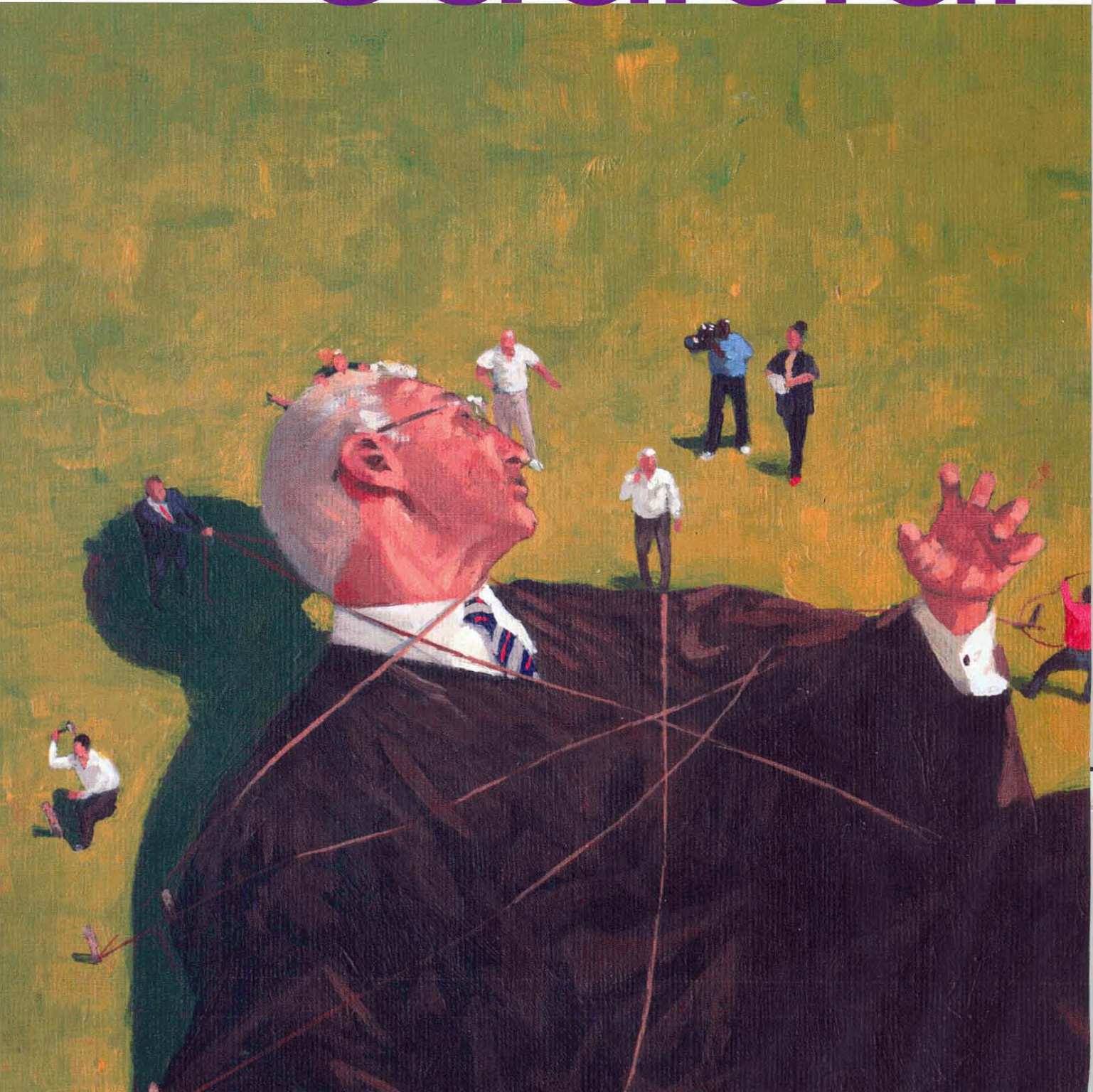


Judicial



Restraint?

An independent judiciary is one of the cornerstones of American democracy and the rule of law. But increasing challenges to the authority of judges have many in the legal community concerned about maintaining the rightful balance of power.

BY GEOFF BROWN
ILLUSTRATION BY KEVIN MCSHERRY

Montgomery County Circuit Court Judge Kathleen Savage knew the verdict she was about to render would create controversy and pain. “This is one of the most difficult decisions I have had to make in a long time,” she wrote of her July 17, 2007 opinion. She also wrote that she understood “the gravity of this case and the community’s concern about offenses of this type.” But her interpretation of the law was simple: A Liberian native, who had been held by Montgomery County police for suspected child abuse and rape for three years while awaiting a translator for his rare West African dialect, had been denied the right to a speedy trial. The charges would be dismissed.



Almost immediately, her decision became national news. Special interest groups and talk show hosts gave out her office's phone number and encouraged the public to call and voice their anger with her decision. On July 27, CNN's *Anderson Cooper 360* did a "Keeping Them Honest" segment on the case. The night before, one of the guests on Fox News Channel's *The O'Reilly Factor* had this to say about Judge Savage: "She should have had more common sense when she weighed a technicality against the outrageous rape of a 7-year old child. ... The entire state of Maryland is infested with left-leaning judges who are easy on criminals."

Adding weight to those comments was the public role of the man who said them: Maryland Delegate Patrick McDonough. He went on to introduce a letter calling for Judge Savage's impeachment during the 2008 General Assembly session.

This wasn't the first time in recent years that a Maryland legislator had called for the removal of a state judge following a controversial decision. In March 2006, Donald Dwyer began an ultimately unsuccessful campaign to have Baltimore City Circuit Court Judge M. Brooke Murdock removed because of her ruling that a Maryland law banning same-sex marriage was discriminatory and unconstitutional. "Murdock must be removed from office for misbehavior in office, willful neglect of duty, and incompetency," said Dwyer in his address to the General Assembly.

Though both these attempts at impeachment failed, they illustrate an increasing trend. Interviews with more than a dozen School of Law graduates and adjunct faculty members currently sitting

on the bench in city, state and federal trial and appellate courts reveal heightened concern about threats to judicial independence. In their view, increased political involvement in the judiciary, efforts to curb the power of judicial review, and reduced funding for the courts all restrain the judiciary's capacity to act. Escalating partisanship and politicization of the courts are fueling an environment that places our system of justice, administered by independent and impartial judges, at risk.

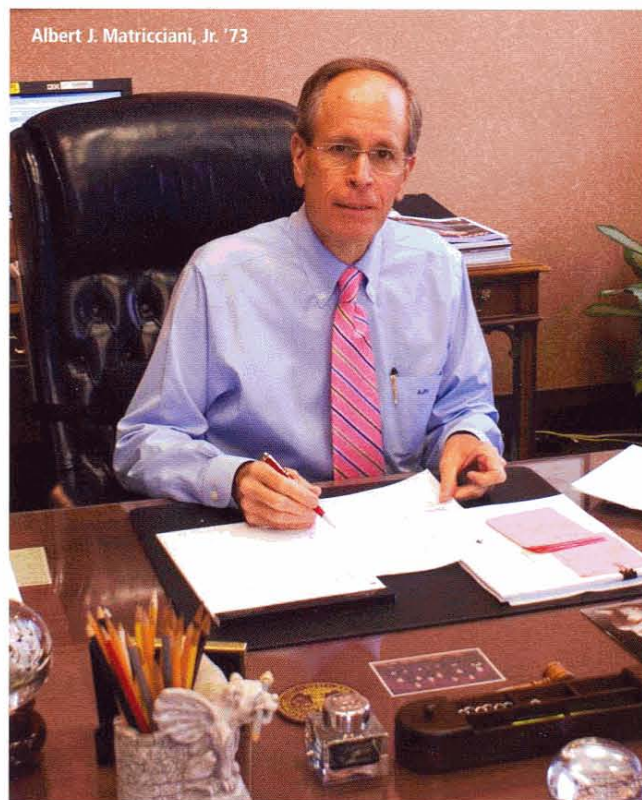
"The result is the creation of a chilling effect on how the judiciary functions," says U.S. District Magistrate Judge and adjunct faculty member Paul W. Grimm. "It is a threat to a fundamental tenet upon which our country is based."

An Independent Judiciary

The concept of American judicial independence was set forth by Alexander Hamilton in Federalist Paper 78. For Hamilton, the complete independence of the judiciary was "peculiarly essential" under a Constitution that would limit the federal legislature's authority. His conception of a "fair, impartial, and independent judiciary" was two-fold. Judges would be independent from political and popular ideologies. And the judiciary would have independence from the operation of the legislative and executive branches of government.

Today, Hamilton's realized vision is at the heart of our government. The public expects courts to be able to render decisions independently, based on the facts and law of the case at hand, and to act without restriction, improper influence, inducements, pressures, threats or interference, direct or indirect.

This is significant because judges, especially when protecting human rights, are



Albert J. Matricciani, Jr. '73

often engaged in a counter-majoritarian exercise. Some of today's revered precedents were once the most fiercely contested issues of their day. When *Brown v. Board of Education* outlawed desegregation in public schools, it ignited a firestorm of criticism in much of the country and had to be enforced in some states by National Guard troops.

"The view that judicial independence is something to be reined in reflects a fundamental misunderstanding of the judicial function," noted Professor of Law Sherrilyn Ifill in a 2007 forum for state appellate judges. "As Justice Kennedy so eloquently put it, 'Judicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must.'"

But contemporary critics of the judiciary often portray judges as politicians in black robes, overstepping their constitutionally proscribed roles. In their view, legislative efforts to constrain the judiciary are a legitimate exercise of the balance of powers.

"When I filed the impeachment charge against Judge Murdock, it wasn't something I did callously or casually. And it wasn't a question of not liking her decision. I believed that she was acting irresponsibly in regard to the oath of office, in specific relation to the case before her," says



“Calls for impeachment are very threatening and intimidating,” says Judge Battaglia. “If a legislature can impeach because they don’t like what an unbiased judge rules, our separation of powers is threatened.”

Delegate Dwyer, a member of the House Judiciary Committee.

“The Legislature is the only branch that has the authority, duty and responsibility to hold the courts accountable. Prior to my action, it had been over 160 years since the Maryland General Assembly had taken action to hold the courts accountable. I think that’s wrong.”

But even many who decry activist judges caution against inappropriate interference with the judiciary. Supreme Court Justice Antonin Scalia, who strongly contends that there are limits to judicial independence (“Judicial independence is not an unmitigated good when unelected judges are deciding social issues like abortion,” he has opined), also sees Congress telling the Court how to do its job as inappropriate: “Congress should keep its nose out of our business,” he said in response to proposed federal legislation forbidding the Supreme Court to use foreign law in its decisions.

Turning Up the Volume

“There’s always going to be someone unhappy with a ruling,” explains adjunct faculty member Albert J. Matricciani Jr. ’73, who was recently elevated from the Baltimore City Circuit Court to the Maryland Court of Special Appeals. “But if you can gain a political advantage by attacking the judge ... people don’t seem to be as hesitant to do that as in the past.”

Calls for impeachment have long been a means through which the judiciary’s

independence has been challenged. “All my professional life, I’ve heard about attacks on judges and impeachment,” says

William Reynolds, the school’s Jacob A. France Professor of Judicial Process. “One of my earliest memories is seeing an ‘Impeach Earl Warren’ sign.” The difference today? “I think the attacks get more attention—everything gets more attention,” Reynolds says.

And with coordinated special interest group blitzes, media pundits with vast audiences, and bloggers with axes to grind, the ability to apply personal and political pressure on a judge is multiplying with each new technological leap.

Despite the increase in volume and intensity with which calls

for judicial impeachment are heard, legal scholars don’t consider such efforts a legitimate way to attempt to change a judge’s decision. They say the only acceptable, legal way to do that is to appeal the case and attempt to win in the court of law. “If you’re going to have an independent judiciary,” says Professor of Law and Government Mark Graber, “you have to understand that you’re going to disagree with some decisions. It’s been understood that we don’t impeach judges for decisions that are reasonable.”

While much of the concern about increased calls for judicial impeachment focuses on the individual judges involved, what’s most important to remember is that judicial independence is designed to protect citizens. If a judge is influenced

by undue pressure, a litigant loses his due process rights to appear before an impartial judge.

“When a judge worries about the personal consequences of her decision, she is reacting to an effort to coerce the outcome. That is not good,” says Reynolds.

Among the judges interviewed, those at the federal level said they were aware of individual attacks on judges, but were fortunate enough to not sustain those sorts of attacks. In the trenches of the circuit court level, however, judges are cognizant of the pillories they may have to endure, depending on what case they draw. “Nobody sits around hoping they get to rule on an issue like, say, gay marriage,” says Judge Matricciani. “There’s no way a judge is coming out of that unscathed.”

To Maryland Court of Appeals Judge and adjunct faculty member Lynne A. Battaglia ’74, calls for impeachment are a threat to our entire system of government.

“Calls for impeachment are very threatening and intimidating,” she says.



Lynne A. Battaglia '74

“If a legislature can impeach because they don’t like what an unbiased judge rules, our separation of powers is structurally and contextually threatened.”

The Weakest Branch

The judiciary has no funding power, no enforcement arm, very limited leeway to issue public statements, and no way to defend itself, save the public’s acceptance of the rule of law. When political rhetoric adopts an unfortunate “us vs. them” attitude toward our justice system, the judiciary becomes an easy target. More troubling, and effective, are the concurrent attempts by the legislature and executive to limit the judiciary’s authority.

In 2002, the Maryland Court of Appeals struck down a plan to redistrict the state’s legislative districts on the grounds the plan was unconstitutional—and, therefore, the court made itself responsible for drawing up the new districts. The next year, in what many observers considered a clear case of political payback, the state

legislature responded by cutting the court’s budget.

“It’s increasingly difficult for courts to function in tight budget times,” says the administrative judge for Baltimore City Circuit Court, Judge Marcella Holland ’83. “And the funding issue can be tied to legislatures not liking a particular decision, even though the decision might not have come from your particular court. The next budget cycle after that decision may be extremely difficult for all the courts in a given area.”

While efforts to curtail the judiciary’s independence abound, the issue burst into national prominence with the Terri Schiavo case in 2005. After 12 years of petitions and cross-petitions in state and federal courts, and three refusals by the Supreme Court to hear the case concerning the removal of Schiavo’s feeding tube, Congress intervened in the court proceedings. Rather than heed prior court orders and rulings, Congress sought to overturn them, not on their merits, but simply because they didn’t agree with them.

The courts’ rulings were upheld but the House Majority Leader vowed to “look at an arrogant, out-of-control, unaccountable judiciary that thumbed their nose at Congress and the president.”

Professor Ifill points out that a proposal was circulated in the House Judiciary Committee later that year to create an inspector general for the federal judiciary that would have imposed punishment on judges for offenses that fell short of being impeachable offenses.

Another example of other branches encroaching upon the courts’ powers came during the 1980s, when the federal government adopted mandatory sentencing guidelines for

certain crimes. These mandatory minimums removed a crucial power—sentencing—from the bench and put it in the hands of the executive branch.

A former U.S. Attorney, U.S. District Court Judge Richard Bennett ’73 has seen the issue of mandatory minimums from both sides of the bench and is not a proponent.

“I recognize that a charging decision is always made by the prosecutor. However, the range of a potential sentence is often made by the prosecutor and this is a

challenge to the independence of the court when I am hamstrung in my sentencing decision by mandatory ranges of sentences. I’m not sure that’s a healthy process,” he says.

Without the power of either the purse or the sword, the judiciary is left only with voluntary compliance to enforce its rulings. Judges say that incursions upon their autonomy are a threat not just to the courts, but to the separation of powers and our form of government.

“We depend on the other branches: for funding, and for enforcement of our decrees,” says Judge Battaglia. “And we depend on the populace for our legitimacy. Unless people believe that what we are doing is fair and equitable and just, then we have no support for what we do.”

Protecting Independence

The judges interviewed were uniform in their belief that maintaining public confidence in the judiciary is the single most important bulwark against threats to judicial independence. But the judiciary’s ability to respond to attacks is limited. “The courts don’t have the ability to debate,” says Judge Grimm. “They have a sort of gag order—there’s no way to respond to attacks.”

Judges are unable to comment on cases on which they have ruled because of pending and potential appeals, and judges themselves are often reluctant to issue their views from any pulpit other than the bench. “Judges don’t want to have their picture in the news every two minutes,”



Marcella Holland '83

says Judge Matricciani. "And they can't go out and give a press conference for a case that is on appeal."

Still, "the judiciary has gotten better at finding ways to respond," Judge Holland adds. "I certainly have spoken out about Judge Murdock and the treatment she received. And it's acceptable because I'm commenting on the administration of the law, not the particulars of a case."

Even at the federal level, where attacks are less effective and prevalent, judges are aware of the need to inform the media and public of the reasoning behind their decisions. Judge Bennett recounts his course of action after upholding a jury verdict against the controversial Westboro Baptist Church for invasion of privacy and intentional infliction of emotional distress after the actions of its members at the funeral of a deceased U.S. Marine. "I don't feel the least bit of intimidation," he says, "but in some cases, I will follow my decision with a written opinion. In this case, I wrote a 45-page opinion that went from A to Z about my ruling in the case."

To help give judges a voice in the court of public opinion—and to educate the public which they serve—some courts have created their own advocacy agencies. In 1997, the Maryland judiciary formed what is today known as the Court Information Office, which works to provide information about how a decision was reached to the media and the public. "Judges were feeling that there was inaccurate reporting in the media, and that there were increasingly outspoken critics," court information officer Sally Rankin says. "I would get requests from judges: 'Can you do something about these attacks?'"

"There was no one to speak on the judges' behalf, no institutional way to respond. And most judges were disinclined to take that on. Now, we have the judicial assistance committee, where judges can

ask for help."

Judges and courts have also begun to use one of the tools most often used to attack them—the Internet—to help educate the media and public in a more timely manner about rulings sure to stir up public debate.

As the administrative judge for Baltimore City Circuit Court, Judge Marcella Holland is responsible for anticipating issues and situations where her courts and judges may receive scrutiny and press coverage—and preparing for it.

"If there is a high-profile civil or criminal case that is likely to proceed to an appellate court, any opinions or rulings in that case should be disseminated widely," says

Judge Holland. "Get that information to the media and the public first, using a website. If the media feels left behind, it's bad."

But it's not as simple as dropping a 50-page ruling on the web. "You can't just flood the site with information," she continues. "Put up a two-page summary. And don't point blank say 'no comment.' Get information and give it to the press in the right language."

"Handling the media is something the judiciary has not done well before," says Judge Holland. "We must have better press relations. I tell judges, 'You can't reach the public. The media can.'"

The sacrosanct role of the rule of law in America should be enough to protect the judiciary from threats. And advances in the courts' ability to have their say in public have helped. Yet the dangers presented by these attacks are not to be taken lightly.

"The rule of law is absolutely integral to any country with an advanced civilization," says Judge Grimm. "Key to that is an



Richard Bennett '73

independent judiciary that will act without fear of retribution. If a judge gets a ruling wrong, that's what appellate courts are for. But it's not appropriate to excoriate judges for individual rulings or to threaten impeachment for the exercise of reasonable discretion."

Does the judiciary need a defender, especially if the threat to it comes from the other branches of government? Not all judges (particularly those at the federal level) felt the need for a champion, but all felt it was acceptable for groups like bar associations to issue statements of support when a judge was being criticized for doing his or her job. At the circuit court level, judges felt that bar associations should stand with the judges against these attacks. "I think every local bar association has the obligation to defend the judiciary," says Judge Holland. "We need the bar association to step up, and to speak up, more often. They don't have to defend our every decision, but they should defend our right to make those decisions."

Most judges feel that the other branches of government do—and have—defended the courts. "Oftentimes, we listen to the rhetoric of only a few people," says Judge Battaglia. "But when it comes to action, I believe the other branches will support us. We have to coexist."

