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## Judicial Independence: The Situation of the U.S. Federal Judiciary

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*U.S. Supreme Court*

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Ruth Bader Ginsburg\*

# Judicial Independence: The Situation of the U.S. Federal Judiciary<sup>†</sup>

Essential to the rule of law in any land is an independent judiciary, judges not under the thumb of other branches of Government, and therefore equipped to administer the law impartially. The U.S. Federal Judiciary has been a model for the world in that regard. Fortunately so, for we can promote the rule of law, administered fairly and fearlessly elsewhere—in Afghanistan, Colombia, Iraq, Kosovo, Ukraine, for example—only by vigilantly practicing at home what we preach abroad. As recent experience confirms, however, judicial independence is vulnerable to assault; it can be shattered if the society law exists to serve does not take care to assure its preservation.

On the essence of independent, impartial judging, a 1980 comment by then Justice William H. Rehnquist seems to me right on target. The man who from 1986 until 2005 served as Chief Justice of the United States compared the role of a judge

to that of a referee in a basketball game who is obliged to call a foul against a member of the home team at a critical moment in the game: he will be soundly booed, but he is nonetheless obliged to call it as he saw it, not as the home crowd wants him to call it.<sup>1</sup>

My remarks this afternoon concentrate on judicial independence in the place I know best, the Third Branch of the U.S. Government, and on current threats to its vitality. Preliminarily, I will note a few, among many, distress signals from other lands.

## I.

Examples abound internationally of how the best efforts of judges to adjudicate cases fairly can be thwarted. From dozens of illustrations one might choose, I will briefly describe assaults in our time on judicial independence in Uganda, Russia, and Ecuador.

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1. William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 PEPP. L. REV. 227, 229–30 (1980).

In what has been called a “bizarre tug of war” between Uganda’s judges and the country’s military, a special terrorism squad of the Ugandan army besieged the High Court in February.<sup>2</sup> The assault forced the evacuation of the Chief Justice and his colleagues.<sup>3</sup> The armed men aimed to re-arrest and detain in military custody several individuals the Court was about to release on bail. The targets of the army squad’s raid managed to avoid military detention. They did so by refusing to sign their release papers. Choosing to remain in civilian custody, they escaped a fate far worse—capture by army thugs.<sup>4</sup>

My second illustration is less current. It concerns the Constitutional Court of Russia. During 1992 and 1993, conflict developed between then President Boris Yeltsin and the pro-Communist legislature. In March 1993, the legislature tried, unsuccessfully, to impeach President Yeltsin. In September 1993, Yeltsin responded by dissolving the legislature. The Constitutional Court upheld the legislature’s prerogative, declaring that Yeltsin had violated the Constitution and could be impeached. President Yeltsin signaled his displeasure: He ordered his bodyguards to kill the Chief Justice’s pet cat and threatened to cut off the Court’s water supply. Ultimately, he took more decisive action. In October 1993, Yeltsin signed a decree suspending the Constitutional Court pending adoption of a new constitution. A newly installed Constitutional Court, with narrower jurisdiction and fewer judges, commenced work in 1995, and the prospect of impeachment no longer embarrassed the President.

My third example also involves an Executive’s response to an impeachment effort. It concerns manipulation of judicial appointments and tenure in Ecuador. In December 2004, Ecuador’s then President, Lucio Gutierrez, summoned members of the nation’s Congress to remove twenty-seven of the Supreme Court’s thirty-one members.<sup>5</sup> That summons was in apparent retaliation for the Court’s decisions rendered during a failed effort to impeach Gutierrez on corruption charges.<sup>6</sup> Gutierrez described the removal measure, ironically, as a means to restore judicial independence to a too partisan judiciary.<sup>7</sup> A compliant Congress also replaced those judges on the Electoral and Constitutional Courts, stacking those tribunals with the administration’s supporters. Protests ensued against the Government’s blatant moves

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2. The East African, *When Generals and Judges Fall Out, Who Will Pass Sentence?*, AFRICA NEWS, Feb. 14, 2006.

3. *See id.*

4. *See id.*

5. *See* Steven Dudley, *Crisis in Ecuador: Ecuador’s President Ousted Amid Unrest*, MIAMI HERALD, Apr. 21, 2005, at 18A.

6. *See* Juan Forero, *Ecuador’s President Revokes Curbs on Protests*, N.Y. TIMES, Apr. 17, 2005, at A10.

7. *See* Juan Forero, *Ecuador’s President Vows to Ride Out Crisis over Judges*, N.Y. TIMES, Apr. 18, 2005, at A12.

to pack the courts.<sup>8</sup> In April 2005, Ecuador's Congress disbanded the Supreme Court, as then composed. Gutierrez resigned shortly thereafter, but a bitterly divided legislature prevented selection of a new Court until November 30 of last year, when thirty-one new judges, named by an independent four-member committee, were sworn in.<sup>9</sup>

(The United States faced its own court-packing crisis almost seventy years ago. The Supreme Court resisted President Franklin Delano Roosevelt's New Deal program. In a thirteen-month span, the Court held unconstitutional sixteen pieces of federal social and economic legislation. Frustrated by his inability to replace the "nine old men" then seated on the Court, President Roosevelt, in February 1937, sent to the Senate a bill to overcome the Court's recalcitrance. He proposed adding one Justice for each member of the Court who had served ten years and did not retire after his seventieth birthday. FDR's proposal would have immediately swelled the Court's size from nine to fifteen members. (If the 1937 plan were to be applied to the current Court, next Term we would have a thirteen-member bench.) Two developments manifest by the end of 1937 combined to defeat Roosevelt's plan: public opposition to the President's endeavor to capture the Court and a growing readiness of the Justices to defer to legislative judgments on matters of social and economic policy.)

## II.

The United States Supreme Court, in its 217-year history, has fared far better than the high courts in Uganda, Russia, and Ecuador, whose plights I just recounted. Under our Constitution, federal judges hold their offices essentially for life, with no compulsory retirement age, and their salaries may not be diminished by the legislature.<sup>10</sup> Through life tenure and compensation that cannot be reduced, the Founders of the United States sought to secure the Judiciary's independence from the political branches of the Government, and thus, the judges' ability to decide cases impartially. Yet I doubt even that insulation would have protected the federal bench if we did not have a culture that frowns on attempts to make the courts over to fit the President's or the Congress' image.

I will next describe three instances in which the U.S. High Court confronted alleged unconstitutional assertions of power by the Executive. My first two illustrations generate no sparks in the United

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8. *See id.*

9. *See* Juan Forero, *Ecuador: A New Supreme Court*, N.Y. TIMES, Nov. 30, 2005, at A14.

10. The Constitution guarantees that federal judges "shall hold their Offices during good Behavior . . . and shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1, cl. 2.

States today. My third example—a pair of decisions handed down in June 2004—concerns the Court's initial responses to the pleas of persons detained by the U.S. military in the aftermath of the September 11 terrorist attacks.

I will recall first a 1974 case entitled *United States v. Nixon*,<sup>11</sup> which yielded a unanimous opinion written by Chief Justice Warren Burger. That case was precipitated by a subpoena issued by a trial court judge, United States District Judge John Sirica, at the height of the Watergate scandal. Judge Sirica's subpoena directed the President of the United States to produce, for use in a criminal proceeding, tape recordings and documents capturing conversations between President Nixon and his closest advisers. In campaigns for the Presidency, Nixon had called for the restoration of "law and order," and promised to appoint judges who would not be "soft on crime."<sup>12</sup> A United States Supreme Court that included four Nixon appointees, among them Chief Justice Burger and then Associate Justice Rehnquist, declared the law: the President was obliged to turn over the evidence as Judge Sirica's disclosure order demanded. The President obeyed the Judiciary's command: he turned over the tapes and documents, then promptly resigned from office.

Earlier in time, my second illustration is popularly known as the *Steel Seizure Case*.<sup>13</sup> In the spring of 1952, the United States was heavily engaged in the Korean War. At home, inflation was rising, and labor unrest was widespread. For several months, the United Steel Workers of America had been seeking a substantial pay increase, which the steel companies had repeatedly refused. With negotiations at an impasse, the steel workers voted to strike beginning on April 9, 1952. On the evening of April 8, to keep the steel mills in operation, President Truman issued an executive order directing the Secretary of Commerce to take possession of eighty-five steel companies.<sup>14</sup>

The steel companies sued to stop the seizure. The companies argued that the President's order was an unconstitutional encroachment on the legislative domain of Congress. In response, the Government urged that a strike would so endanger national security that the President must be held to possess "inherent power" to seize the steel mills without first gaining explicitly empowering legislation. The United States District Court for the District of Columbia rejected the Government's plea and enjoined enforcement of the President's order. But the United States Court of Appeals for the District of Columbia Cir-

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11. 418 U.S. 683 (1974).

12. See, e.g., 2 STEPHEN E. AMBROSE, *NIXON: THE TRIUMPH OF A POLITICIAN*, 1962-1972, at 376 (1989).

13. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

14. See *id.* at 590-91 (appendix to the opinion of the Court).

cuit, sitting en banc, immediately voted 5–4 to stay the district court’s injunction, with the eight judges appointed by President Truman evenly divided on the issue. One month later, a 6-to-3 majority of the United States Supreme Court declared the President’s order invalid; the authority to permit Executive Branch seizure of private property, the Court held, is a power the Constitution gives exclusively to Congress “in both good and bad times.”<sup>15</sup>

While four of the Justices in the *Steel Seizure Case* majority were appointed by Truman’s predecessor, Franklin Roosevelt, the fifth and sixth votes against the President’s position came from Justices Burton and Clark, both Truman appointees. President Truman immediately complied with the Court’s judgment. Less than thirty minutes after the Justices finished reading their opinions from the bench, the President dispatched a letter ordering the Secretary of Commerce to return the seized mills to their owners.<sup>16</sup>

Almost fifty years later, on the morning of September 11, 2001, deadly terrorist attacks on the World Trade Center in New York City and the Pentagon just across the river from the U.S. Capitol shocked our Nation and world, and resulted in approximately 3,000 deaths. The attacks once again thrust into question the scope of executive authority in times of war and national peril. Controversies arising in the aftermath of September 11 are ongoing. I will describe the Court’s first full decisions in point, *Hamdi v. Rumsfeld*<sup>17</sup> and *Rasul v. Bush*,<sup>18</sup> both decided in June 2004.

Yaser Esam Hamdi was a U.S. citizen alleged by the Government to be an “enemy combatant.”<sup>19</sup> Born in the United States but raised in Saudi Arabia, Hamdi was seized in Afghanistan by allies of the United States during 2001 hostilities against the Taliban. Originally sent to the U.S. naval base in Guantánamo Bay, Cuba, Hamdi was transferred to a Navy brig in Charleston, South Carolina, when his U.S. citizenship became known. In June 2002, Hamdi’s father petitioned for a writ of habeas corpus seeking his son’s release. He maintained that the detention, then incommunicado, lacked legal authority.

The United States District Court for the Eastern District of Virginia ruled that Hamdi must be allowed to challenge the factual basis for his detention.<sup>20</sup> (The petition his father filed alleged that he was not a combatant at all, but a humanitarian relief worker.) Reviewing and reversing the district court’s judgment, the United States Court of

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15. *Id.* at 589.

16. *See generally* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE (1977).

17. 542 U.S. 507 (2004) (plurality decision).

18. 542 U.S. 466 (2004).

19. *Hamdi*, 542 U.S. at 509 (internal quotation marks omitted).

20. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 535–36 (E.D. Va. 2002).

Appeals for the Fourth Circuit upheld the President's authority to order the detention. The appeals court found it lawful, given the war against terrorism and consequent security concerns, to deny Hamdi any opportunity to show he was not an "enemy combatant."<sup>21</sup> The Supreme Court agreed to review that determination.

The Government argued in the Supreme Court that judicial review of the detention of persons the Executive had classified as "enemy combatants," if it could be had at all, should be "heavily circumscribed."<sup>22</sup> Although the Justices did not sign on to a one-voiced opinion, the Court decisively rejected the position that the Executive has unreviewable authority to impose open-ended detention on citizens.

Eight Justices agreed that Hamdi must be allowed to challenge the factual basis of his detention before a tribunal meeting the demands of due process. Even in "our most challenging and uncertain moments" when "our Nation's commitment to due process is most severely tested," Justice O'Connor wrote for a four-Justice plurality, "we must preserve our commitment at home to the principles for which we fight abroad."<sup>23</sup> "[H]istory and common sense," she noted, "teach us that an unchecked system of detention carries the potential to become a means of oppression and abuse."<sup>24</sup> "[A] state of war," her opinion makes clear, "is not a blank check for the President" to remove the rights of citizens.<sup>25</sup>

Justice Souter, with whom I joined, reached no constitutional question. We concluded that Congress had accorded the President no authority to detain people without formal charges and trial.<sup>26</sup>

The other 2004 "enemy combatant" case, *Rasul v. Bush*, concerned the legality of the detention of foreign nationals captured in hostilities abroad, then transported to the U.S. naval base at Guantánamo Bay. The Government maintained that Guantánamo detainees were not entitled to prisoner-of-war status under the Geneva Conventions and could not challenge the legality of their detention in any U.S. court.

Lawyers for detainees sought writs of habeas corpus in the United States District Court for the District of Columbia. They were unsuccessful in the courts of first and second instance. Those courts held that the Judiciary lacked power to intervene. The Supreme Court disagreed. In a 6-to-3 decision, the Court ruled simply and only that the Guantánamo detainees may petition for federal court review of their

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21. *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003).

22. *Hamdi*, 542 U.S. at 535.

23. *Id.* at 532.

24. *Id.* at 530.

25. *Id.* at 536.

26. *See id.* at 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

situations.<sup>27</sup> It reserved for another day what the outcome of such petitions should be.

Just last week, the Court heard argument in another Guantánamo Bay case, *Hamdan v. Rumsfeld*.<sup>28</sup> The challenger, Salim Ahmed Hamdan, is a citizen of Yemen alleged to have served as a personal driver for Osama bin Laden. Hamdan contests the authority for, and adequacy of, a two-stage military tribunal process the President decreed: first, a procedure for classifying detainees as “enemy combatants”; second, provisions governing trial of persons so classified. The case presents a threshold question: Did a law Congress passed at the end of 2005<sup>29</sup> effectively bar federal courts, including the Supreme Court, from considering currently pending Guantánamo Bay cases in advance of actual classifications and convictions?

Before the summer recess, the Court will announce its disposition of the pending petition. I will say no more about the *Hamdan* case except to remark on the open character of the Court’s hearing, and the high quality of the briefing and arguments on both sides. The Court confronted hard issues; it had the aid of able counsel and *amici*; the audiotape of the arguments was instantly available to the press and broadcast media. The adversary system to which we adhere was on display before a watchful world.

### III.

I turn now to some current concerns about the security of the Federal Judiciary in our constitutional order. Reading or listening to what some members of the Congress and the press say about the federal courts, one might not entirely understand what history, in large part, bears out: Federal judges, whether appointed by Republican or Democratic Presidents, generally endeavor to administer justice impartially and to interpret laws reasonably and sensibly, with due restraint and fidelity to precedent. Yet in some political circles, it is fashionable to criticize and even threaten federal judges who decide cases without regard to what the “home crowd” wants.

A headline-producing illustration: In late March 2005, the United States Court of Appeals for the Eleventh Circuit refused to order the feeding tube restored to Terri Schiavo, the brain-damaged Florida woman at the center of a right-to-refuse-life-support controversy. That court and the district court had simply read a one-time-only federal statute as it was written, not as a goodly number of the members of Congress wished it had been written. In angry reaction, the then House Majority Leader accused federal judges of “thumb[ing] their

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27. See *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

28. 415 F.3d 33 (D.C. Cir.), *cert. granted*, 126 S. Ct. 622 (2005).

29. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

nose[s] at Congress and the [P]resident.”<sup>30</sup> He warned: “[T]he time will come for the men responsible for this to answer for their behavior. . . .”<sup>31</sup> “Congress,” he amplified, “for many years has shirked its responsibility to hold the judiciary accountable. No longer.”<sup>32</sup> Other members of Congress chimed in. A House Judiciary Committee member, for example, cautioned federal judges to remember that Congress “ha[s] the constitutional authority to eliminate any and all inferior courts.”<sup>33</sup>

Similarly unsettling, not long after the murders of a state court judge in Atlanta and a federal judge’s mother and husband in Chicago in 2005, a prominent senator gave a widely reported speech on the Senate floor.<sup>34</sup> After inveighing against “activist jurists,” he suggested there may be “a cause-and-effect connection” between judicial activism and the “recent episodes of courthouse violence in this country.”<sup>35</sup>

Moving beyond verbal blasts, in May 2005, the Chairman for the House Judiciary Committee announced that the Committee was considering the creation of an “office of inspector general for the federal judiciary.”<sup>36</sup> The office would investigate allegations of judicial misconduct and report them to Congress. In the Committee Chairman’s view, judges must “be punished in some capacity for behavior that does not rise to the level of impeachable conduct.”<sup>37</sup> If the Chairman’s subsequent action indicates the role he envisions for the proposed inspector general, judges have good cause for concern. In June 2005, the Chairman’s Office dispatched a letter to Joel Flaum, Chief Judge of the United States Court of Appeals for the Seventh Circuit, complaining that the court had ordered an unlawfully low sentence for a

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30. Carl Hulse & David D. Kirkpatrick, *Even Death Does Not Quiet Harsh Political Fight*, N.Y. TIMES, Apr. 1, 2005, at A1 (internal quotation marks omitted) (quoting then H. Majority Leader, Rep. Tom Delay).

31. *Id.* (internal quotation marks omitted).

32. Editorial, *Attacking a Free Judiciary*, N.Y. TIMES, Apr. 5, 2005, at A22 (internal quotation marks omitted) (quoting then H. Majority Leader, Rep. Tom Delay).

33. Charles Babington, *GOP Is Fracturing over Power of Judiciary*, WASH. POST, Apr. 7, 2005, at A4 (quoting Rep. Steve King of Iowa, Member, H. Comm. on the Judiciary).

34. See Editorial, *The Judges Made Them Do It*, N.Y. TIMES, Apr. 6, 2005, at A22.

35. Charles Babington, *Senator Links Violence to ‘Political’ Decisions; ‘Unaccountable’ Judiciary Raises Ire*, WASH. POST, Apr. 5, 2005, at A7 (quoting Sen. John Cornyn of Texas).

36. David D. Kirkpatrick, *Republican Suggests a Judicial Inspector General*, N.Y. TIMES, May 10, 2005, at A12 (internal quotation marks omitted) (quoting Rep. F. James Sensenbrenner of Wisconsin, Chairman, H. Comm. on the Judiciary).

37. *Id.*

narcotics-case defendant. The letter called for a “prompt response . . . to rectify” the decision.<sup>38</sup>

Among other troubling congressional initiatives are proposals to restrict federal courts’ references to foreign law.<sup>39</sup> In a recent interview, Justice Stephen Breyer addressed the apparent misunderstanding. He explained why the Court’s citations to foreign laws and decisions should not be controversial.<sup>40</sup> “References to cases elsewhere are never binding,” Justice Breyer emphasized.<sup>41</sup> We interpret and apply only our own Constitution—our own laws. But it can add to our store of knowledge “to look at how other people [with a commitment to democracy similar to our own] solve similar problems.”<sup>42</sup> He compared references to the decisions of foreign and international tribunals to references to a treatise or to a professor’s work.

Lest I appear to be spreading too much gloom, I should emphasize the vocal defenders of the Judiciary—intelligent voices that do not divide along Party lines. The *New York Times* recently editorialized, “The courts will not always be popular; they will not even always be right. But if Congress succeeds in curtailing the judiciary’s ability to act as a check on the other two branches, the nation will be far less free.”<sup>43</sup> Former Solicitor General Ted Olson published a similar view: “Americans understand,” I hope he is right, “that no system is perfect and no judge immune from error, but also that our society would crumble if we did not respect the judicial process and the judges who make it work.”<sup>44</sup>

History bears out that Congress is unlikely to employ the nuclear weapon—impeachment—against judges who decide cases in a way that the “home crowd” does not want. In the 217 years since the ratification of the U.S. Constitution, the House of Representatives has impeached only thirteen federal judges; in only seven instances did impeachment result in a Senate conviction,<sup>45</sup> and those judges were impeached and convicted not for wrongly interpreting the law, but for

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38. Maurice Possley, *Lawmaker Prods Court, Raises Brows; Demands Longer Term in Chicago Drug Case*, CHI. TRIB., July 10, 2005, at C1 (quoting Rep. Sensenbrenner’s letter).

39. See American Justice for Americans Citizens Act, H.R. 1658, 109th Cong. § 3 (2005); S. Res. 92, 109th Cong. (2005); Constitution Restoration Act, S. 520, H.R. 1070, 109th Cong. § 201 (2005); H. Res. 97, 109th Cong. (2005).

40. See *Toward “Active Liberty,”* HARV. L. BULL., Spring 2006, at 14, 18, available at [http://www.law.harvard.edu/alumni/bulletin/2006/spring/feature\\_1.php](http://www.law.harvard.edu/alumni/bulletin/2006/spring/feature_1.php).

41. *Id.*

42. *Id.*

43. Editorial, *supra* note 32.

44. Theodore B. Olson, *Lay off Our Judiciary*, WALL ST. J., Apr. 21, 2005, at A16.

45. Federal Judicial Center, *Impeachments of Federal Judges*, <http://www.fjc.gov/history/home.nsf> (follow “Judges of the United States” hyperlink; then follow “Impeachments of Judges” hyperlink) (last visited July 6, 2006).

unquestionably illegal behavior, including such high crimes as extortion, tax evasion, and perjury.<sup>46</sup>

Although casual use of impeachment against federal judges is a remote prospect, another threat to judicial independence cannot be discounted so easily. In President Clinton's second term, it bears reminding, political hazing of federal judicial nominees was unrelenting. The confirmation process in those years often strayed from examining the qualifications of each nominee into an endeavor to uncover some hidden "liberal" agenda the nominee supposedly harbored. For many Democrats, President Bush's successive terms have been pay-back time, an opportunity to hold up or reject Bush nominees to the Federal Judiciary on ideological grounds.

Injecting politics prominently into the nomination and confirmation process means long delays in filling judicial vacancies, and delay, in the face of mounting caseloads, threatens to erode the quality of justice the Federal Judiciary can provide. Vacancies in large numbers inevitably sap the energy and depress the spirits of the judges left to handle heavy dockets. That is a point former Chief Justice Rehnquist stressed annually in his State of the Judiciary report, both during Clinton's presidency, and with regard to President Bush's nominees.

Our new Chief Justice, John G. Roberts, Jr., has sounded the same theme. In his confirmation hearings, he said he would be "vigilant to protect the independence and integrity of the Supreme Court and judicial branch," appreciating that "[a]n independent judiciary is one of the keys to safeguarding the rule of law."<sup>47</sup> Distinguishing judging from political activity, then Judge Roberts commented on his tenure on the United States Court of Appeals for the D.C. Circuit:

I have been fortunate for the past two years to serve on a court in which . . . [the] judges put aside [their political] ties and . . . views and become judges all focused on the same mission of vindicating the rule of law. . . . [T]he decisions of the D. C. Circuit . . . are almost always unanimous. . . . [T]o the extent that there are any disagreements, they don't shape up along political lines.<sup>48</sup>

He added, however, that "the more the [confirmation] process becomes politicized, the less likely" that ideal will be achieved.<sup>49</sup>

In addition to confirmation politics, recent congressional efforts to police judges' "good Behavior"<sup>50</sup> include criticism of, and proposed limitations on, judges' attendance at out-of-town educational events. A

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46. Maria Simon, Note, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617, 1617 n.2 (1994).

47. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 258 (2005).

48. *Id.* at 254.

49. *Id.*

50. See *supra* note 10.

few years ago, a high-profile Republican senator launched an inquiry into the extracurricular activities of federal judges, most of which consist of lecturing, writing, and participating in training jurists. He concluded that judges ought to “stay home and mind the store.”<sup>51</sup> More recently, in January 2006, three Democratic senators co-sponsored a measure that would prohibit federal judges from taking trips of more than one day to legal education seminars underwritten by private organizations, including, along with commercial enterprises, law schools, and bar associations.<sup>52</sup>

These proposals are, in my view, misguided. Judges, of course, should not expose themselves to influence by private interests. But, as I see it, current ethics rules are sufficient to protect against that risk. Impeding judges’ ability to attend and participate in out-of-town events, as former Chief Justice Rehnquist critically commented, runs “contrary to the public interest in encouraging an informed and educated Judiciary, and contrary to the American belief in unfettered access to ideas.”<sup>53</sup>

I should mention, too, the host of jurisdiction-curtailing measures placed in the congressional hopper this year and the year before. These include the Streamlined Procedures Act,<sup>54</sup> severely shrinking the scope of federal habeas review. Another bill introduced last year would strip federal courts of jurisdiction over actions seeking relief against a governmental unit’s or officer’s “acknowledgement of God as the sovereign source of law, liberty, or government.”<sup>55</sup>

Of the same genre, the Safeguarding our Religious Liberties Act,<sup>56</sup> introduced in December 2005, would remove federal courts’ authority to decide any case concerning the Ten Commandments, the Pledge of Allegiance, or the National Motto. Introduced a month earlier, the We the People Act<sup>57</sup> would substantially reduce the problem of overloaded federal court calendars. It would take away from the federal courts authority to adjudicate free exercise or establishment of religion claims, privacy claims (including those raising “any issue of sexual practices, orientation, or reproduction”), and any claim to equal protection of the laws “based upon the right to marry without regard to sex or sexual orientation.”<sup>58</sup>

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51. Robert Schmidt, *Federal Judges in the Jet Set?*, LEGAL TIMES, Apr. 6, 1998, at 6 (quoting Sen. Charles Grassley of Iowa).

52. Federal Judiciary Ethics Reform Act, S. 2202, 109th Cong. (2006).

53. Chief Justice William H. Rehnquist, Remarks at the American Law Institute Annual Meeting (May 14, 2001), available at [http://www.supremecourtus.gov/publicinfo/sp\\_05-14-01.html](http://www.supremecourtus.gov/publicinfo/sp_05-14-01.html).

54. S. 1088, H.R. 3035, 109th Cong. (2005).

55. Constitution Restoration Act, S. 520, H.R. 1070, 109th Cong. § 101 (2005).

56. H.R. 4576, 109th Cong. § 2 (2005).

57. H.R. 4379, 109th Cong. § 3 (2005).

58. *Id.*

And there are more, but here again, history is instructive. Jurisdiction-stripping reactions to disliked decisions have been proposed perennially. In the 1950s, desegregation and domestic-security cases were on some legislators' strip lists; in the 1960s, federal court review of certain criminal justice matters; in the 1970s, busing to achieve racial integration in schools; in the 1980s, abortion and school prayer. None of these efforts succeeded, and current efforts seem to me to have no better chance of passage. A simple truth has helped to spare the Federal Judiciary from onslaughts of this character: It is easier to block enactment of a bill than to get a bill enacted.

I note, finally, a head-on Congress–Court confrontation proposed in 2004 and revived the next year. The most recent try, entitled the Congressional Accountability for Judicial Activism Act of 2005, would allow Supreme Court judgments declaring a federal law unconstitutional to be overturned by a two-thirds vote of the House and Senate.<sup>59</sup>

A Constitution providing for legislative review of court decisions resolving constitutional questions, author and journalist Anthony Lewis observed, “would be more democratic in the sense that it would remove constraints on majority rule.”<sup>60</sup> But, Lewis rightly reminds us, in the words of Aharon Barak, President of the Supreme Court of Israel: “Democracy is not only majority rule. Democracy is also the rule of basic values . . . values upon which the whole democratic structure is built, and which even the majority cannot touch.”<sup>61</sup> The Founders of the United States did not envision a rule of law based on pure majoritarianism,<sup>62</sup> and I see no cause to embark on such an experiment now.

This description would be incomplete if I did not remark on the election of judges, at least at some levels, in at least thirty-eight of the fifty States of the United States. In Nebraska, for example, a merits selection commission recommends potential judicial appointees to the Governor, but once appointed, a judge seeking retention must stand for an up or down vote periodically.<sup>63</sup> A question I am often asked when traveling abroad: “Isn’t an elected judiciary totally at odds with judicial independence?” How can an elected judge resist doing “what the home crowd wants?” I invite this audience’s suggestions for satisfactory answers to those questions.

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59. H.R. 3073, 109th Cong. § 2 (2005).

60. Anthony Lewis, *Why the Courts*, 55 REC. 178, 181 (2000).

61. *Id.* (internal quotation marks omitted) (quoting Aharon Barak, President of the Supreme Court of Israel).

62. See THE FEDERALIST No. 51 (James Madison).

63. See American Judicature Society, *Judicial Selection in the States: Nebraska*, [http://www.ajs.org/js/NE\\_methods.htm](http://www.ajs.org/js/NE_methods.htm) (last visited July 6, 2006).

Life tenure, enjoyed by U.S. federal judges, of course, is not the only means a system might employ to secure judicial independence. Some countries, to that end, have adopted fixed, non-renewable terms for judges of their constitutional courts. Judges of the Federal Constitutional Court of Germany, for example, are appointed for twelve-year non-renewable terms,<sup>64</sup> and regular members of the French Constitutional Council hold their offices for nine-year non-renewable terms.<sup>65</sup>

To return to my starting line, when former Chief Justice Rehnquist described an independent judiciary as America's hallmark and pride, he was repeating a theme sounded since the United States became a nation. James Madison was perhaps most eloquent on the subject. When he introduced in Congress the amendments that became the Bill of Rights, he said:

[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of th[e]se rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.<sup>66</sup>

In harmony with James Madison, Justice Hugo Black 150 years later wrote that it is the authority and responsibility of the Third Branch (the Judiciary) to "stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."<sup>67</sup> Madison and Black may have put the matter with more force than history confirms, but their basic idea remains vibrant.

It is fitting, I think, to close with the words of two U.S. legal scholars from different ends of the political spectrum—one, Bruce Fein, known for his "conservative perspective," the other, Burt Neuborne, known for his "progressive vision." Though often on opposite sides in debate, they joined together to speak with one voice on the value of judicial independence. Their co-authored essay concludes:

Judicial independence in the United States strengthens ordered liberty, domestic tranquility, the rule of law, and democratic ideals. At least in our polit-

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64. See Gesetz über das Bundesverfassungsgericht [Law on the Federal Constitutional Court of Germany], art. 4, July 16, 1998, BGBl. I at 1823, available at <http://www.iuscomp.org/gla/> (follow "Statutes" hyperlink; then follow "Federal Constitutional Court Act" hyperlink; then follow "Article 4" hyperlink) ("The term of office of the judges shall be twelve years, not extending beyond retirement age.").

65. See 1958 CONST. 56 (Fr.), available at <http://www.legifrance.gouv.fr/citoyen/code/> (follow "La Constitution" hyperlink; then choose "English" hyperlink; then follow "Title VII" hyperlink) ("The Constitutional Council shall consist of nine members, whose term of office shall last nine years and shall not be renewable.").

66. James Madison, Address to the House of Representatives (June 8, 1789), in *THE MIND OF THE FOUNDER* 224 (Marvin Meyers ed., 1973).

67. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

ical culture, it has proved superior to any alternative form of discharging the judicial function that has ever been tried or conceived. It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans.<sup>68</sup>

### POSTSCRIPT

On June 29, 2006, the Supreme Court announced its 5–3 disposition of the petition in Hamdan’s case.<sup>69</sup> In the minority’s view, Congress had withdrawn the Court’s jurisdiction to consider the case. On the merits, the minority accepted the Government’s argument that the President, as Commander-in-Chief, had full authority to decree the military commission process. The five-member majority determined, first, that Congress had not retroactively withdrawn the Court’s authority to adjudicate Hamdan’s petition. Next, the majority held that, absent Congress’s mandate, the President lacked power to establish a military commission unbound by the Uniform Code of Military Justice or the prescriptions of international accords—the Geneva Conventions—to which the United States adheres.

The Court’s decision was rooted in the Constitution’s division of authority among three branches of government. Concentration of power in the Executive Branch, the Court observed, is antithetical to the Constitution’s tripartite scheme. It is the Court’s obligation, the *Hamdan* opinion holds, to make certain that if military tribunals are established to classify and try the Guantánamo detainees, the law-making branch—Congress—has approved that course.

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68. Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 JUDICATURE 58, 63 (2000).

69. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Chief Justice Roberts did not participate in that decision.