his caseload is

like a tidal wave. As soon as I finish 25 cases per month, the next 25 are on top of me and then you've got the sentence reports you did two months before. There's no stop, no break at all, year in and year out, here they come. We've already got more than we can say grace over down here. We have a docket. that can be tripled probably at the drop of a hat.³⁴⁷

Both the Northern and Southern Districts had two long-standing vacancies in 1997. One vacancy in each court was filled in March of 1998,³⁴⁸ but these are large multi-member district courts,³⁴⁹ and they need additional seat allocations to keep up with the increased case load. The Middle District of Florida has one of the largest caseloads in the country, and the backlog was so great that its judges conducted a continuous fourmonth trial session in the summer of 1998 to reduce the backlog.³⁵⁰ The

³⁴⁶ Carney, supra note 142, at 2913-14.

³⁴⁷ Sue Ann Pressley, Cases Pile Up as Judgeships Remain Vacant, WASH. POST, May 15, 1997, at A1.

³⁴⁸ See United States Senate Committee on the Judiciary, Alphabetical List of Judicial Nominees (visited Mar. 17, 1998) http://www.senate.gov/~judiciary/105alpha.htm

³⁴⁹ The Northern District of Texas, based in Dallas, has 12 seats, and the Southern District, based in Houston, has 18 seats.

³⁵⁰ See Jim Leusner, Wake Up Call for Lawyers on Federal Judge Shortage, ORLANDO SENTINEL, Mar. 19, 1998, at D3. Testifying on the problems of the Middle District of Florida before the House Committee on the Judiciary Subcommittee on Courts and Intellectual Property, Chief Judge Elizabeth Kovachevich stated that

[[]t]o try to help ourselves, we have decided to withdraw our forces from the

Florida backlog was not directly related to the Senate's confirmation gridlock because Florida judges have always been confirmed in a timely fashion.

New judges also need to be assigned to the Southern District of California, where the number of federal law enforcement agents has doubled since 1994. There are more federal felony cases in San Diego than in any other district, approximately 4000 per year. So many defendants await trial in the district that hundreds have to be bussed in from 130 miles away Since 1978, the number of judges has remained constant at eight. According to Alan Bersin, who was United States Attorney in San Diego: We've reached the limit. We have found that there is an irreducible bottleneck at the point of courtrooms and active federal judges who can hear the criminal cases that are being generated by the agencies and brought by our office. Judith Keep, the Chief Judge in the Southern District, agrees:

There's an awful lot of just crisis management that's constantly going on. We're not able to do anything well. Even with the criminal cases, you have to have such an assembly line to get them through. You cannot give them the attention that they deserve. And you know that you're making a lot of mistakes with—because of the speed.³⁵⁵

Alan Bersin attributes congressional failure to authorize new judgeships to politics, noting:

Jacksonville and the Orlando Divisions and to redeploy and to attack the caseload in Tampa and Fort Myers this summer by having the active U.S. district judges abandon Orlando and Jacksonville for three months and come to Tampa. This will put all eleven U.S. district judges in Tampa courtrooms to tackle the backlog of civil cases in the Tampa and Fort Myers divisions. We recognize that by doing so we will cause undue hardships to the constituents of the Orlando and Jacksonville divisions. We are forced to steal from Peter to pay Paul, and realize that this is merely a short-term solution to a long-term problem.

Hearings Before the Subcomm. on Courts and Intellectual Property, 106th Cong. 5-6 (1997) (statement of Hon. Elizabeth Kovachevich), available in 1997 WL 626973.

³⁵¹ See Morning Edition: Federal Judge Shortage (Nat'l Public Radio broadcast, Sept. 23, 1997).

³⁵² See 1d.

³⁵³ See 1d.

³⁵⁴ Id.

³⁵⁵ Id.

What is a political battle within the Beltway, and may make sense in the logic of Washington politics, has real life consequences. Without judges, we cannot bring these prosecutions. Without the prosecutions, we can't support the agencies in their enforcement efforts and we end up with no effective deterrence to the crime that exists here on the border. If we don't have judges, that law ends up having no teeth, and we end up chasing our tails to some degree. 356

To combat some of the problems associated with backlog and expanded caseloads, the Judicial Conference in 1996 recommended that Congress expand the size of the judiciary by creating fifty-three new seats, equaling seventeen court of appeals judgeships and thirty-six district court judgeships. As Chief Justice William Rehnquist stated in his speech on the status of the judiciary at the end of 1996:

Another shortcoming in Congress' 1996 record on legislative matters concerning the Federal judiciary that will confront us again in 1997 is its decision not to create additional Federal judgeships. Despite an increasing caseload and the fact that no new Article III judgeships have been created since 1990, Congress declined the Judicial Conference's request to create such positions. Circuit court judges continue to be especially squeezed between time constraints and heavy dockets. Eventually, Congress will have to reconcile this mismatch between Federal caseload and judicial personnel. Either the former must be reduced or the latter increased if the quality of justice administered by the Federal judiciary is to be maintained. 358

The Chief Justice returned to this theme in his 1997 report, stating that

[s]ince December 1990, the last time Congress created any new judge-ships, the number of cases filed in courts of appeals has grown by 21 percent and those filed in district courts have increased by 24 percent.

³⁵⁶ Id.

³⁵⁷ See Administrative Office of U.S. Courts, News Release, Judicial Conference Seeks New Judgeships to Handle Growing Workloads at All Levels (Mar. 11, 1997).

³⁵⁸ William Rehnquist, 1996 Year-End Report on the Federal Judiciary, at 4 (Dec. 31, 1996).

In general, Congress has declined to eliminate the disparity between resources and workload in the Federal judiciary by an expansion of the number of judges.³⁵⁹

Finally, in a May 11, 1998, speech to the American Law Institute, he said, "We need vacancies filled to deal with the cases arising under existing laws, but if Congress enacts, and the President signs new laws allowing more cases to be brought into the federal courts, just filling the vacancies will not be enough. We will need additional judgeships." Legislation which would lead to a modest expansion was reintroduced in 1997. It was not formally considered, and the bill died at the end of the 105th Congress. 361

3. Ninth Circuit Split

During the 104th and 105th Congresses, the issue of splitting the Ninth Circuit again arose.³⁶² The Ninth Circuit Court of Appeals is the United States's largest in terms of case filings,³⁶³ population served, and geography It includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the territories of the Northern Mariana Islands and Guam. For the past decade, conservative western members of Congress have repeatedly introduced legislation which would split the

³⁵⁹ Rehnquist, supra note 305, at 2-3.

³⁶⁰ William Rehnquist, May 11, 1998 Speech to the American Law Institute, LEGAL TIMES, May 18, 1998, at 12.

³⁶¹ See Federal Judgeship Act of 1997, S. 678, 105th Cong. (1997).

³⁶² In 1974, the Hruska Commission, chaired by Senator Roman Hruska (R-Neb.), recommended that for efficiency purposes, both the Fifth Circuit (which then included Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas) and the Ninth Circuit be split. The judges on the Fifth Circuit and the bar associations from the affected states all enthusiastically agreed, and Congress split the Fifth Circuit in 1981. At the same time, lawyers and judges in the Ninth Circuit strongly opposed splitting the court of appeals, and Congress chose not to take action at that time. Law review articles discussing the history of the Ninth Circuit and arguing for and against its split include Senator Conrad Burns, *Dividing the Ninth Circuit Court of Appeals: A Proposition Long Overdue*, 57 Mont. L. Rev 245 (1996); Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 SMU L. Rev 583 (1997); and Judge J. Clifford Wallace, *The Ninth Circuit Should Not Be Split*, 56 Ohio St. L.J. 941 (1995).

³⁶³ In fiscal year 1997, 8692 appeals were filed. See 1997 FEDERAL COURT MANAGEMENT STATISTICS, supra note 344, at 20.

Ninth Circuit, primarily by isolating California with one or more additional states and placing the remainder into a new conservative Twelfth Circuit.³⁶⁴ Proponents of the split argue that because twenty-eight of twenty-nine Ninth Circuit cases accepted for review by the Supreme Court during its 1996-1997 term were reversed, the Ninth Circuit is jurisprudentially out of step with the rest of the country.³⁶⁵

While claiming in many cases to act purely on efficiency principles, the major impetus behind these measures is to create a new court structure because of distaste for particular rulings issued by members of the Ninth Circuit. Split supporters acting at the behest of the timber, mineral and oil extraction, grazing, and forestry industries, key in many of the western states, believe that these constituencies have been stymied by environmental rulings and decisions impacting on Native American rights. According to University of Washington law professor Stewart Jay, Senator Slade

³⁶⁴ See, e.g., S. 431, 105th Cong. (1997) (Ninth Circuit Court of Appeals Reorganization Act of 1997); H.R. 2935, 104th Cong. (1996) (proposing split); S. 956, 104th Cong. (1995) (establishing commission on structural alternatives for Courts of Appeals); S. 853, 104th Cong. (1995) (proposing split); H.R. 3654, 103d Cong. (1993) (same); S. 1686, 102d Cong, (1991) (same); H.R. 4900, 101st Cong. (1990) (same); S. 948, 101st Cong. (1989) (same).

³⁶⁵ See David G. Savage, Getting the High Court's Attention: Liberal-Leaning 9th Circuit is Often Reversed, A.B.A. J., Nov 1997, at 46.

³⁶⁶ See, e.g., Alaska v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286 (9th Cir. 1996), rev'd, 522 U.S. 520 (1998) (awarding tribal government sovereign rights over tax decisions); Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995), rev'd sub nom. Bennett v. Spear, 117 S. Ct. 1154 (1997) (holding that ranchers and water irrigation districts could not employ citizen suit provisions of Endangered Species Act to challenge government action); Coeur d'Alene Tribe v. Idaho, 42 F.3d 1244 (9th Cir. 1994), rev'd in part, 117 S. Ct. 2098 (1997) (holding that state officials were not immune from suit in boundary dispute concerning ownership of land under a lake and between three rivers flowing through reservation lands); Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311 (9th Cir. 1990), rev'd, 503 U.S. 429 (1992) (enjoining enforcement of appropriations statute that would have allowed timber sales from old growth forests in Oregon and Washington because of the presence of spotted owls protected by the Endangered Species Act); Oregon Natural Resources Council v. Marsh, 832 F.2d 1489 (9th Cir. 1987), rev'd, 490 U.S. 360 (1989) (enjoining construction of Elk Creek Dam in Oregon because Army Corps of Engineers violated National Environmental Protection Act); David C. Frederick, An Old Argument: Bids to Split the Ninth Circuit Are Nothing New, nor Are the Sound Arguments Against a Split, RECORDER, Aug. 20, 1997, at 6; Letter from Ninth Circuit Judge Charles E. Wiggins to Representative Harold Rogers (Aug. 1, 1997) (copy on file with author).

Gorton (R-Wash.), a perennial sponsor of legislation to split the circuit, "is doing this because he thinks it will produce rulings in environmental and land-use cases that are more favorable to his ideology "367 Carolyn Richardson, chief environmental lawyer for the California Farm Bureau, a trade association, believes there is a California slant to the environmental decisions: "the 9th Circuit is California, when you look at the decisions coming out. I think that the other states have good cause to complain."368 Speaking of the 1996 Alaskan Native American sovereignty decision, Alaska v. Native Village of Venetie Tribal Government, 369 Senator Ted Stevens (R-Alaska) proclaimed, "[the] court has too much to do to even learn about Alaska. I don't think any of those judges ever have been to Alaska and yet we have them issuing an opinion like this which has so much to do with our future."370

Senators favoring a split believe that if the California judges are isolated, then the environmental decisions will be more favorable to industrial interests,³⁷¹ but as Ninth Circuit Judge Alex Kozinski proclaims:

I'm no big friend of the environment—I'm pretty conservative. And I haven't seen a lot of outrageous things happen. I've seen a bunch of laws written in a mushy way getting applied by judges who have a view, but who aren't doing anything terribly outrageous. If you want to change what courts do, you're going to have to write better laws.³⁷²

As Governor Pete Wilson of California angrily noted, "the real issue appears to be one of judicial gerrymandering, which seeks to cordon off some judges in one circuit while keeping others in another because of concerns, whether perceived or real, over particular judges' perspectives or judicial philosophy "373"

Senior Ninth Circuit Judge J. Clifford Wallace wrote to Senator Hatch:

³⁶⁷ Ostrom, supra note 26, at A1.

³⁶⁸ Morning Edition (Nat'l Public Radio broadcast, Aug. 27, 1997).

³⁶⁹ Alaska v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286 (9th Cir. 1996), rev'd, 522 U.S. 520 (1998).

³⁷⁰ Neil A. Lewis, Western Senators Are Pushing to Break Up Circuit Court, N.Y TIMES, Sept. 1, 1997, at A16.

³⁷¹ See Frederick, supra note 366, at 6.

³⁷² Ostrom, supra note 26, at A1.

³⁷³ Editorial, Study the Split: Attack on 9th Circuit Is "Judicial Gerrymandering," SACRAMENTO BEE, July 18, 1997, at B6.

Exactly sixty years ago this month, President Roosevelt acknowledged the defeat of his plan to "pack" the Supreme Court in order to reverse decisions he did not like. What killed the plan is that Roosevelt lost the support of liberals who agreed with his legislative agenda but were unwilling to alter court structures as a means to that end. Here, the plan involves "unpacking" a court, but the lesson remains equally apt altering court structures for ideological purposes is an inappropriate use of Congress' power.³⁷⁴

Todd True of the Earthjustice Legal Defense Fund claimed that

[i]n the past, proposals like this have been motivated by a desire to change the outcome, particularly in natural resource and environmental cases. To the extent this proposal has the same motivation, it's not just a bad idea, it's flat-out dangerous. Court packing or restructuring by the legislature to try to control the judiciary shouldn't be part of our government system.³⁷⁵

In 1978, twenty-three Ninth Circuit judges handled 3100 cases.³⁷⁶ By 1995, twenty-eight judges handled 8600 cases.³⁷⁷ Two years later, because of the Senate's inaction on confirming judicial nominees, there were ten vacancies, and eighteen judges were handling almost 9000 cases and overseeing an enormous backlog.³⁷⁸ According to Ninth Circuit Chief Judge, Proctor Hug, Jr., because of the Senate's confirmation gridlock, "We simply do not have enough active district and appellate judges to hear and decide cases in a prompt and timely manner."³⁷⁹ The chief judge said, "We've examined our procedures. We've looked at every other circuit, looked at ways to handle more cases. We've sought measure to improve the process without overdelegation of work to staff and law clerks."³⁸⁰ In 1997,

³⁷⁴ Letter from Judge J. Clifford Wallace, Senior Judge of the Ninth Circuit Court of Appeals, to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee (July 18, 1997) (copy on file with author).

³⁷⁵ Senate Panel Oks Breakup of Region's Appeals Court, LAS VEGAS REV -J., July 16, 1997, at 6B.

³⁷⁶ See David J. Pasternak, *The Judiciary Under Attack*, 20 L.A. LAWYER, Sept. 1997, at 11, 11.

³⁷⁷ See 1d.

³⁷⁸ See 1d.

³⁷⁹ *Id*.

³⁸⁰ Carney, supra note 142, at 2913.

the chief judge was forced to cancel 100 circuit panels, affecting 600 cases.³⁸¹

During the past three years, interest by Republican senators from the West in an immediate split was so intense that holds were placed on all nominees to the Ninth Circuit. None were confirmed in 1996 and 1997 A Senate colleague approached Senator Joseph Biden (D-Del.) and said

"I am not going to let anybody go through until the ninth circuit splits into two circuits."

I said "Why do you want it to split?"

He said "The reason I want it to split is I don't like the fact that California judges are making decisions that affect my state." 382

Senator Dianne Feinstein was

concerned about what appears to me to be a plan to force the splitting of the U.S. Court of Appeals for the Ninth Circuit by crippling its ability to do its work.

Ten of the twenty-eight judgeships on that court are now vacant-36 percent of the bench.

I believe that proponents of the ninth circuit split wish to keep these seats vacant as long as possible, so that the vacant judgeships can then be transferred to the new twelfth circuit, and filled by judges who they hope will be more in line with their own political philosophy.

Unfortunately, this plan is substantially impairing the ability of the ninth circuit to do its job, and impeding justice for the millions of Americans who live within the ninth circuit.³⁸³

During the 104th Congress, the Senate Judiciary Committee held hearings on a proposal to place California, along with Arizona, Hawaii, Nevada, and the Pacific territories in the Ninth Circuit. The remaining states would be placed in a new Twelfth Circuit.³⁸⁴ Voted out of committee, the proposal died at the end of the Congress. In July of 1997, without

³⁸¹ See Mike Doyle, Unfilled Judgeships Cause Case Crunch, FRESNO BEE, June 2, 1997, at B1.

^{382 143} CONG. REC. S2540 (daily ed. Mar. 19, 1997).

^{383 143} CONG. REC. S9165 (daily ed. Sept. 11, 1997).

³⁸⁴ See S. 956, 104th Cong., 1st Sess. (1995). The remaining states are Alaska, Idaho, Montana, Oregon, and Washington.

any hearings and with limited discussion, a new proposal was added to the Senate appropriations bill covering the Departments of Commerce, State, and Justice, and the Judiciary³⁸⁵ that would have split the Ninth Circuit at the beginning of the following fiscal year (October 1, 1997). California, Nevada, and the two Pacific territories were to be included in a reconfigured Ninth Circuit, and the remainder of the jurisdiction was to be placed in a new Twelfth Circuit. Almost all of the bar associations from the affected states were opposed to this provision, as were most of the judges on the Ninth Circuit. Although the split provision in the appropriations bill was substantive legislation included with appropriations (which is theoretically frowned upon), it passed the full Senate.

Senator Dianne Feinstein (D-Cal.) had proposed that the Senate pass a substitute measure, previously approved by the House of Representatives on June 3, 1997, 387 which would have set up a commission to study all of the circuit courts and make recommendations as to their structure uniformly 388 Senator Feinstein's alternative failed on a party line vote on July 24, 1997 389 The appropriations process for the bill broke down between House negotiators, who wanted a free-standing commission to be included in the final passage of the appropriations measure (who were joined by the Democratic members of the Senate), and Senate Appropriations Chairman Ted Stevens (R-Alaska), who favored an immediate Ninth Circuit split. Ultimately, Congress approved a compromise provision in the last days of its 1997 session that established a five-person Commission on Structural Alternatives for the Federal Courts of Appeals which would study "the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit." 390

Chaired by retired Supreme Court Justice Byron White, the Commission included Senior Arizona District Judge William D. Browning, N. Lee Cooper, past president of the American Bar Association, Sixth Circuit Judge Gilbert S. Merritt, and Ninth Circuit Judge Pamela Ann Rymer. The Commission held six public hearings in 1998 at which eighty-nine witnesses testified, sixty-four at two hearings held in San Francisco and Seattle. It received ninety-two written statements from other interested persons, and it produced a draft report and received seventy-six comments

³⁸⁵ See S. 1022, 105th Cong., 1st Sess. (1997).

³⁸⁶ See 143 CONG. REC. S8084 (daily ed. July 24, 1997).

³⁸⁷ See 143 CONG. REC. H3223 (daily ed. June 3, 1997).

³⁸⁸ See H.R. 908, 105th Cong., 1st Sess. (1997)

³⁸⁹ See 143 CONG. REC. S8061 (daily ed. July 24, 1997).

³⁹⁰ 143 CONG. REC. S12339 (daily ed. Nov. 9, 1997).

on that report.³⁹¹ The Commission surveyed and received responses from more than eighty percent of all active and senior circuit and district judges. It also surveyed a national sample of more than 5600 lawyers who regularly handle appeals in the federal courts and received responses from fifty-four percent.³⁹² 69.7% of the judges on the Ninth Circuit and 67.6% of the district judges within the Ninth Circuit "do not favor realignment of the boundaries of the circuit."³⁹³ The governors of California, Nevada, Oregon, and Washington, the United States Department of Justice, the American Bar Association, and most state bar associations oppose a split, while some of the senators from Alaska, Montana, and Washington, and some state attorneys general within the Circuit support a split.³⁹⁴ Four members of the United States Supreme Court–Justices Kennedy, O'Connor, Scalia, and Stevens–also favor a split.³⁹⁵

While the Commission looked at the structure of all of the federal courts, pursuant to its mandate it concentrated on the Ninth Circuit. Its work was based on an important premise:

There is one principle that we regard as undebatable: It is wrong to realign circuits (or not realign them), and to restructure courts (or leave them alone) because of particular judicial decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.

In conducting our analysis and developing our recommendations, we have proceeded on the premise that the decisions about judicial structure and circuit alignment should be based on objective and principled considerations of sound judicial administration. Moreover, such decisions should be made with a long-range perspective and not be motivated by short-range, temporary circumstances.³⁹⁶

Having made this assertion, the Commission's concluding report was divided into two parts, one that focused on how the Ninth Circuit functions

³⁹¹ See COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 3-4 (Dec. 18, 1998) [hereinafter FINAL REPORT].

³⁹² See 1d. at 4.

³⁹³ Id. at 38.

³⁹⁴ See Commission on Structural Alternatives for the Federal Courts of Appeals, Tentative Draft Report 36 (Oct. 1998).

³⁹⁵ See 1d.

³⁹⁶ FINAL REPORT, supra note 391, at 6.

as an administrative unit and the other on how the Ninth Circuit works as a court of appeals. The Commission concluded that administratively the Ninth Circuit was functioning well, that it been innovative in handling its burgeoning caseload, and that "the administration of the Ninth Circuit is, at the least, on a par with that of other circuits, and innovative in many respects. We see no good reason to split the circuit solely out of concern for its size or administration."³⁹⁷ In fact, the Commission thought that the present configuration was advantageous in providing western and Pacific Rim states with a single uniform body of federal law, unlike the Atlantic coast/Gulf of Mexico corridor which is divided into six circuit courts.

The Commission was concerned about the high reversal rate by the Supreme Court to which the Ninth Circuit was subjected, the immense number of decisions made by Ninth Circuit judges, and the probability that the judges on that bench were unable to retain an understanding of all of the cases decided by the court. In response to these problems, the Commission recommended that the current borders of the Ninth Circuit should not be redrawn but that it should be split into three internal divisions to "capitalize on the benefits of smaller decisional units without sacrificing the benefits of a large circuit." The three divisions would include: a Northern Division made up of Alaska, Idaho, Montana, Oregon, and Washington; a Middle Division with the Northern and Eastern Districts of California, Hawaii, Nevada, and the Pacific islands; and a Southern Division made up of Arizona and the Central and Southern Districts of California.

Each of the three divisions would be made up of at least seven judges, a majority of whom would have to reside within that division, and the remainder could be assigned permanently or for temporary tours of duty. The Commission believes that the combination of resident home judges mixed with judges from outside the region and inclusion in the larger circuit "heightens the regional character deemed a desirable feature of the federal intermediate appellate system, without losing the benefits of diversity inherent in a court drawn from a larger area."

The Commission believes that this divisional structure would promote consistency and predictability

Over time, coherence and consistency suffer when judges are unable to monitor the law of their entire decisional unit or correct misstatements of

³⁹⁷ *Id*. at 1x.

³⁹⁸ Id. at 47

³⁹⁹ See 1d. at 48.

⁴⁰⁰ Id. at 49.

the court's decisional law. We believe that judges operating in the smaller decisional units we propose—the regional divisions—will find it easier to monitor the law in their respective divisions and that those smaller decisional units will thus promote greater consistency.⁴⁰¹

Each division would have an added advantage for litigants because the division would be "much more of a 'known bench,' fostering judicial accountability and public confidence. Likewise, the circuit judges will know better the district judges and lawyers within their jurisdiction."⁴⁰²

Each division "would function as a semi-autonomous decisional unit. Decisions made in one division would not bind any other division, but they should be accorded substantial weight as the judges of the circuit endeavor to keep circuit law consistent." In order to maintain consistency and prevent legal conflict within the circuit, the Commission recommended establishing a circuit-wide review panel, to be called the Circuit Division for Conflict Correction. The Circuit Division would review cases where a regional division has conducted an en banc review or where such a review was sought and denied. This special panel would consist of thirteen judges, including the Chief Judge of the circuit and four judges from each of the three regional divisions, to be selected by lot. 404

The Circuit Division would not have jurisdiction to review a decision by a regional division on the ground that it is considered to be incorrect or unsound; its only authority would be to resolve square interdivisional conflicts. A regional division's decision that is claimed to be in error but does not create a conflict between divisions would be subject to review only by the regional division sitting *en banc* or by the Supreme Court. ⁴⁰⁵

The current "mini en banc" provision used in the Ninth Circuit would be abolished. 406

The Commission summarized its thoughts about the Ninth Circuit:

The divisional structure for the court of appeals that we recommend, with a ready conflict-correction mechanism, is a practical alternative that

⁴⁰¹ Id. at 47

⁴⁰² *Id*.

⁴⁰³ Id. at 43.

⁴⁰⁴ See 1d.

⁴⁰⁵ Id. at 45.

⁴⁰⁶ See 1d.

is workable, will achieve the legitimate ends of those who favor splitting the circuit and those who seek to preserve it, and affords the greatest promise for flexibility in the future. It is not, of course, a perfect structure. We can think of none that can be, with California—the single largest contributor to caseload—a part of the circuit. Yet we are persuaded that it is better to have the State of California subject to different divisions within the same circuit than to split it between circuits. 407

It is important to note that the Commission recognized that many of the calls for division of the Ninth Circuit were politically motivated, and that there were no controlling reasons to split the court. While there may be some benefits in having regional influences reflected in a court of appeals, these can be accommodated while still safeguarding a single coherent body of law throughout the Ninth Circuit. Accordingly, the recommendations appear to be a victory for those who advocate retention of the current parameters of the court. However, unless the recommendations are implemented, we will not know how effective the internal Circuit Division for Conflict Correction would be in maintaining consistency from one division to another. The end result may be three balkanized divisions having little to do with each other jurisprudentially, except that they are administratively maintained within a single larger Ninth Circuit.

Unsurprisingly, there has been a mixed response to the Commission's recommendations. Ninth Circuit Chief Judge Proctor Hug, Jr., who has led the court's effort to remain united, is "pleased the commission said the circuit should not be split" and delighted that the report notes that "administration of the 9th Circuit is at least on a par with other circuits and innovative in many respects," but on behalf of the court, he finally said that the proposal would undermine the Commission's desire to maintain a single body of federal law in the western states. Senator Frank Murkowski (R-Alaska), who has favored a split, called the Commission's recommendations "an ideal solution. It was good to see the commission largely accept our arguments for the need for cases to be reviewed inside each region. I believe this recommendation will bring about the momentum needed to see this carried out by Congress."

⁴⁰⁷ Id. at 57

⁴⁰⁸ David Savage, California and the West: Panel Urges Realignment of Appeals Court, L.A. TIMES, Oct. 8, 1998, at A3.

⁴⁰⁹ 9th Circuit Chief Judge Objects to Divisions, SACRAMENTO BEE, Oct. 8, 1998, at A3.

⁴¹⁰ Paul Elias, *Splitting Circuit Is Not 1st Choice*, RECORDER, Oct. 8, 1998, at 1.

In contrast, split proponent and Ninth Circuit Judge Diarmuid O'Scannlain said,

If we're going to go through all that trouble, why not split it? I think that the people in Congress will see that there is some merit in restructuring the circuit. Because now a really highly regarded committee, with four judges and the former head of the ABA, is saying something must be done.⁴¹¹

Long-time Ninth Circuit split supporter Senator Conrad Burns (R-Mont.) views the Commission's recommendations as "a floor, not a ceiling." A spokesperson for California Governor Pete Wilson, who opposes splitting the Ninth Circuit, said, "It seems to split the baby, having two divisions in California. A disagreement between each division could be very confusing and problematic." ³⁴¹³

The Commission's work is simply a recommendation, and the 106th Congress has the opportunity to transform these recommendations into legislation.⁴¹⁴

IV CONCLUSION

Judicial independence is the ability of judges to be free from outside pressures, other than legal constraints and precedents, so that they can decide cases in an impartial manner. In the federal system, judicial independence has been safeguarded by life tenure and salary protection. Arguably, the current array of congressional challenges to the judiciary is the greatest threat posed to judicial independence in more than sixty years. The most direct contemporary attacks on the federal judiciary are

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⁴¹² Savage, supra note 365, at A3.

⁴¹³ Jordan Lite, Commission Says Western-States Circuit Should Be Reorganized, FRESNO BEE, Oct. 8, 1998, at A3.

⁴¹⁴ In 1998, while the Commission was functioning, the Senate confirmed judges to fill five of the ten vacancies on the Ninth Circuit. *See* Administrative Office of U.S. Courts, *Vacancies in the Federal Judiciary* (visited Mar. 17, 1998) http://www.uscourts.gov/vacancies/judgevacancy.htm; *cf.* ADMINISTRATIVE OFFICE OF U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (1999). Two additional seats, those of Betty Fletcher and David Thompson, became vacant during 1998. *See id.*

⁴¹⁵ Undoubtedly, President Roosevelt's court packing scheme of 1937 represents the most extreme and dangerous attack on the judiciary in the twentieth

the proposals to end life tenure and to require judges to petition for reappointment, because these proposals directly strip away their constitutional protections. Equally extreme are the calls for impeachment of judges because of dislike for individual decisions and the plans to "intimidate" federal judges. While these are the most aggressive of the attacks on judicial independence, in fact they have had little impact. No one on the political right or left seriously believes that impeachment proceedings will be initiated; even if the public thinks that life tenure is inherently undemocratic, there is little likelihood that the Constitution will be amended to bring about its demise.

Verbal attacks on judges such as those made during the 1996 presidential campaign and the convening of hearings to study judicial activism are designed to challenge the judiciary, and these too can have an impact on judicial independence. Because he suppressed a large amount of cocaine, Southern District of New York Judge Harold Baer became a whipping boy for Senator Dole, President Clinton, and various members of Congress. Ultimately he revisited that suppression decision and changed his mind. Third Circuit Judge Lee Sarokin was harshly criticized during that same campaign, mostly for decisions made when he had served as a district court judge. Judge Sarokin soon opted to retire from the bench instead of taking senior status as planned. Who knows why Judge Baer changed his mind and why Judge Sarokin actually retired? Judge Baer may have decided not to suppress the cocaine because of legitimate legal principles that were not evident when he initially made the decision, and Judge Sarokin may have decided to retire because he wanted to spend more time with new grandchildren in California. In part, these decisions may also have resulted from attacks on character, legal acumen, or honesty, and if so, these attacks on judicial independence were successful.

As Second Circuit Judge John M. Walker, a former president of the Federal Judges Association, suggests that there is a difference between helpful criticism and harmful intimidation:

century and resulted in its most significant capitulation to external pressure. Although FDR failed to win enactment of this legislation, he succeeded in his overall goal: within months of the introduction of the plan, the Supreme Court permanently changed its jurisprudential outlook and the most obstructionist members of the Court soon resigned. This attack on the judiciary represented an assault on judicial independence, and it caused the federal courts to alter their behavior. See, e.g., Leonard Baker, Back to Back. The Duel Between FDR and the Supreme Court (1967); Harold L. Ickes, The Inside Struggle: The Secret Diary of Harold L. Ickes (1954); William E. Leuchtenberg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt (1995).

I don't want to suggest that discussion, indeed forceful criticism of particular decisions of particular courts is somehow inappropriate. Vigorous critical debate is an important part of our culture and part of the advancement of our ideas in our society. I and all other judges benefit from thoughtful criticism of those taking issue with the reasoning or unstated assumptions of our opinions. Indeed, the appellate process is grounded on thoughtful criticism. Nor do I suggest that personal or partisan criticism is somehow outside the tradition of our freedom of expression. But when criticism reaches the level of intimidation—that is, the attempt to affect the outcome of a particular case or future cases of like kind before a particular judge—then I believe judicial independence is imperiled.

Appropriate criticism would certainly include pointing out defective reasoning, mis-application of the law to the facts, and a judge's clear departure from the law to effect personal policy preferences independent of the law. Criticism, I think, goes too far when it consists of personalized attacks that are focused simply on the result of a judge's decision without any consideration of its legal reasoning or of the facts of the case, or attacks that call for a judge's resignation or removal from office on the basis of rulings in a particular case. That's a fairly narrow category of criticism. [E]nlightened, thoughtful criticism that is comprehensive and well-reasoned and makes sincere points appealing to intellect are almost always appropriate

While congressional hearings on so-called "judicial activism" have not resulted in specific congressional action, equating the rendering of reasoned judicial decisions with judicial misbehavior, as in one hearing entitled *Judicial Misconduct and Discipline*, contributes to rising hatred for government generally, diminishes respect for the courts specifically, and can serve to jeopardize judicial independence.

Congress, of course, has the constitutional authority to establish and modify the jurisdiction of the federal courts. It is completely appropriate (although perhaps bad policy) for Congress to federalize specific crimes, eliminate violations of the criminal code, and alter diversity jurisdiction which limits caseload. Congress has also modified a relevant law or passed a new one in response to specific findings of unconstitutionality by the Supreme Court. However, when Congress passes legislation like the Illegal

⁴¹⁶ ABA Hearings of the Comm'n, supra note 16 (Dec. 13, 1996) (statement of Judge John M. Walker).

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Immigration Reform and Immigrant Responsibility Act or considers the DeLay Prison Amendment to H.R. 1252 to remove jurisdictions from the courts and the right to create potential remedies from individual judges, this can effectively curtail judicial independence, even though it may not be unconstitutional. Legislators have long recognized the danger of court-stripping legislation, and while much of this legislation has been introduced in previous years, almost none passed until the 104th Congress. These recent laws have effectively diminished the power and influence of federal judges in direct response to unwelcome court decisions.

The three branches of government are interdependent. Most people would concede that deliberate congressional action to eliminate funding from the federal courts would constitute an attack on judicial independence. Many of these same people would fail to recognize such an attack in the failure to confirm judicial appointees or the elimination of federal judgeships. They would similarly fail to see a problem with changing the configuration of certain courts or in not approving legislation which adds new federal judgeships. Collectively, these policies represent the implementation of "court-unpacking" plans, a modern congressional analog to President Roosevelt's action of the past. If the judiciary is so overworked that it cannot address the rising number of cases before it, it may have to alter systems and procedures in response. If a general financial crisis affected the entire government, then required sacrifices by the judicial branch would not constitute an attack on judicial independence. Currently, however, the United States is facing little financial difficulty, and the courts, in any event, constitute only a tiny fraction of the entire national budget.

A portion of the confirmation gridlock, in the form of Republican efforts to prohibit expansion of the judiciary, and plans to shrink part of it are designed to deny President Clinton his right to appoint judges. Much of this effort represents an ultraconservative response to specific decisions, because some members of Congress believe that fewer judges will mevitably lead to less judicial activism. Senator Jeff Sessions made direct reference to this in Merrick Garland's 1997 confirmation debate. Claiming it was unnecessary to fill the eleventh seat on that court, Sessions observed that "mischief sometimes gets started. I recall the old saying my mother used to use: an idle mind is the devil's workshop. We need judges with full caseloads, with plenty of work to do, important work to do. Fundamentally, this is a question of efficiency and productivity "⁴¹⁷ Representing an attack on the courts, these plans have also placed the judiciary in an

⁴¹⁷ 143 CONG. REC. S2533-34 (daily ed. Mar. 19, 1997).

increasingly vulnerable relationship with Congress, such that pleas for relief threaten judicial independence.

What is particularly incongruous about the recent series of attacks on the judiciary is that the courts have not made expansive policy. While there are certainly some errant decisions, these do not justify wholesale changes in the structure, powers, and strength of the judiciary. The theoretical excesses of the Warren Court took place more than thirty years ago, and the federal courts today are populated by Reagan-Bush conservatives, Clinton moderates, and a few scattered liberals. Unlike the Great Depression, which might have provided some rationale for attacking activist decisions of the 1930s, there is no contemporary national emergency which can justify an assault on judicial independence. The United States is prosperous at home and hegemonic abroad. Instead, legislators have placed judicial independence on the altar of political expediency solely to curry favor with the electorate. Federal judges can look forward to similar treatment during the remainder of the 106th Congress.